MAINE REPORTS

156

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1960 to JANUARY 1, 1961

MILTON A. NIXON

REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ROBERT B. WILLIAMSON, Chief Justice

HON. DONALD W. WEBBER

HON. WALTER M. TAPLEY, JR.

HON. FRANCIS W. SULLIVAN

HON. F. HAROLD DUBORD

HON. CECIL J. SIDDALL

HON. FREDERICK A. JOHNSON, *Clerk*

[1]HON. BESSIE O. KELLER, *Clerk*

[2]HON. ERSKINE L. DODGE

1 Term expired Dec. 31, 1960
2 Appointed Jan. 1, 1961

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

HON. EDWARD P. MURRAY

JUSTICES OF THE SUPERIOR COURT

HON. HAROLD C. MARDEN
HON. RANDOLPH A. WEATHERBEE
HON. LEONARD F. WILLIAMS
HON. ABRAHAM M. RUDMAN
HON. CHARLES A. POMEROY
HON. JAMES P. ARCHIBALD
HON. ARMAND A. DUFRESNE, JR.
HON. THOMAS E. DELEHANTY

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

MILTON A. NIXON

TABLE OF CASES REPORTED

A

B

C

D

E

F

G

H

I

J

K

L

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

DONALD E. NEAL

vs.

WILLIAM S. LINNELL

AND

ELEANOR NEAL

vs.

WILLIAM S. LINNELL

Cumberland. Opinion, January 5, 1960.

Torts. Negligence. Consortium. Imputed Negligence. Damages. Emergency. Verdict. Rear-end Collision.

A verdict will not be set aside unless it is so erroneous as to make it appear that it was produced by prejudice, bias, mistake of law or fact.

The Law Court will not substitute its judgment for that of the jury on questions of fact concerning which conscientious and intelligent men may differ.

A husband can not recover for loss of consortium of his wife or for moneys expended in his wife's behalf where his own negligence contributes to such injuries.

A verdict of $15,000 can not be said to be excessive for services and permanent head injuries affected with past concussional syndrome with symptoms of dizziness, headaches, difficulty arising upon sudden exertion, pain, and spots before her eyes.

$2300.00 for loss of consortium for severe and lasting injuries to a wife is not excessive.

Grover G. Alexander,
Douglas P. MacVane, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. These two cases arose out of an automobile accident occurring on December 6, 1957, on Deering Avenue, a public highway, in the City of Portland, Maine.

The plaintiff, Donald E. Neal, sought to recover for damages to his automobile and for consequential damages because of injuries suffered by his wife. He made no claim for personal injury to himself. Eleanor Neal sought damages for her personal injuries, suffering and permanent impairment. The two actions were tried together and the jury returned a verdict in the case of Donald E. Neal in the amount of $3,000 and for Eleanor Neal in the amount of $15,000.

The cases are before us on defendant's general motion for a new trial on the usual grounds that the verdicts are against the evidence and also because the damages are excessive.

It appears that shortly after 9:00 p.m. on the date in question, the plaintiff, Donald E. Neal, accompanied by his wife, the other plaintiff herein, as a passenger in his car, was proceeding in a general southerly direction through Woodford Square, so-called. Woodford Square is created by the intersection of Woodford Street, Forest Avenue and Deering Avenue. Traffic from the north on Forest Avenue which desires to proceed south must use Deering Avenue to Revere Street. Traffic entering the Square from the west on

Woodford Street and desiring to go south must also use Deering Avenue to Revere Street. From the northerly end of Deering Avenue to Revere Street, traffic on Deering Avenue is one way only to the south.

The plaintiff, Donald E. Neal, entered the Square from the north on Forest Avenue and the defendant entered the Square from the west on Woodford Street. The entrance of both drivers was controlled by synchronized traffic lights. It seems to be admitted that both drivers entered Deering Avenue properly upon green signals. There is a crosswalk running easterly and westerly across Deering Avenue 62 feet from the southwesterly corner formed by the intersection of Woodford Street and Deering Avenue. Another light controls traffic approaching the crosswalk. Parking of vehicles along the westerly curb of Deering Avenue from the corner to the crosswalk is prohibited.

The plaintiff, Donald E. Neal, corroborated by his wife, testified that while going at a moderate rate of speed, he observed defendant's car as it turned into Deering Avenue; that the two cars ran parallel to each other for a short distance until suddenly and without warning the defendant veered his car to the left directly into the pathway of plaintiff's automobile and stopped suddenly close to the crosswalk; and at that time plaintiff, confronted by an emergency, was unable to prevent a collision with the rear end of defendant's car. It appears that immediately after the accident, defendant's car was moved to another point on Deering Avenue close to the scene.

Donald E. Neal placed the point of collision easterly of the center line of Deering Avenue. His testimony was to the effect that immediately after the accident his car was entirely in the left or easterly lane. Deering Avenue at this point is 39 feet wide.

On the other hand, the defendant testified that after he had turned into Deering Avenue he kept his car in a course 6 or 7 feet from the westerly curb; that he stopped his car for a red light just before reaching the crosswalk and that he was hit from the rear by the car in which plaintiffs were riding; and that at the time of the collision the right side of his car was not over 6 or 7 feet from the westerly curb.

During the course of the trial, defendant's counsel, in cross examination, requested the plaintiff to designate certain places on a map which was being used as an exhibit for the defendant. Acting under these directions, plaintiff placed an "X" to indicate the point where his car was when he first noticed defendant's car. With a "Y" he indicated the location of defendant's car. Again at the request of defendant's counsel, plaintiff placed the letter "A" to designate a point where his car was when the defendant veered to the left as claimed by the plaintiffs. The letter "A" appears to be 6 or 8 feet from the crosswalk. The defendant argues very strenuously that the accident could not have happened in the manner described by the plaintiffs in the short distance between the crosswalk and the point marked "X." The defendant says this evidence, as well as the testimony relating to the alleged swerving of the car by the defendant into the pathway of plaintiffs' car in the few feet between the point marked "A" and the crosswalk is improbable, incredible and unworthy of belief.

Defendant while admitting that the record may show a conflict of testimony and that the evidence must be viewed in the light most favorable to the plaintiff, says that plaintiffs' evidence had no probative value.

We give attention first to the issue of whether or not the verdicts are supported by the evidence.

The burden of proving a verdict is manifestly wrong is on the party seeking to set such verdict aside. A verdict will

not be set aside unless so manifestly erroneous as to make it appear it was produced by prejudice, bias, or mistake of law or fact. The credibility of witnesses and the weight of their testimony is for the jury. Where evidence presented leaves only a question of fact, about which intelligent and conscientious men might differ, the Law Court will not substitute its judgment for that of the jury. The evidence in a case must be viewed in the light most favorable to the successful party.

The foregoing principles of law are so well known as to require no supporting citations.

Of course, the plaintiffs had the burden of proving that the accident was caused by the negligence of the defendant as well as proving their own due care. Moreover, a husband cannot recover for loss of the consortium of his wife or for moneys expended in her behalf, occasioned by her injuries to which his own negligence contributes. *Kimball* v. *Bauckman,* 131 Me. 14, 158 A. 694.

Now, let us look at the evidence. Plaintiffs testified that a short distance before they reached the crosswalk on Deering Avenue, the defendant veered his car into their pathway and that the collision was unavoidable. The evidence was sufficient to permit the jury to find that the collision occurred in the easterly lane. This is indicated by the position of plaintiffs' car immediately after the accident. Two police officers corroborated the plaintiff, Donald E. Neal, to the effect that his car was entirely in the left or easterly lane upon their arrival at the scene. There is no evidence that the car had been moved.

Citing *Jordan* v. *Portland Coach Company,* 150 Me. 149, 158, in which this court said: "Uncontroverted and undisputed physical facts may completely override the uncorroborated oral testimony of an interested witness which is completely inconsistent with those physical facts, and natural

and physical laws have universal application and may not be disregarded," defendant contends that the testimony adduced by the plaintiffs as to the manner in which the accident occurred is overridden by physical facts. With this contention we do not agree.

A witness is not always necessarily precluded by marks which he places upon a map. The non-professional witness very often has no conception that maps are drawn to scale and the marks upon the map are merely evidence to be considered by the jury along with, and in the light of, all the other evidence.

The defendant testified that he kept his car in a course of travel not more than 6 or 7 feet from the westerly curb of Deering Avenue and that his car was at this distance from the curb at the time of the collision. This conflict of testimony raised a straight question of fact and the evidence was such as to permit the jury to believe that the accident occurred where the plaintiffs claimed it did. It would appear that defendant's most direct course, because of his planned destination, would ordinarily have kept him in the westerly lane. If the jury accepted plaintiffs' version as to where the cars were at the time of the collision, in like manner, they were warranted in believing that the defendant had not maintained a course parallel with the westerly curb as he contended, but that he in fact steered his vehicle diagonally to the left to the point of collision. Another issue of fact arose because of the variance in the testimony concerning the existence or non-existence of a white line designating the center of Deering Avenue. A witness for the plaintiff testified that he was the one who had painted the line and that it was in existence at the time of the accident. Resolving this issue for the plaintiffs was within the prerogative of the jury and such a finding may well have had some influence when the weight of all the evidence was under consideration.

As a result of a careful study of the record, we find nothing to indicate that the jury was in any manner affected by prejudice, bias, or mistake of law or fact. We are convinced that the evidence presented left only questions of fact, about which intelligent and conscientious men might differ. We find no error in the verdict insofar as the question of liability is concerned.

We pass now to the issue raised by the defendant that the damages are excessive. In the case of Mrs. Neal, the jury returned a verdict for $15,000. The evidence discloses that she suffered a head injury. There were complaints on her part of headaches, dizziness, spots before her right eye and pain. There was evidence that the visual field of the right eye was impaired. A neuro-psychiatrist with a good background of learning and experience, testified that as a result of the head injuries suffered by Mrs. Neal, she was affected with a post concussional syndrome and he described this condition as a group of symptoms usually following head injuries, consisting of dizziness, headaches, and difficulty arising upon sudden exertion and over-exertion. He testified that this condition was permanent and would continue for the remainder of her life. Although there was conflicting testimony, this was a question of fact purely within the province of the jury. In view of the seriousness of the injuries and their permanency, we cannot say that the award was excessive.

In the case of the husband, the special damages proved amounted to about $700. There was evidence to indicate that Mrs. Neal had lost wages in the amount of approximately $700. There is nothing in the record to indicate in which verdict this loss was contained. If the amount was added to the special damages suffered by the husband, then the balance of about $1,600 must be considered as an award for loss of consortium. If the lost wages are not included in his verdict, then the amount given for loss of consortium

would amount to about $2,300. In either event, in view of the severe and the lasting injuries to his wife, as we said in *Britton* v. *Dube,* 154 Me. 319, we cannot say the verdict is excessive.

The entry in each case will be:

Motion for new trial denied.

STATE OF MAINE
vs.
ROBERT DOAK

Knox. Opinion, February 9, 1960.

Criminal Law. Directed Verdict.

When the evidence is so defective or weak that a verdict based upon it cannot be sustained, the trial court upon motion, should direct a verdict for defendant.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the refusal of the presiding justice to direct a verdict for defendant. Exceptions sustained.

Curtis M. Payson, County Attorney, for plaintiff.

Christopher F. Roberts,
Harold J. Rubin, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. The respondent was charged with the crime of sodomy and convicted by jury verdict. At the close of all

of the evidence, respondent moved for a directed verdict. Exception to an adverse ruling upon this motion raises the only issue here presented.

"The rule governing the direction of verdicts in a criminal case is that when the evidence is so defective or weak that a verdict based upon it cannot be sustained, the trial court, on motion, should direct a verdict for the respondent." *State* v. *Sullivan,* 146 Me. 381, 384; *State* v. *Gustin,* 123 Me. 307.

The female complainant was fifteen years old at the time of the alleged criminal act and sixteen at the time of trial. Her testimony comprises the only evidence in the case. She was subjected to a rigorous and searching cross examination in the course of which her testimony, in our view, raised grave and serious doubts as to her veracity and regard for truth.

No useful purpose will be served by perpetuating in this opinion the sordid details related by the prosecutrix. We are not shocked into disbelief by any naive assumption that human conduct never sinks to the depths of depravity which she has described. Unfortunately we know that all too frequently it can and does. Rather are we impressed and disturbed by the numerous and manifest inconsistencies in her story and by her description of alleged events and behavior so improbable as to pass beyond the limits of credibility.

We have no doubt that interwoven with what is obviously highly imaginative fiction there may well be elements of truth in the narration of the prosecutrix. In our view, however, it is beyond the capacity of any factfinder to separate truth from fiction in this case and to determine with the necessary degree of certainty what, if any, crimes the respondent may have committed during a relationship with this prosecutrix over a period of several years. Evidence

of such doubtful quality, entirely uncorroborated, cannot suffice for conviction.

When one entertains such doubts as to the veracity of a youthful complainant, one instinctively looks for a possible motive which might prompt a false accusation. We have carefully analyzed the evidence with such a thought in mind and are satisfied that a rational explanation for such motivation is disclosed by her testimony.

After a painstaking review of the evidence, containing as it does so much that is obviously and transparently exaggerated, improbable or manifestly untrue, we are satisfied that a verdict upon it could not be sustained. The entry will be

Exceptions sustained.

STATE OF MAINE
vs.
FRED T. SMALL

Lincoln. Opinion, February 11, 1960.

Criminal Law. Pleading. Larceny. Ownership. Variance. R. S., 1954, Chap. 145, Sec. 12. Corporations. Associations.

It is a fundamental principle of criminal procedure that an indictment must contain a direct allegation of every essential element of the crime alleged.

An indictment charging breaking, entering and larceny must charge that the property alleged to have been stolen was the property of one other than the respondent. The owner, if known, must be set forth. These elements must be alleged and proved.

R. S., 1954, Chap. 145, Sec. 12, when applied to larceny cases have eliminated in many respects the problem of variance as related to the issue of ownership.

Property in unincorporated associations is in the members.

Corporate existence might be implied without being averred.

If it appears in evidence that the property was owned by the person named and others, the State has carried its burden of proof as to ownership, provided the circumstances of ownership are such that the respondent himself had no right to take the property.

The allegations of ownership "in the custody of" or "in possession of" for the benefit of unnamed beneficiaries of an unincorporated association are legally insufficient.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the denial of a motion in arrest of judgment. Exceptions sustained. Judgment arrested.

James Blenn Perkins, for plaintiff.

Basil Latty,
David Klickstein, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, SULLIVAN, DUBORD, SIDDALL, JJ. TAPLEY, J., did not sit.

SIDDALL, J. On Exceptions. The respondent was indicted for breaking, entering, and larceny in the nighttime and was found guilty after a jury trial in the Superior Court for the County of Lincoln. The indictment contained three counts. One count alleged a prior conviction of robbery against the respondent. The jury returned a verdict of guilty on all counts.

The respondent duly filed a motion in arrest of judgment based upon the following grounds:

(1) That the indictment did not sufficiently charge an offense against the respondent under the Constitution and Laws of the State of Maine.

(2) That the indictment did not allege that the property taken was owned by anybody or by any legal entity.

(3) That the indictment did not allege any proprietary interest in anybody, or any legal entity in the property alleged to be taken.

(4) That the indictment did not allege that the property taken was not the property of the respondent.

The motion was overruled by the presiding justice, and respondent filed exceptions.

As a part of its proof of the prior conviction and sentence, the State offered in evidence a copy of the record of the conviction and sentence in the Cumberland County Superior Court of one Fred T. Small for the crime of robbery, such copy being signed and attested by the Clerk of such court and under its seal. Counsel for the respondent objected to the admission of this document on the ground that it was not the best evidence and that it was hearsay. The document was admitted *de bene* subject to further testimony being presented identifying the Fred T. Small named therein as the respondent in the instant case. The respondent filed exceptions to the admission of this document.

The respondent was sentenced under the provisions of R. S., 1954, Chap. 149, Sec. 3, which authorizes an increased sentence upon conviction of a felony in those cases in which conviction and sentence to a state prison for a prior offense have been alleged and proved.

We consider first the respondent's motion. The respondent was indicted for breaking, entering, and larceny. The indictment alleged that the respondent broke and entered the schoolhouse of the Boothbay-Boothbay Harbor Community School District and stole therefrom certain personal property "in the custody of Clifford H. Buck, Principal of

the Boothbay Region High School, who was then and there holding said property for the beneficiaries of the Boothbay Region High School Activities Fund." The first and second counts contained identical language except in one count the building which allegedly was broken into was described as a building in which valuable things were kept, and in the other count as a building for public use.

Under our statutory definition of larceny the personal property alleged to have been stolen must have been "the property of another." R. S., 1954, Chap. 132, Sec. 1. Our statute in this respect follows the common law definition of larceny.

The issue raised by the respondent's motion is whether or not the allegations in the indictment as quoted above are sufficient allegations of ownership in another of the property which was the subject matter of the alleged larceny.

It is a fundamental principle of criminal procedure that an indictment must contain a direct allegation of every essential element of the crime charged.

An essential element of the crime charged in this case is that the property alleged to have been stolen was the property of one other than the respondent. This element must be alleged and proved. The name of the owner if known must be set forth in the indictment. *State* v. *Davidson,* 119 Me. 146, 109 A. 593; *State* v. *Bartlett,* 55 Me. 200; *State* v. *Polland,* 53 Me. 124; *State* v. *McAloon,* 40 Me. 133; *McKee* v. *State* (Ga.), 37 S. E. (2nd) 700; *State* v. *McGraw* (W. Va.), 85 S. E. (2nd) 849; *Nickles* v. *State,* 86 Ga. App. 290, 71 S. E. (2nd) 578; *Pownall* v. *People* (Colo.), 311 P. (2nd) 714. For a general discussion of the same principle see WHARTON'S CRIMINAL LAW (12th Ed.), Sec. 1222; 52 C. J. S., Larceny, Sec. 80; 32 Am. Jur., Larceny, Sec. 113.

The purposes of the requirement of an allegation of ownership in larceny indictments are to inform the respondent

of the exact nature of the crime charged and to enable him to defend himself against a subsequent prosecution, and also to negative ownership in the respondent.

Ownership of the property taken, when unknown, may be alleged to be in persons unknown. See *State* v. *Davidson, supra; State* v. *Polland, supra.* However, "if it appears from the evidence in the case that the name of the owner was in fact known to the grand jury, the respondent should be discharged, subject to be tried on a new indictment adapted to the facts in the case." *State* v. *Davidson, supra.*

Although every indictment for larceny must allege an ownership of the property taken, there are no particular words which the law requires to be used. Words must be used that convey clearly the idea that certain persons named are the owners of the property taken. *State* v. *Bartlett, supra.* In that case it was held sufficient to allege that the property taken was "of the goods and chattels of" several persons named therein. Likewise in *State* v. *Leavitt,* 66 Me. 440, cited in respondent's brief, the term "of the goods and chattels" of a named person was held to be a sufficient allegation of ownership. In *State* v. *Polland, supra,* also cited in respondent's brief, it was claimed that the owner of the property stolen was not stated in a complaint which alleged the larceny to have been of "one sheep of the value of five dollars, the property of another person, who is unknown to your complainant." The court held the complaint sufficient. In each of these cases the words used clearly indicated ownership of the property taken in a person or persons named, or in persons unknown. On the other hand, in *State* v. *McAloon, supra,* in which the validity of an indictment for receiving stolen property was an issue, that part of the indictment which set forth the larceny by the principal contained an allegation that the property taken was "in the possession of" a named person. The court held it to be necessary to allege and prove the ownership of the prop-

erty stolen, or that the principal had been convicted, and that the indictment did not contain either allegation.

The respondent's counsel also cites in his brief the case of *State* v. *Somerville,* 21 Me. 14. In that case the indictment read "of the goods, chattels, books and property of one Zabdiel Hyde, then and there in the possession of one William Hyde." The indictment clearly set forth ownership in the property, and the issue was whether the proof supported the allegations of ownership. The court held "that proof that the person alleged to be the owner had a special property in the goods taken was sufficient to support the allegations of ownership in the indictment." Likewise, in the case of *State* v. *Pettis,* 63 Me. 124, also cited by the respondent, the complaint alleged the taking of certain property "of the goods, chattels, and property" of a named person. The court held that the allegation of property was sustained if the person named held possession of them under a loan from or contract of sale with the owner. In *State* v. *Jutras,* 154 Me. 198, also cited by respondent, the court merely decided that proof of bailment was sufficient evidence of ownership. The complaint in that case is not set forth in the opinion. The record, however, shows that the complaint alleged the articles taken to be the "property of Joseph Taylor." In each of the above cases the process clearly indicated that the persons named therein were the owners of the property taken, or that the owners were unknown, and the question of the sufficiency of the allegation of ownership was not an issue. The issue before the court in each case was whether the proof of ownership followed the allegation. It may be noted at this time that the provisions of what is now R. S., 1954, Chap. 145, Sec. 12, hereafter discussed, were in effect at the time of the commission of the alleged offense in each of these cases. These provisions when applied to larceny cases have eliminated in many respects the problem of variance between the allegation of ownership and the evidence in proof thereof.

The indictment alleges that the property taken was in the custody of the principal of the Boothbay Region High School for "the beneficiaries of the Boothbay Region High School Activities Fund." The beneficiaries of this fund were obviously members of an unincorporated association. It has been generally held that an indictment charging the larceny of property belonging to a partnership or an unincorporated association, in the absence of a statute permitting the property to be laid in the association by name, or in one or more of its officials or members, should allege the property to be in certain named persons who are the individuals composing the partnership or association. See 52 C. J. S. 887; 32 Am. Jur. 1027; WHARTON'S CRIMINAL PROCEDURE, Vol. II, (10th Ed.), Sec. 872. This rule has been relaxed, without the benefit of a statute, in some jurisdictions in cases of churches and benevolent and fraternal societies having officers and trustees or other governing bodies, in which cases the ownership may be laid in such officers, trustees, or governing body. WHARTON'S CRIMINAL PROCEDURE (10th Ed.), Vol. II, *supra;* 18 Am. & Eng. Anno. Cases 1123. The rule is different, however, in cases of larceny from corporations. The property of a corporation is in the corporation itself and not in its members, while the property of an unincorporated association is in the members thereof. Thus it is sufficient to allege ownership of property taken from a corporation as being in the corporation. It has been held in this State that under some circumstances the fact of incorporation need not be alleged. In *State* v. *Hume,* 145 Me. 5, 70 A. (2nd) 543, cited by the respondent on the issue of the sufficiency of the allegation of ownership, the articles taken were alleged to be "the property of said Maine Central Railroad Company." No allegation was made that such company was incorporated, and a motion in arrest of judgment was filed alleging the indictment defective because of that omission. Our court following the case of *Norton* v. *State,* 74 Ind. 337 held

that when a name was used in an indictment which was apparently a corporate one, a corporate existence might be implied without being averred.

We are now led to an examination of R. S., 1954, Chap. 145, Sec. 12, referred to previously in this opinion, to determine in what respect, if any, the requirements relating to an allegation of ownership in larceny cases have been altered. R. S., 1954, Chap. 145, Sec. 12, reads as follows:

> "**Owner of property, as used in indictment.** — In an offense in any way relating to real or personal estate, it is sufficient and not a variance if it is proved at the trial that, when the offense was committed, the actual or constructive possession of or the general or special property in the whole of such estate or in any part thereof was in the person or community alleged in the indictment to be the owner thereof."

This provision is by no means of recent origin. It appears in substantially the same form in Chap. 167, Sec. 8, of the Revised Statutes of Maine passed October 22, 1840. This provision simplifies criminal pleading in cases relating to the ownership of real or personal property. In cases involving larceny an allegation of ownership in one having either the general or a special property in the whole or in any part of the property taken is sufficient and the introduction of evidence that other persons also have an interest in the property taken is not open to objection on the ground of variance. The statute in no way eliminates the necessity of alleging ownership in a person or persons other than the respondent. On the contrary, it recognizes the necessity of such an allegation. Applying the statute to the facts of the present case, if, by proper language, one of the members of the unincorporated association had been named as the owner of the property taken, the issue now being discussed would have presented no problem. It should be noted that we are here concerned with a question of *pleading* and not

one of *proof*. The State must prove a felonious taking on the part of the respondent of the "property of another." However, if it appears in evidence that the property was owned by the person named and others, the State has carried its burden of proof as to ownership, provided that the circumstances of the ownership are such that the respondent himself had no right to take the property.

In view of the principles of law and decisions discussed herein, we must conclude that the wording of the indictment in this case does not meet the necessary requirements in relation to the ownership of the property alleged to have been taken. The words "in the custody of" are no more indicative of ownership than the words "in the possession of" as used in the process in *State* v. *McAloon, supra,* and the allegation of custody in a certain named person for the benefit of unnamed beneficiaries of an unincorporated or voluntary association is not equivalent to an allegation of ownership in a named person other than the respondent, or in an entity capable of owning property. If it was the intent of the State to allege ownership in the principal of the school, the allegation was insufficient for that purpose; if the State intended to allege ownership in the beneficiaries of the association, the allegation was insufficient for lack of identification of any of the beneficiaries or members of the association.

The indictment in this case was fatally defective in not properly alleging all of the elements of the crime of larceny. A motion in arrest of judgment is the proper method to take advantage of this defect. See *State* v. *Hume, supra; State* v. *McAloon, supra.*

In view of our conclusions, it becomes unnecessary to discuss any other issue raised by the respondent.

The entry will be

Exceptions sustained.
Judgment arrested.

SCOTT PAPER COMPANY
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, March 7, 1960.

Taxation. Evidence. R. S., 1954, Chap. 17, Sec. 2.

The limitations of the Sales and Use Tax Law that "Sale Price" (shall not) include the price received for labor and services used in installing or applying or repairing the property sold, *if separately charged or stated* (emphasis supplied) does not preclude a vendee taxpayer under Regulation 8 from showing through records of the vendor or other competent evidence that such items of labor and service were in fact "separately charged or stated" even though such charges did not appear in the vendee's invoices.

It is error for the Tax Assessor to refuse to admit competent and material evidence at a reconsideration hearing.

ON REPORT.

This is a tax appeal before the Law Court upon report and agreed statement. Case remanded to the Superior Court for entry of judgment for appellant in accordance with this opinion.

Weeks, Hutchins & Frye, for plaintiff.

Ralph W. Farris, Sr., for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

TAPLEY, J. On report. The facts are presented by agreed statement. The application of a portion of Sec. 2 of Chap. 17, R. S., 1954 (Sales and Use Tax Law) to the agreed facts is in issue. The pertinent portion of Sec. 2 reads:

> " 'Sale price' means the total amount of the sale or lease or rental price, as the case may be, of a

> retail sale, including any services that are a part of such sale, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expenses whatsoever; provided, however, that discounts allowed and taken on sales shall not be included, and 'sale price' shall not include allowances in cash or by credit made upon the return of merchandise pursuant to warranty, or the price of property returned by customers when the full price thereof is refunded either in cash or by credit, *nor shall 'sale price' include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated.*" (Emphasis supplied.)

The assessor contends that the cost of the labor or services is only excluded from the sale price if "separately charged or stated" in the invoice of the vendor and that any other evidence thereof is inadmissible and not to be considered at an oral hearing for reconsideration of an assessment. The appellant (hereinafter referred to as vendee), on the other hand, argues that the price for labor or services is "separately charged or stated" if shown on the records of the vendor and that the records of the vendor are admissible in a use tax assessment proceeding to determine the amount to be excluded from the sale price.

The vendee is a foreign corporation engaged in the business of manufacturing pulp paper products in Maine. It is successor to Hollingsworth & Whitney Company. The vendee has no regular place for making retail sales in the State but is registered with the State Tax Assessor under the provisions of the Sales and Use Tax Law. In the conduct of its business the vendee makes purchases of tangible

personal property at retail sale, both within and without the State of Maine. The transactions here involved took place under provisions of Regulation 8 which relieved vendors from collecting taxes from the vendee. The vendee under this regulation obligated itself to report and pay directly to the assessor all sales and use taxes on all taxable, tangible personal property purchased by it. The vendee made all purchases in issue in this case under the terms of Regulation 8.

The assessor audited the books and records of the vendee and on February 18, 1958 assessed additional use taxes and interest from November 1, 1955 to October 31, 1957 in the sum of $13,029.76. The vendee petitioned for reconsideration of the assessment and an oral hearing was held before the assessor on April 9, 1958. The assessor rendered his decision on May 27, 1958, determining the use tax and interest as being $10,998.78 tax and $1,061.33 interest. The total use tax assessed on labor and service charges amounts to $2,731.53, with interest at $301.79, which totals the amount in controversy. The balance of the tax and interest has been paid and is not in issue. During the oral hearing vendee sought to show from the books and records of the vendor the separation or breakdown of labor or services as distinguished from the cost of material. The assessor excluded such evidence as inadmissible not because of its incompetency as evidence but for the reason that the only evidence he would accept was any separation or breakdown contained in the invoices or records of the vendee, and in these cases there were no such breakdowns in the invoices received by the vendee.

The definition of the words "sale price" as used in Sec. 2 presents the issue.

At the time of the audit of the books of the vendee, the items assessed were billed on a lump sum basis without any breakdown of labor and materials. The assessor's position

is that the Legislature in using the words "separately charged or stated" intended that the separation of items for labor and service from the material purchased should be reflected on the invoices or books of the vendee, which in the instant case is the taxpayer, so that the tax assessor by audit or examination would be able to determine the proper basis upon which the assessment should be made. The assessor further contends that the vendee, having failed to show the breakdown on its records at the time of audit, is precluded from showing such breakdown or separation at a subsequent hearing on reconsideration.

The transactions involved in this tax dispute are in three general classes:

"1. The appellant entered into lump sum contracts for the installation of machinery owned by the appellant with the contractor furnishing labor and materials to complete the installation. This class includes:

Lord Electric Co.	
Total invoice	$109,537.10
Labor	92,507.49
Materials	17,029.61
Economy Electric Co.	
Total invoice	$ 3,787.50
Labor	2,278.43
Materials	1,509.07
Midwest Piping Co.	
Total invoice	$ 1,560.00
Labor	1,000.00
Materials	560.00
Dole Company	
Total invoice	$ 3,963.00
Labor	3,252.00
Materials	711.00
P. S. Thorsen Co.	
Total invoice	$ 30,161.00
Labor	20,509.00
Materials	9,652.00

The appellant entered into lump sum contracts for the repair of machinery or equipment owned by it with the contractor supplying labor and materials to complete the repair work. This class includes:

Improved Machinery Co.		
Total invoice	$	688.00
Labor		329.00
Materials		359.00
Beloit Iron Works		
Total invoice	$	17,640.00
Labor		11,811.00
Materials		5,829.00
Cheney Bigelow Wire Co.		
Total invoice	$	1,166.00
Labor		736.68
Materials		429.32
Hodgdon Bros.-Goudy & Stevens		
Total invoice	$	571.00
Labor		418.63
Materials		152.37

The appellant entered into lump sum contracts for the acquisition and installation of machinery furnished by the contractor. This class cludes:

Execuphone Systems, Inc.		
Total invoice	$	8,790.00
Labor		3,071.00
Materials		5,719.00"

The assessor under authority of Sec. 20, having determined a deficiency in vendee's payment of taxes, assessed additional taxes and interest. Sec. 32 provides that any person against whom an assessment shall be made by the assessor may petition for a reconsideration of the assessment. The petitioner may adopt one of two courses, either to file a petition requesting a reconsideration without a hearing, or he may in his petition for reconsideration request an oral hearing as did the vendee in this case. At this

hearing the vendee had the burden of proving the transactions were not, in part, taxable. Chap. 17, Sec. 9:

> "The burden of proving that a transaction was not taxable shall be upon the person charged with tax liability."

This burden could be met by the vendee if it were permitted to show the items taxed were "separately charged or stated." The vendee would have been able to meet the burden placed upon it by producing competent evidence at the hearing that the items taxed were "separately charged or stated" but the evidence to prove this fact was available only from the records of the vendor. The assessor because of his interpretation of the Legislature's definition of "sale price" did not permit the taxpayer to show through this otherwise competent evidence that the items were "separately charged or stated." The assessor takes the position that the Legislature intended that unless the items were separately charged or stated on the vendee's invoices or records the door was forever closed for it to otherwise prove the fact. The Legislature provides in plain and unambiguous language that "sale price" shall not "include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated." Unfortunately, the Legislature failed to specify whether the vendor's or vendee's records must show the property separately charged or stated. Did it intend to restrict the breakdown to invoices only, or did it consider that where a hearing was had, such as in this case, the breakdown could be shown by competent evidence from the vendor's records? Did it enact Sec. 9 which places the burden of proving that a transaction was not taxable upon the person charged with tax liability and at the same time intend to take from him the right to satisfy the burden by competent evidence? The tax assessor ordinarily would have predicated the tax upon an audit of the vendor's rec-

ords but in this case where Regulation 8 is concerned the audit was made and subsequent tax base established on the records available in the possession of the vendee. According to the interpretation the assessor gave to the definition of "sale price," as contained in Sec. 2 of the Act, the vendee was estopped from showing that it was entitled to be taxed on a lower sales price because it didn't have in its possession an invoice or other record showing a breakdown.

The sales tax is collected by the retailer from the purchaser and paid by him to the State. Sec. 5, "Every retailer shall add the sales tax - - - - or the average equivalent of said tax, to his sale price - - - - -." Sec. 3 provides, "Retailers shall pay such tax at the time and in the manner hereinafter provided, and it shall be in addition to all other taxes." The Legislature, having placed the responsibility on the retailer for payment of the tax, provides the tax assessor with the authority to determine amount due and its collection. Sec. 29, "Every retailer shall keep records of his sales, the kind and form of which shall be adequate to enable the assessor to determine the tax liability. All such records shall be safely preserved for a period of 3 years in such manner as to insure their security and accessibility for inspection by the assessor or by any of his employees engaged in the administration of this chapter. The assessor may consent to the destruction of any such records at any time within said period." Sec. 25 gives the assessor power of "examination or investigation of the place of business, the tangible personal property, and the books, records, papers, vouchers, accounts and documents of any retailer."

The transactions involved are such that Sec. 4 of the Sales and Use Tax is concerned. The vendor has in this instance been relieved of collecting the taxes from the vendee because of Regulation 8, which reads as follows:

> "With respect to manufacturers and utilities, where the Assessor finds that the conduct of a tax-

> payer's business renders it impractical or inequitable for it to pay sales and use taxes separately under the law on purchases made by it, and where the Assessor has determined that payment of such taxes to the State would not be jeopardized, such taxpayer shall be given a certificate, with an identifying registration number, relieving its vendors of collecting such taxes from it, upon the taxpayer's obligating itself to report and pay directly to the Assessor sales and use taxes on all tangible personal property purchased by it, the sale or use of which is otherwise taxable. The placement of such registration number on the taxpayer's purchase orders or contracts shall be sufficient evidence to its vendors to relieve them from collecting sales or use taxes thereon. The Assessor may require any such taxpayer to give bond, in such sum and form as he may deem necessary to secure the payment of such taxes."

The Sales and Use Tax Law is designed for the imposition of a tax on the sale of personal property and for the collection of such tax. The Legislature has provided a method of collection by placing upon the retailer, first, a responsibility to collect the tax and, secondly, the payment of it to the State. The tax assessor is provided with the authority and power of investigation of the business books and records of the retailer to facilitate the collection of the tax. The books, records and other documents of the retailer are expected to reflect the amount of tax due the State on personal property sold by the retailer. When the audit is made of the records of the retailer, it is then that such exemptions as the law may provide are credited to him. If, for instance, in the examination of a retailer's records there should be found a transaction wherein material was sold and services rendered in its installation, the retailer would not be required to pay a tax on the amount charged for service. In analyzing the act it is not difficult to determine that the Legislature recognized that the natural and most accurate source

of information of sales tax income would be found on the records of the retailer. It is obvious that a purchaser would seldom, if at all, have in his possession any records showing amount of sales tax on purchases made by him.

The function of Regulation 8 is one of practicability to the end that a vendor is relieved of his legal responsibility to collect and pay the tax upon the vendee agreeing to pay such tax. The Regulation in no way changes the apparent intent of the Legislature that the proper and most reliable source of data upon which to base the tax is the books and records of the vendor where would be found information as to whether property sold was *separately charged or stated.*

Roberts v. *Glander,* 156 Ohio St. 247, 102 N. E. (2nd) 242 concerns itself with definition and meaning of "price" as used in its Sales Tax Law. This was the case of an upholsterer who recorded separately on his books charges for services performed and material used in upholstery repairs, but did not give his customers the breakdown in their invoices. Incidentally, this case treats of records of a vendor. The statute, in substance, is similar to the one concerned in this case. The opinion of the court, on page 244, analyses the question in a most comprehensive and enlightening manner by saying:

> "(2) A careful examination of the Sales Tax Act, Sections 5546-1 to 5546-24c, inclusive, General Code, discloses that nowhere in the act is it stipulated how or in what manner the consideration for services and that for materials shall be 'separately stated' to except the former as a predicate for the tax. This fact suggests an inquiry as to the purpose of the statutory requirement for separation for tax purposes. Is it for the benefit of the vendee by way of an invoice for his purchase, or is it to enable the Tax Commissioner to determine and assess the tax against the vendor?

> There is no indication in the act that the requirement concerns the vendee, as he has no obligation to compute, or make a return of the tax to the state, and he is advised of its amount by the cancelled tax receipts which he receives from his vendor. Doubtless, a purchaser may demand an invoice for, as he may demand an inspection of, goods purchased before payment may be required. On the other hand, it is apparent that the purposes to be served in making the separation of charges are to enable the Tax Commissioner to determine and assess the tax and to enable the vendor to make his tax return to the state and claim his exception by keeping copies of his invoices or by keeping books of account reflecting the breakdown of the charges. And it is quite apparent that such a breakdown on the books of the vendor would be just as efficacious for the purpose and more permanent in form than the retention of invoices as and when made."

A most important consideration is the rights of the vendee at the oral hearing. This is a hearing where substantive rights of the vendee are concerned and in view of the fact that the Sales and Use Tax Law imposes upon it the burden of proving the transactions were not taxable (Sec. 9) and where it was in possession of competent evidence to satisfy that burden, it follows that refusal to accept such evidence would be extremely prejudicial.

It is not logical to take the position that the Legislature in placing the burden of proof on the taxpayer to prove nontaxability intended that its definition of "sale price" should be interpreted in such a manner as to preclude him from satisfying the burden by the introduction of competent evidence.

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it,

> amounts to a denial of due process is not open to debate." *Donnelly Garment Co.* v. *National Labor Relation Board,* 123 F. (2nd) 215.

The reasons for appeal are not that the findings of the assessor were not supported by evidence but rather that an error in law was committed by the assessor's refusal to admit evidence which was pertinent and material in character and that as a result of the refusal to admit this evidence, the use tax assessment as determined on reconsideration was erroneous.

According to the undisputed facts and our view of the law applicable thereto, the tax assessor was in error in not admitting the records of the vendor at the oral hearing.

The use tax assessment amounting to $2731.53, with interest of $301.79, shall be abated.

Case remanded to the Superior Court for entry of judgment for appellant in accordance with this opinion.

STATE OF MAINE
vs.
FREDERICK BLANCHARD

Aroostook. Opinion, March 9, 1960.

Constitutional Law. Probation. Courts. Sentence. Judgments. Modification.

The Probation Statute P. L., 1957, Chap. 387, Sec. 6, which permits a court to suspend execution of sentence and place a criminal on probation is not in contravention of Art. III, Secs. 1, 2 and Art. V, Part First, Secs. 1 and 11, Constitution of Maine, as being an excise of the pardoning power reposed in the executive department.

R. S., 1954, Sec. 11, Subsection II which provides for a term of court "at Houlton on the 2d Tuesday of September for criminal business and by adjournment at Caribou for civil business" does not preclude a reconvening at Houlton to dispose of unfinished criminal business.

To "adjourn" is to suspend a session, for resumption at another time or place, or indefinitely.

Where a court has pronounced sentence it has no power *(unless so authorized by statute)* to make any order, the effect of which would be to indefinitely suspend the execution of that sentence.

Cf. special docket.

A probation officer in relation to convicted criminals who have been placed in his custody, is a judicial officer. Cf. deputy sheriff as court officer.

A court has jurisdiction over its judgments within the term within which they are rendered and such court has the power to alter or modify its sentence during the term within which it was imposed, except when execution has begun.

When a convict is placed in the custody of a probation officer, sentence has not begun.

ON REPORT.

This case is before the Law Court upon report and agreed statement following an order revoking probation. Complaint for alleged violation of probation dismissed.

Ferris Freme, County Attorney,
Harold Stewart, Ass't County Attorney, for the State.

Adolphus S. Crawford, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, SULLIVAN, DUBORD, SIDDALL, JJ. TAPLEY, J., did not sit.

DUBORD, J. This case is before us on report under the provisions of Section 15, Chapter 103, R. S., 1954.

According to an agreed statement of facts, one Frederick Blanchard, hereinafter referred to as the respondent was indicted at the April 1957 Term of the Superior Court within and for the County of Aroostook, upon the charge of assault with intent to kill and murder. After commitment to the Bangor State Hospital for observation and report as to his sanity, the respondent was returned to the aforesaid Superior Court for trial at its September 1957 Term. At this term, a nolle prosequi was entered to that part of the indictment which charged intent to kill and murder.

At this September 1957 Term, upon arraignment, the respondent pleaded guilty to the indictment in its amended form and was sentenced to be imprisoned at hard labor for not less than two nor more than four years in the state prison; execution of this sentence was suspended, and the respondent was placed on probation under the provisions of Chapter 387, P. L., 1957, for a term of four years, conditioned on his entering Veterans' Facility at Togus, forthwith, and accepting such treatment for such period of time as said Veterans' Facility should recommend, and that the respondent further report to the probation officer forthwith and on the first day of each month during said term.

On the 15th calendar day of said September 1957 Term, being the 28th day of September, 1957, the respondent was in court present with counsel, whereupon the aforesaid

sentence of imprisonment was revoked by the same presiding justice who had pronounced it; the said presiding justice ordered that the nolle prosequi hereinbefore referred to should stand without prejudice; that the respondent be permitted to withdraw his plea of guilty without prejudice; thereupon, without further plea by the respondent, the presiding justice ordered that the case be marked "continued;" and bail was set by the presiding justice and furnished by the respondent for his appearance at the next Term of Court in said County of Aroostook, when criminal cases would be in order for trial, namely, the November 1957 Term of said Court.

At the November 1957 Term of said Court, counsel for the respondent withdrew. Respondent was present in court in person, but without counsel, and was notified by the justice presiding at said Term, who was not the same justice who had presided at the September Term, that the original probation was in full force; and thereupon, the case was ordered by the presiding justice to stand continued on the docket.

At the ensuing April, September and November 1958 Terms of the aforesaid Court, when criminal cases were in order for trial, the case against the respondent was still further continued upon order of the court.

On January 27, 1959, a complaint on the part of the probation officer, was filed in the aforesaid Superior Court, then in vacation, addressed to the resident justice of said court, charging that the respondent had violated the terms of the probation imposed upon him by the presiding justice of the Superior Court at the September 1957 Term. Upon this complaint, a capias was ordered to be issued upon which the respondent was arrested on February 8, 1959 and confined in Aroostook County Jail until March 21, 1959, when he obtained his release on bail for his appearance at the

April 1959 Term of said Superior Court to be held in Houlton.

To the allegations contained in the complaint for violation of probation, the respondent filed pleadings in which he set forth the contention that the presiding justice at the September 1957 Term was without authority to suspend the execution of the sentence, for the reason that this action on his part was an exercise of the pardoning power specifically reposed by the Constitution in the executive department of the State. In other words, the respondent attacked the constitutionality of Section 6, Chapter 387, P. L., 1957, as being in contravention of Article III, Sections 1 and 2, and of Article V, Part First, Sections 1 and 11 of the Constitution of Maine. Respondent further contended in his pleadings that if the provisions of the probation statute did not infringe upon the Constitution, that the probation decreed upon the original sentence was annulled, when the presiding justice, at the same Term of Court at which the sentence was pronounced and probation imposed, revoked the sentence and permitted the respondent to withdraw his plea of guilty, and ordered the case continued without further plea.

To these contentions of the respondent, the State countered that the provisions of Chapter 387, P. L., 1957, insofar as they relate to the suspension of execution of a sentence and the placing of a convict upon probation were constitutional; and that the attempted revocation of the sentence by the presiding justice at the September 1957 Term was without authority, since it was not made before adjournment of the same term at which it was pronounced; and because, before such revocation, the respondent had already begun the execution of his sentence having come under the control and custody of a probation officer, who the State says is an officer of the executive branch of the government.

After a hearing on the complaint charging violation of probation, the presiding justice ruled that the provisions of Chapter 387, P. L., 1957, relating to suspension of execution of a sentence and imposition of probation, was not in violation of the Constitution of Maine; that the presiding justice at the September 1957 Term was without authority to revoke the sentence previously pronounced; that there had been a violation of the terms of the probation; and that the respondent should abide the terms of the original sentence of imprisonment.

The execution of the sentence was stayed pending a decision of the Law Court upon the issues presented.

According to the agreed statement of facts, the case comes before us for determination on the following issues:

> "(1) The constitutional validity of that part of Chapter 387 of the Public Laws of Maine, 1957, which permits the court to suspend execution of the sentence, and to place on probation, a person convicted of a criminal offense.
>
> "(2) Under the agreed statement of facts and the records herein presented, did the presiding justice, at the September 1957 term of said Superior Court, have authority to revoke the sentence and probation that he had previously pronounced and imposed?"

We think it is of importance to first dispose of the question as to whether or not the action of the presiding justice at the September 1957 Term took place at the same term of court at which the original sentence was imposed. A determination of this issue requires interpretation of subsection II, Section 11, R. S., 1954, relating to the September Term of the Superior Court in Aroostook County. The statute provides that there shall be a term of court "at Houlton on the 2nd Tuesday of September for criminal business and by adjournment at Caribou for civil business,".

The docket entries show that court was held in Houlton from September 10, 1957 to September 20, 1957 for the disposal of criminal business. The original sentence was imposed upon the respondent upon the 8th day of the Term, viz., September 19, 1957, or while court was in session in Houlton. The docket entries further show that the session of court was adjourned to Caribou where civil business was conducted from September 23, 1957 to September 28, 1957. On September 28, 1957, court which was then convened in Caribou adjourned to Houlton for criminal business and it was on this day that the original sentence was revoked.

Counsel for the State, while conceding that the presiding justice may modify a sentence previously imposed at the same term of court, providing execution of the sentence has not begun, contends that the action which took place on September 28, 1957 was not at the same term of court. It is the State's contention that where the statute authorizing the September Term of Court in Aroostook County made no provision for an adjournment back from Caribou to Houlton, that there was in fact no current term of court in existence on September 28, 1957, and that the action taken by the presiding justice in revoking the original sentence was a complete nullity. Stating the position of the State in another way, it seems that the State says that it was beyond the power of the court to adjourn from Caribou back to Houlton and that in essence, what the court attempted to do on September 28, 1957 was not within any term at all. It is the position of the State that when court adjourned the term at Caribou, the effect was a final adjournment of the term, because there is no legislative authority to adjourn the term back to Houlton.

To rephrase the State's position in still another manner, the State says in effect that the Legislature established a September Term of Court to be held first in Houlton for criminal business and then in Caribou for civil business.

Upon this theory, the State argues that the court had not been given the power by the Legislature to reconvene the term from Caribou back to Houlton.

This issue can be resolved only upon a determination of Legislative intent.

The word "adjournment" is not one of fixed but of flexible meaning. See 2 C. J. S. 47. In Webster's Dictionary we find among other definitions for the word "adjourn" the following: "To suspend a session, for resumption at another time or place, or indefinitely; as, a court *adjourns* sine die."

This statute is to be construed as other statutes are with the view of determining Legislative intent. We are of the opinion that the obvious intent and purpose of the Legislature was that there should be one September Term of Superior Court held annually in Aroostook County; that it was Legislative intendment only to limit the business transacted in Houlton to criminal business and the business transacted in Caribou to civil business, but that the term continued either in one place or the other until *final* adjournment. Manifestly, the changing of the place where the court shall sit is merely for convenience of litigants and interested parties, and we find nothing in the statute to preclude reconvening in Houlton to dispose of unfinished criminal business.

Upon this issue, we hold that the action of the presiding justice on September 28, 1957, when he revoked his original sentence, took place at the same term of court at which the original sentence was imposed.

We pass now to consideration of whether or not the provisions of the general probation and parole law enacted as Chapter 387, P. L., 1957, which permit a court to suspend the execution of a sentence already imposed and place the respondent on probation, infringes upon any of the provisions of the Constitution of the State of Maine.

Regardless of the opinion in the case of *State* v. *Sturgis*, 110 Me. 96, which we will discuss later, the issue presented to us in the instant case appears to be of novel impression in this State.

The first probation statute in this State was enacted as Chapter 263, P. L., 1909. After a provision relating to the appointment of probation officers, Section 2 of this Chapter reads in part as follows:

> "Section 2. When any person by plea of guilty, or upon trial, is convicted of any offense other than a capital offense before any court having criminal jurisdiction, such court is invested with authority in its discretion to continue the matter for sentence, suspend sentence, or suspend the execution of any sentence, to be done under the provisions of this act, but nothing herein contained shall be held to take away the right of appeal from any respondent, or any right to have his case reviewed or retried under the provisions of law as they now exist. The court at or before the time for sentence shall inquire into the circumstances of the respondent and of his offense, and if the matter is continued for sentence, the respondent shall be placed in the custody and under the control of the probation officer in the county where such respondent has been convicted. Such sentence may be continued by the court indefinitely, or to definite time, and in every instance the court may order the respondent to report to the probation officer at such times and places as the court shall designate, and shall cause to be given to the respondent a writing signed by the clerk or by the court showing such continuance for sentence, the time during which the same is continued, and the times and places when the respondent is to report to such probation officer."

In 1957 the Legislature enacted a general probation and parole law, which is Chapter 387, P. L. 1957.

The Sections of this Chapter, which are pertinent to the issues before us are as follows:

> "**Sec. 6. Probation of person by court.** When a person is convicted of an offense which is not punishable by life imprisonment, the Court may continue the case for sentence, suspend the imposition of sentence, or impose sentence and suspend its execution."
>
> "**III.** The Court may impose a sentence, suspend its execution for not more than 4 years and place the respondent on probation."
>
> "**Sec. 7. Person on probation under jurisdiction of Court.** A person on probation is under the sole jurisdiction of the Court which finally tried his case. When a person is placed on probation, he shall be committed by the Court to the custody and control of a Probation-Parole Officer. The Probation-Parole Officer has the same authority with respect to the probationer as if he were surety upon the recognizance of the probationer. The Court shall fix the duration of the probation, which may not be more than 4 years. The Court shall determine the conditions of the probation, and shall give the probationer a written statement containing the conditions of his probation. The probationer shall forthwith report to the Probation-Parole Officer and shall subsequently report to the Probation-Parole Officer as he may direct."
>
> "**Sec. 8. Person violating probation.** When a probationer violates a condition of his probation, the Probation-Parole Officer shall forthwith report the violation to the Court, or to a Justice of the Court in vacation, which may order the probationer returned. After hearing, the Court or Justice may revoke the probation and impose sentence if the case has been continued for sentence or if imposition of sentence has been suspended, or may order the probationer to serve the original sentence where its execution has been suspended."

"**Sec. 9. Person discharged from probation by Court.** A person on probation may be discharged by the Court which placed him on probation."

"**I.** When it appears to a Probation-Parole Officer that a probationer is no longer in need of his supervision, he may so report to the Court, or to a Justice of the Court in vacation, which may order the probationer returned. After hearing, the Court or Justice may terminate his probation and allow him to go without day."

"**II.** When it appears to the Court that a probationer under its jurisdiction has fulfilled the conditions of his probation, it shall terminate his probation and allow him to go without day."

The general probation and parole law was amended at the Special Session of the Legislature by Chapter 428, P. L., 1957. However, these amendments did not go into effect until October 31, 1957, and are not applicable to the case now before us.

Article III, of the Constitution of Maine, relating to the distribution of powers reads as follows:

"§ **1.** The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial."

"§ 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

Sections 1 and 11 of Article V, Part First, of the Constitution of Maine, defining executive powers, read:

"§ **1.** The supreme executive power of this state shall be vested in a Governor."

"§ **11.** He shall have power, with the advice and consent of the council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves, commutations and pardons, - - - -."

The only opinions of this court in which the question of the constitutionality of the probation statute is referred to are *State* v. *Jenness,* 116 Me. 196; 100 A. 933, and *Cote* v. *Cummings,* 126 Me. 330; 138 A. 547.

However, we find statements in *State* v. *Sturgis,* 110 Me. 96; 85 A. 474, which would seem to indicate that the question of the constitutionality of the probation statute has been passed upon by this court. Nevertheless, a study of this opinion, and references thereto in subsequent opinions, as well as a qualifying statement in the opinion itself, would seem to indicate that the issue of constitutionality was not in fact passed upon.

In the case of *State* v. *Sturgis, supra,* the action was one of scire facias to recover the penal sum in a recognizance entered into by the defendants. It appears that the defendant, Charles E. Sturgis, was convicted of maintaining a liquor nuisance, at the January 1910 Term of the Superior Court for Kennebec County. He was sentenced to pay a fine of $1000 and in addition was sentenced to imprisonment in jail for a term of 6 months, and in default of payment of fine, 30 additional days in jail; the imprisonment part of the penalty to be cancelled on payment of the fine, if respondent shall recognize with sufficient sureties in the sum of $1500 to keep the peace and be of good behavior, and especially to violate no provision of the law for the prevention of the traffic in intoxicating liquors for the term of two years.

The fine was paid and the peace recognizance given. Thereafter, at the September Term 1911 of said Superior Court, Sturgis entered a plea of *nolo contendere* to a search and seizure process entered against him for a violation of a provision of law for the prevention of the traffic in intoxicating liquors, and was sentenced thereunder to pay a fine and costs which he paid. Thereupon, at said September Term of

Court, he and his sureties in the peace recognizance were defaulted and this action of scire facias was brought to recover the penalty of the recognizance.

The court said that it is fundamental law that the sentence in a criminal case should be definite and certain, and not dependent upon any contingency or condition. The court further said, that in the absence of a statute authorizing such a sentence, that a sentence in the alternative is bad for uncertainty. The court then ruled that the sentence imposed on Sturgis was invalid, because it was in the alternative and judgment was entered for the defendants.

In the course of the opinion the court had this to say:

> "Again, it is a well recognized principle, that after a sentence has been imposed the court has no authority to relieve the convict from its execution. The authorities draw a clear distinction between the suspension of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment therefor prescribed by law, but however the courts may differ as to such power, it is well established that the court cannot, after the judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment and release the prisoner therefrom in whole or in part. Of course, it is not to be understood that the court has not the power to temporarily postpone the execution of its sentence pending an appeal and other proceedings to obtain a new trial or review of the judgment, and in cases where cumulative sentences are imposed, and perhaps in some cases of great necessity and emergency. And the power of the court to correct errors in its judgment, and to change its sentence, during the term at which it is imposed and before its execution has begun, is

another and different matter. The act which the authorities hold that the court has not the power to do, is not the act which stays the execution of its sentence in order that the convict may exercise his legal rights to obtain a reversal or modification of the judgment against him, and not the act done to correct its sentence, so that it shall be in accord with its final and lawful judgment, but the act done for the purpose of exonerating the convict, in whole or in part, from the final and lawful judgment and sentence of the law which has been imposed upon him. That is the power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the State, which power has not been given to the courts, but confided exclusively to the Governor of the State, with the advice and consent of the Council. Const. Maine, Art. V., part First, Sec. 11.

"It may be unnecessary to cite authorities in support of this principle, that after sentence has been pronounced in a criminal case the court cannot as a matter of leniency to the convict, do that which would in effect cancel the sentence and reprieve or pardon the offender in whole or in part." *State* v. *Sturgis,* 110 Me. 96, 100; 85 A. 474.

In its final summary, the court made this statement:

"The citation of authorities need not be multiplied, for they are in substantial harmony in holding that where the court has pronounced the sentence of the law against one convicted of a criminal offense, it then has no power (*unless so authorized by statute*) to make any order, the effect of which would be to indefinitely suspend the execution of that sentence, - - - - - - - - - -." (Emphasis supplied.) *State* v. *Sturgis,* 110 Me. 96, 104; 85 A. 474.

It will be noted that a determination of the issue before the court in *State* v. *Sturgis,* was not dependent upon the

constitutionality of the probation statute (then actually in existence), so that it would seem that whatever bearing this statement of the court may have upon the constitutionality of the probation statute must be considered obiter dicta and is not to be construed as authority or precedent.

It is somewhat interesting to note that the opinion in *State* v. *Sturgis,* was rendered in 1912 and that the probation statute enacted in 1909 was in effect at the time the opinion was rendered, and yet no reference is made to the statute.

In the case of *State* v. *Jenness, supra,* at the January Term 1917 of the Superior Court for Kennebec County, the respondent was tried and convicted for maintaining a common nuisance, and was sentenced to pay a fine and in default of payment to suffer imprisonment for a term of ten months. Exceptions taken during the course of the trial were afterwards overruled for want of prosecution, and in March, 1917, he was committed to jail in execution of sentence. At the same January term of the Superior Court, he was also tried and convicted on the charge of unlawful possession of intoxicating liquor. Upon this second charge, he was sentenced to fine and imprisonment, and, it seems, was placed "on probation." At the April Term of the court, complaint having been made of the conduct of the respondent, the court, after hearing, directed that the following docket entry be made: — "Probation off, mittimus to issue at expiration of sentence in number 30," which was the nuisance case.

To this ruling and direction, the respondent excepted, on the ground that the order made at a term subsequent to the term at which sentence was imposed was in fact a changing of sentence and the imposing of a new and additional sentence, whereas the original sentence unmodified by this subsequent order of the presiding justice ran concurrently

with the sentence in the nuisance case, which the respondent was then serving in jail. The court sustained the position taken by the respondent.

While the court recites its authority to suspend the execution of the sentence by virtue of the provisions of § 12, Chap. 137, R. S., 1916 (the probation statute enacted in 1909), the opinion ends with this paragraph:

> "The constitutionality of such a statute as the one in question has been raised elsewhere. But it has not been raised nor suggested in this case, and we have now no occasion to consider it." *State* v. *Jenness,* 116 Me. 196, 198; 100 A. 933.

In the case of *Cote* v. *Cummings, supra,* the respondent after being found guilty in the Municipal Court of Waterville of illegal possession of intoxicating liquor was sentenced to pay a fine of $500 and to serve imprisonment for two months. He took an appeal to the next term of the Superior Court. Prior to the time that the Superior Court convened, he withdrew his appeal and paid the fine. The jail sentence was suspended and he was placed on probation for one year. Within one year, he was ordered to appear before the court and found guilty of having violated the probation regulations, and was ordered to serve the two months. Mittimus was issued, and he was committed. He applied for a writ of habeas corpus which was issued, and upon the theory that a so-called "split" sentence was unauthorized and illegal, the exceptions of the respondent were sustained.

The issue of the constitutionality of the probation statute was not before the court. However, the court had this to say:

> "The statutory authority in this state for the suspension of the imposition or execution of a sentence or for a stay of execution is the Probation Act of 1909 (Rev. Stats. 1916, Chap. 137, Secs. 12, 13, 14) and Rev. Stats. 1916, Chap. 136, Sec. 27 as

> amended by the Public Laws of 1917, Chap. 156, Sec. 3. ---------- What limitations upon the authority of a court of general jurisdiction to postpone the imposition of a sentence, or to suspend sentence, or to stay execution of sentence, now exist, if any, we find it unnecessary to decide and express no opinion thereon." *Cote* v. *Cummings,* 126 Me. 330, 338; 138 A. 547.

The court in *Cote* v. *Cummings* in referring to the opinion in *State* v. *Sturgis,* further said:

> "The opinion laid down 'some principles applicable to judgments and sentences in criminal cases,' and said, 'The authorities draw a clear distinction between the suspension of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment therefor prescribed by law, but however the courts may differ as to such power, it is well established that the court cannot, after judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, ----------.'" *Cote* v. *Cummings,* 126 Me. 330, 335; 138 A. 547.

That this court assumed that the question of the constitutionality of the probation statute had never been passed upon, in spite of the statement in the case of *State* v. *Sturgis,* is strongly indicated, we think, by the following paragraph in the opinion of *Cote* v. *Cummings:*

> "That the court meant this could not be done without statutory authority appears from its final summary, (p. 104) 'The citation of authorities need not be multiplied for they are in substantial harmony in holding that where the court has pronounced the sentence of the law against one convicted of a criminal offense, it then has no power *(unless so authorized by statute)* to make any order, the effect of which would be to indefinitely

> suspend the execution of that sentence.' " (Emphasis supplied.) *Cote* v. *Cummings,* 126 Me. 330, 336; 138 A. 547.

It appears by the weight of authority that in the absence of statutory enactment, a court has no power indefinitely to suspend the execution of a sentence, either in whole or in part, and that any such order made after judgment, is void. 24 C. J. S. Criminal Law, § 1618 a.

However, suspension of execution of sentence, in many states, is authorized by statutes which control and regulate the cases and conditions under which suspension may be ordered and these statutes have generally been held constitutional.

> "A statute authorizing the suspension of the execution of sentences or providing for probation in case of such suspension, is not unconstitutional, and does not encroach on the constitutional power of the executive to grant reprieves and pardons." 24 C. J. S. Criminal Law, § 1618 b.

In the case of *Belden* v. *Hugo,* 91 A. 369, Conn. (1914), the constitutionality of a probation statute authorizing suspension of execution of the sentence was attacked. The court held that there was nothing in the statute violative of the Constitution, and had this to say:

> "In passing upon this question it is important that we gain a correct conception of the character of that which the statute authorizes the courts to do in the matter of stays of execution. In no true sense is it an exercise of the pardoning power. The provisions of the statute like those authorizing releases from imprisonment on parole merely prescribe conditions attaching to the punishment authorized and inflicted. The General Assembly defines the punishments which may be imposed and it may gather around those punishments such incidents or conditions as it may deem wise. Statutes which prescribe these incidents or conditions,

> although general in their application, are dealing with the punishment, and their provisions enter into and form a part of it. So it is that every sentence to imprisonment for a term carries with it and has incorporated into it by necessary implication those provisions whose operation may result in a modification of its letter. When some such provision results in a release on parole or stay of execution with a probation commitment, that result does not have its source in an exercise of the pardoning power. It comes in the due course of the operation of the sentence under the provisions of law which prescribe what it may be and its incidents. In this view of the matter there can be no doubt as to the competency of the General Assembly to legislate as it did in the probation statute and to attach to or incorporate into punishments authorized to be imposed the conditions it embodies.
>
> "We need not stop here. Let it be assumed that there exists, in a stay of execution which may be made permanent, the essence of a remission of sentence. We are then unable to discover good reason, constitutional or otherwise, why courts of criminal jurisdiction may not by legislation be given control over their own judgments for the period of one year so that within that period they may be modified or erased. That at most is all that the stays provided for in the statute amount to. The power exercised even in that aspect of it does not constitute a pardon or commutation. It is in effect only a change of judgment, and for that reason a radically different thing from a pardon or commutation, which import that the sentence stands while the sentenced person is relieved from its operation upon him. The gist of that which the statute authorizes is that the pronouncement of the court may be changed, not that a way of escape from it is provided." *Belden* v. *Hugo,* 91 A. 369, 371.

The constitutionality of a New York statute authorizing suspension of execution of an imposed sentence was upheld in *People* v. *Goodrich,* 149 N. Y. S. 406. The court said:

"The question thus presented is whether the trial court had power at the March term, after passing sentence of imprisonment, to direct a suspension of the same; for, if it had such power, then it clearly possessed a like power to revoke such suspension at a future term. In my opinion the court possessed such power, both at common law and under the statutes. The inherent power of the Supreme Court over its own decrees, both in pronouncing judgment and in suspending the execution of the same, would seem to follow from its constitution and the very nature of its jurisdiction. Indeed, such power has rarely been questioned. ---------- The matter was settled beyond all question by the Court of Appeals in the case of People v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856, where it was held that the court possessed inherent power to suspend sentence after conviction. The court in this case clearly points out how the suspension of judgment in a criminal case in no manner conflicts with the pardoning power granted to the executive.

"But it is urged that the above cases all related to the postponement of sentence, while the case at bar was a postponement of the execution of a sentence after it had been passed. It is difficult to see any distinction between the two cases. If the court possesses inherent power to postpone the passing of sentence, why should it not possess a like power to postpone execution of a sentence after it has been pronounced? As is said in People v. Fabian, 126 App. Div. 97, 111 N. Y. Supp. 140, the suspension of sentence in no way disturbs the finding, but merely postpones the imposition of punishment. Why may not the same result be accomplished by postponing execution?

"This power of postponing the infliction of punishment both before and after sentence, seems to have been exercised in England from the earliest times. In the reign of Queen Elizabeth the question was submitted to the Queen's Bench whether

> the justices of assize could, after the session had adjourned, lawfully command the sheriff to respite the execution still longer, and by the opinion of all the justices the order for further respite was adjudged good enough, and they said that the custom of the realm had always been to the effect. 2 Dyer, 205." 149 N. Y. S. 406, 408.

In holding that the power to suspend the execution of a sentence under probation statutes was not an exercise of the pardoning power, the Vermont Supreme Court in the opinion of *In re Hall,* 136 A. 24, said:

> "It is generally held that statutes which confer upon a court the power to suspend execution of sentence, and commit the respondent to the custody of the probation officer, are valid, and do not contravene the constitutional provisions which vest the pardoning power in the executive." *In re Hall,* 136 A. 24, 25.
>
> "In Ex parte United States, 242 U. S. 27, 52, after holding that the United States District Courts possessed no inherent power indefinitely to suspend the execution of a sentence, the validity of probation statutes was distinctly recognized, Chief Justice White saying:
>
> " 'And so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable Courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete.' "

It appears that our own court in *Welch* v. *State,* 120 Me. 294; 113 A. 737, has looked with favor upon the probation statute, even though no opinion was expressed relating to

the constitutionality thereof. This was a writ of error in which the plaintiff in error pleaded guilty to a complaint for illegal possession of intoxicating liquor and the court ordered the case placed on the special docket without imposing sentence. At a subsequent term the case was brought forward from the special docket and sentence was imposed upon him. The court in sustaining the power to place the cause upon the special docket said:

> "No probation was attempted in the case at bar. None was necessary. The court in placing the cause upon the special docket was not compelled to place the respondent in charge of a probation officer. The broad powers as to sentence inhering in a court of general jurisdiction were not diminished or curtailed by the passage of the Probation Act of 1909. That act did not take from but added to the authority of the court. It afforded a new method in the administration of criminal law, tending toward the reformation rather than the punishment of the convicted, and placed a new and often times an effective instrumentality in the hands of the court." *Welch* v. *State,* 120 Me. 294, 298; 113 A. 737.

In determining whether or not a statute contravenes executive power:

> "The test is whether the statute 'authorizes the courts to perform a function so closely connected with and so far incidental to strictly judicial proceedings that the courts in obeying the statute would not be exercising executive or nonjudicial powers.' " Opinion of the Justices, 142 N. E. (2nd) 770, 773 (Mass.)

Somewhat analogous to the decisions that suspension of the execution of a sentence is not an exercise of the pardoning power is the decision in *Ex parte Ridley,* 106 P. 549 (Okla.), to the effect:

> "That an act of the Legislature specifically defining credits for good behavior, in existence at the

> date of the judgment against the prisoner, becomes a part of the sentence and inheres into the punishment assessed, and is not an invasion of the constitutional prerogative of the Governor." *Ex parte Ridley,* 106 P. 549, 555.

The decision, *Eva E. Bowden's Case,* 123 Me. 359; 123 A. 166, is of interest upon the contention of the State that the probation officer is an officer of the executive department. In the *Bowden* case the court ruled that a deputy sheriff, while acting as court officer during a session of the court, is not and cannot be held to be exercising an executive function while acting as such officer.

The court said:

> "It is a rule generally prevailing, and adhered to in this state, that the executive and judicial departments are absolutely independent of each other within the sphere of their respective powers. *Dennett, Petitioner,* 32 Maine, 508. This rule does not preclude just what happened in the instant case. A deputy sheriff, an executive as well as an administrative officer, was for the time being acting as an officer of the judicial department, as an officer of a court, within the sphere of the power of that court. This overlapping and interlacing of the duties of officers of the two departments is not unusual. On the contrary, it is a very necessary result of our governmental system." *Eva E. Bowden's Case,* 123 Me. 359, 365; 123 A. 166.

We arrive at the conclusion, therefore, that the probation officer in relation to convicted criminals who have been placed in his custody, is a judicial officer; and that the provisions of the probation statute do not infringe upon the Constitution.

Having concluded that the September Term of the Superior Court in Aroostook County is one term and that the revocation of the original sentence took place at the same Term of Court at which the original sentence was imposed;

and that the probation officer, when a convict has been placed in his custody, is a judicial officer; and that the provisions of the probation statute which permit suspension of the execution of a sentence do not conflict with any constitutional provision, we pass now to the only remaining issue; and that is whether or not the presiding justice at the September 1957 Term of the Superior Court had authority to revoke the sentence and the probation previously pronounced and imposed.

It seems clear, and it has been so generally held that a court has jurisdiction over its judgment within the term within which it was rendered and that such court has the power to alter or modify its sentence during the term within which it was imposed except when the execution of the sentence has begun. 24 C. J. S. Criminal Law, § 1587 and § 1588.

> "Unquestionably, the court has power, within definitely prescribed limits, to reconsider its judgment and to vacate, modify, or amend it by reducing or increasing a sentence imposed, *but such power must be exercised at the term or session of the court at which the judgment was pronounced.* Thus, where a sentence has not been executed, the court may, in a proper case, during the term or session in which the sentence was rendered, reconsider it and may modify, amend, or revise the sentence by either mitigating or even by increasing its severity. However, under the decisions, as we understand them, where the sentence has been put into execution, the court cannot, even during the term or session of the court at which the sentence was pronounced, modify, amend, or revise it in any way." *In re Cedar,* 269 N. Y. S. 733, 737.

> "The sole question is, Is the second sentence valid? In criminal cases, where a sentence is valid and the defendant has commenced the service of the sentence, the court thereupon loses all power over the case, even during the same term." *Hynes* v. *United States,* 35 F. (2nd) 734, 735.

> "In this state it is definitely settled that when a person accused of crime has been convicted, sentenced, and delivered to the warden of a penitentiary or the superintendent of a reformatory under a mittimus, the court rendering the judgment and imposing the sentence has lost jurisdiction over the case and is without power to vacate, set aside, or modify the judgment." *People ex rel Swanson* v. *Williams,* 352 Ill. 227; 185 N. E. 598, 599.

This doctrine was recognized and adopted by our own court in *Brown* v. *Rice,* 57 Me. 55, where our court said:

> "It seems to have been settled by practice and by authority, both in this country and in England, that during the term the court has power over its unexecuted entries or judgments, and may revoke, alter, or substitute new decrees or entries in place of those before made or entered and not executed, both in civil and criminal cases. - - - - - - - - - - - - - - So in a criminal case, so long as the sentence remains entirely unexecuted in any part, and no execution of it has been attempted or made, it has been held that it might be revoked, and another sentence be substituted." *Brown* v. *Rice,* 57 Me. 55, 57.

See also *State* v. *Sturgis,* 110 Me. 96 at 101; 85 A. 474, where the court said:

> "And the power of the court to correct errors in its judgment, and to change its sentence, during the term at which it is imposed and before its execution has begun, is another and different matter."

Granted that the presiding justice at the September 1957 Term had the power to modify the sentence he had previously imposed, providing execution of the sentence had not begun, the sole remaining question is whether or not execution had begun when the respondent was placed in the custody of the probation officer. Such an issue has never

been decided in Maine, but there are numerous precedents supporting the theory that when a convict is placed in the custody of a probation officer, the execution of the sentence has not begun.

In the case of *Oxman* v. *United States,* 148 F. (2nd) 750; 159 A. L. R. 155, after the defendant had been convicted, he was sentenced to imprisonment, and was placed temporarily in a room in the marshal's office close by the courtroom, awaiting action on certain co-defendants. Before being removed to the place at which his sentence was to be served, he was called back into court. The original sentence was revoked and a new sentence imposed. It was the contention of the defendant that when he was placed in this room, he had already begun to serve his sentence and, therefore, the court was without power to alter it. It was held that such temporary detention was not a beginning of the execution of his sentence. The court said:

> "The general rule is that judgments, both civil and criminal, are within the control of the court during the term at which they are made. For that time they are deemed to be 'in the breast of the court,' subject to be amended, modified, or vacated." *Oxman* v. *United States,* 148 F. (2nd) 750; 159 A. L. R. 155, 160.

In holding that the period during which the probationer was in the custody of the probation officer could not be counted as time during which he was undergoing punishment imposed upon him, the Supreme Court of Vermont said *In re Hall,* 136 A. 24:

> "The execution of his sentence did not come into operation until his commitment, after the finding by the court that the terms and conditions of his probation had been violated." *In re Hall,* 136 A. 24, 26.

In the case of *Schimpf* v. *Alvis,* 115 N. E. (2nd) 856 (Ohio), it was held that a sentence which is stayed is not

in force; and it is pointed out that the obvious purpose of probation is to stay the execution of the sentence. Manifestly, the very words "suspend the execution" imply that execution of the sentence has not begun.

In the case of *Belden* v. *Hugo,* previously cited, the defendant had been convicted at the April 1913 Term of Court and sentenced to a fine and to a term of one year in jail. The execution of the jail part of the sentence was suspended and he was committed to the custody of the probation officer for the term of one year. At the January 1914 Term of Court, the order of suspension was revoked and he was committed to jail to serve the original sentence. It was his contention that the time during which he was in custody of the probation officer should be deducted from his sentence. Upon the theory that the execution of the sentence had not begun when the respondent was placed in the custody of the probation officer, the court overruled his contention and had this to say:

> "One of the difficulties with the plaintiff's view is that it ignores the purpose of the probation commitment and mistakes its true character. It is not ordered for the purpose of punishment for the wrong for which there has been a conviction, or for general wrong-doing. Its aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. The end sought is the good of the individual wrongdoer, and not his punishment. Underlying the act of commitment is the hope that it may prove that punishment will be unnecessary, and that its stigma may be avoided. A sentence partakes of an essentially different character. It is the judgment of the court formally pronounced 'awarding the punishment to be inflicted.' Black's Law Dictionary, 1071. It deals out punishment, and one of its underlying aims is to cause its subject to suffer for the wrong he has done.

"The suggestion that the probation commitment partakes of a penal character because it involves an award of custody, a restraint of liberty of conduct by the necessity of observance of prescribed rules and regulations, and the creation of a right and power of supervision in another is one which overlooks the end sought and the fundamental character of the limitations upon personal independence which are involved. Restraints upon individual freedom of action are not by any means all penal. The youth at school is under restraint. He comes under the duty of obedience to the rules prescribed for his well-being and wholesome development. He is subject to the supervision of a superior, and yet his school life is not one of punishment. There are limitations upon the right of individual freedom of action born of social conditions which are constantly recognized. Their character is not penal where the purpose of their imposition is not punitory.

"The nonpenal character of the probation commitment under our law is plainly recognized in its provisions wherein a suspension of the execution of the sentence imposed is provided for where a commitment to the custody of a probation officer is made, and a revocation of the suspension provided for when imprisonment in conformity to the sentence is to begin. The sentence, to use the words of the statute, does not come to have full force and effect until this revocation is made. A sentence unexecuted entails no punishment upon the offender. It is only a judicial pronouncement. It is the carrying into effect of the sentence by process providing for its execution which results in punishment. A suspension of execution necessarily involves a suspension of the penal consequences of the judgment. *Suspension is altogether inconsistent with operation. It implies a stay — a cessation of operation.* (emphasis supplied.) The position of a person under sentence, but committed to the care of a probation officer, as described in the language of the statute, involves the conception of a ceasing of the

> operation of the sentence, and not operation of the sentence proceeding simultaneously with or by means of the probation process. The statute plainly contemplates nothing of the latter sort. It as plainly contemplates that proceedings to secure punishment shall not be in force during the period when the probation process is in operation, and that execution of sentence will not run unless and until that process shall have failed to accomplish the desired results." *Belden* v. *Hugo,* 91 A. 369, 370.

See also *Hynes* v. *United States, supra,* where the court said:

> "Unless there is a statutory provision, or a provision in the judgment as entered, that the service shall begin at a specified time, service begins when the prisoner is delivered into the custody of the officer at the prison where the sentence is to be served." *Hynes* v. *United States,* 35 F. (2nd) 734, 735.

Bearing in mind the very words of the statute that permits suspension of the execution of a sentence, and that suspension is altogether inconsistent with operation, we are of the opinion that the execution of the sentence imposed upon the respondent in this case did not begin when he was placed in the custody of the probation officer. It would seem to follow that if the execution of a sentence begins with placing a convicted respondent in the custody of the probation officer, that the time he is in such custody would be deducted from the length of the sentence imposed. Manifestly, such was not the intent of the Legislature.

Looking at the case from the standpoint of the respondent, he had every reason to believe that he had not been convicted when the presiding justice revoked the original sentence and permitted him to withdraw his plea of guilty, and ordered the cause continued without further plea. Although the order of revocation did not specifically mention

the probation, it necessarily follows that the probation previously imposed was revoked, because there can be no probation until a person charged with crime has been convicted. Moreover, Section 1, Chapter 149, R. S., 1954, provides that "no person shall be punished for an offense until convicted thereof in a court having jurisdiction of the person and case."

It has also been held that:

> "No person can be punished for crime except upon the verdict of a jury or upon a plea of guilty or nolo contendere." *State* v. *Cross,* 34 Me. 594.

When the complaint for alleged violation of probation was filed against this respondent on January 27, 1959, he was not on probation, because he had never been convicted.

The entry will be:

Complaint for alleged violation of probation dismissed.

STATE OF MAINE
vs.
RICHARD N. WARD

Cumberland. Opinion, March 17, 1960.

Criminal Law. Pleading. Motor Vehicles. Demurrer.

A complaint alleging that respondent "was a person whose license to operate a motor vehicle had been suspended" is not the equivalent of alleging that respondent's license was under suspension at the time of the alleged offense since the language of the complaint merely indicates that sometime in the past respondent's license had been suspended.

Where the operation while under suspension—statutes provide different penalties where the causes of suspension differ—respondent is entitled to have the reason for suspension set forth in the complaint. R. S., 1954, Chap. 22, Sec. 81, Par. VII; R. S., 1954, Chap. 22, Sec. 161; P. L., 1957, Chap. 250, Sec. 5.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the overruling of a demurrer. Exceptions sustained.

Arthur Chapman, Jr., County Attorney, for plaintiff.

Basil Latty, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

SIDDALL, J. On exceptions. The respondent demurred to a complaint against him. The complaint charged that:

"RICHARD N. WARD

of Harrison, in said County, on the 12th day of August A.D. 1959, at said Harrison was a person

> whose license to operate a motor vehicle had been suspended by the Secretary of State of the State of Maine, and the said Richard N. Ward unlawfully and without right, did then and there operate a motor vehicle, to wit, an automobile, upon the highway and public streets of the town of Harrison, Maine, to wit, Route #117, against the peace of the State and contrary to the form of the Statute in such case made and provided."

The demurrer was overruled by the court, and the respondent seasonably filed exceptions.

The issues here involve the sufficiency of the complaint. The respondent contends that the complaint is insufficient in that it fails to specify that his operator's license was under suspension on August 12, 1959, the date of the alleged offense, and that it does not set forth the reasons for the suspension.

We consider at this time the first contention of the respondent. An examination of the pertinent statutes reveals that on August 12, 1959, three statutory provisions were in effect, all relating to the offense of operating a motor vehicle after suspension of the operator's license. R. S., 1954, Chap. 22, Sec. 81, Par. VII, a part of the so-called Financial Responsibility Law, provides that any person whose operator's license has been suspended, restoration thereof being contingent upon the furnishing of certain financial requirements, and who drives any motor vehicle upon any highway during such suspension, except under some permitted circumstances, shall be punished by imprisonment for not more than 6 months, or by a fine of not more than $500, or by both. The same law also applies, under certain circumstances, to persons who operate a motor vehicle after the suspension of such person's registration certificate. Another statute, R. S., 1954, Chap. 22, Sec. 161, provides that any person who drives a motor vehicle on any highway in this state at a time when his privilege to do so is suspended,

shall upon conviction be punished by a fine of not more than $500 or by imprisonment for not more than 6 months, or by both. By P. L., 1957, Chap. 250, Sec. 4, this statute was amended by changing the penalty upon conviction to a fine of not less than $100 nor more than $500 or by imprisonment for not more than 6 months, or by both. Still another law enacted as Sec. 5 of the same chapter 250 of the Public Laws of 1957 as an addition to R. S., 1954, Chap. 22, Sec. 161, provides for a fine of not more than $500 or imprisonment for not more than six months, or both, upon being convicted of operating a motor vehicle upon any highway at a time when the privilege to operate is suspended for failure to comply with the provisions of the Financial Responsibility Law.

The offense under each of the above statutory provisions consists in the operation of a motor vehicle on the highway at a time when the license of the driver is under suspension. Did the complaint in this case contain a sufficient allegation that the respondent's license was under suspension at the time of the alleged offense?

It is a cardinal rule of criminal pleadings that all of the essential elements of the crime sought to be charged must be alleged, and that the description of the offense must be certain, positive, and complete, and not by way of recital, argument, intendment, implication, or inference. See *State* v. *Michaud,* 150 Me. 479, 114 A. (2nd) 352; *State* v. *Rowell,* 147 Me. 131, 84 A. (2nd) 140; *State* v. *Bellmore,* 144 Me. 231, 67 A. (2nd) 531; *Smith* v. *State,* 145 Me. 313, 75 A. (2nd) 538; *State* v. *Pooler et al.,* 141 Me. 274, 43 A. (2nd) 353; *State* v. *Peterson,* 136 Me. 165, 4 A. (2nd) 835; *State* v. *Beckwith,* 135 Me. 423, 198 A. 739; *State* v. *Faddoul,* 132 Me. 151, 168 A. 97; *State* v. *Beattie,* 129 Me. 229, 151 A. 427; *State* v. *Beliveau,* 114 Me. 477, 96 A. 779.

Bearing these principles of criminal pleading in mind, we must conclude that the complaint in this case is clearly in-

sufficient. An essential element of the crime sought to be charged is that the operator's license of the respondent must have been under suspension at the time of the alleged offense. The complaint contains language which indicates that the license of the respondent had at some time in the past been suspended, but lacks a certain positive or direct allegation that it was under suspension on the date of the alleged offense. The complaint charges no crime.

We now discuss the claim of the respondent that the complaint should have set forth the reason for which his license was suspended. The State contends that the complaint is sufficient in that it follows the statute in language which is substantially equivalent thereto as to that part of Chap. 22, Sec. 161, which provides that "no person shall operate a motor vehicle after his license or right to operate has been suspended or revoked. . . . Any person who drives a motor vehicle on any public highway of this state at a time when his privilege to do so is suspended or revoked shall be guilty of a misdemeanor. . . ."

Article I, Section 6 of the Constitution of the State of Maine provides that in all criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation. It has been repeatedly held that this constitutional provision entitles a person to know the nature and cause of the accusation without being obliged to go beyond the record, and to have the facts alleged to constitute the crime set forth in the complaint with that reasonable degree of fullness, certainty, and precision requisite to enable him to meet the exact charge against him. *State* v. *Michaud,* 150 Me. 479, 114 A. (2nd) 352; *State* v. *Euart,* 149 Me. 26, 98 A. (2nd) 556; *Smith* v. *State, supra; State* v. *Beckwith, supra.* This principle is so well established that the citation of other cases appears to be unnecessary.

In order to meet this constitutional requirement it is not always sufficient to draw a complaint in the language of the

statute creating the crime. In *State* v. *Munsey,* 114 Me. 408, 410, 96 A. 729, our court said:

> "The charge against the respondent is of conduct not criminal at common law but made so by statute. It is an elemetary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the complaint or indictment. It has been also frequently declared that in complaints or indictments charging violation of a statutory offense it is sufficient to charge the offense in the language of the statute without further description, providing the language of the statute fully sets out the facts which constitute the offense. Again it has been held that the complaint or indictment is sufficient if it should state all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent. It has also been held that the indictment or complaint is sufficient if it follows the statute so closely that the offense charged and the statute under which the indictment is found may be clearly identified. But even where a charge of a statutory offense is made the respondent still has the right to insist that the indictment, whether in the language of the statute or otherwise, shall state the facts, alleged to constitute the crime, with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment, which may be rendered upon it, in bar of a subsequent prosecution for the same offense. *State v. Snowman,* 94 Maine, 99; *State v. Lynch,* 88 Maine, 195; *State v. Bushey,* 96 Maine, 151; *State v. Doran,* 99 Maine, 329."

In *State* v. *Lashus,* 79 Me. 541, 542, 11 A. 604, our court said:

> "The complaint follows the language of the statutory provision (R. S., c. 27, Sec. 31,) which creates the offence intended to be charged; but such a

> mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State v. And. R.R. Co.* 76 Maine, 411; *Com. v. Pray,* 13 Pick. 359. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offence as shall apprise him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offence he may plead the former conviction or acquittal in bar."

In *State* v. *Dunn,* 136 Me. 299, 302, 8 A. (2nd) 594, our court used the following language:

> "Assuredly, as argued, where the words of a statute may by their generality embrace cases falling within its literal terms, which are not within its meaning or spirit, the indictment must be enlarged beyond the words of its enactment, and allege all facts necessary to bring the case within legislative intent. *State v. Lashus,* 79 Me., 541, 11 A., 604; *State v. Doran,* 99 Me., 329, 59 A., 440; *State v. Conant,* supra."

"If a statute does not sufficiently set out the facts that make the crime, a more definite statement of facts is necessary." *State* v. *Michaud, supra,* p. 482. The purpose of the rule requiring the charge to be set forth particularly is well stated in *State* v. *Longley,* 119 Me. 535, 537, 112 A. 260, as follows:

> "It is familiar law that the object of the rule requiring the charge to be particularly, certainly and technically set forth, is three fold: To apprise the defendant of the precise nature of the charge made against him: To enable the court to determine whether the facts constitute an offense and to render the proper judgment thereon: That the judgment may be a bar to any future prosecution for the same offense."

Having these principles of criminal pleading in mind, as well as the reasons therefor, we now turn to the consider-

ation of their application to the facts of this case. As previously stated, Section 161 contains two distinct and separate provisions relating to the operation of a motor vehicle after the suspension of the license of the operator. Each carries a separate and different penalty. That part of Section 161 which was added thereto by Section 5 of Chapter 250, P. L., 1957, hereafter called for convenience the special provision of Section 161, applies only to those prosecutions in which the suspension resulted from a failure to comply with the Financial Responsibility Law. The other part of Section 161, hereafter called the general provision of that section, under which the State claims the present complaint was brought, applies to prosecutions resulting from violation of suspensions in general, without any reference being made as to the reason for the suspension. We must assume that the Legislature intended to achieve a consistent body of law and did not intend to provide two different penalties under Section 161 for exactly the same act. We cannot believe that the Legislature by enacting the special provision of Section 161 intended that one operating a motor vehicle in violation of its provisions should also be liable to prosecution and punishment under the general provisions of the same section. We therefore conclude that a person cannot be prosecuted under the general provision of Section 161 for operating a motor vehicle after suspension for failure to comply with the Financial Responsibility Law. Therefore, an allegation which follows the statutory language of the general provision of Section 161, as in the instant case, without specifying the reason for the suspension, might embrace cases falling within the letter of that provision but not within its real meaning or spirit. The possibility of such a situation requires the allegation of other facts necessary to appraise the respondent of the exact nature of the crime which the State seeks to charge. It appears obvious that a person accused of operating after suspension of his license cannot determine from the com-

plaint whether he is being prosecuted under the general or under the special provision of Section 161, or whether the prosecution is brought under the provisions of R. S., 1954, Chap. 22, Sec. 81, Par. VII, unless the reason for which the suspension occurred is set forth in the complaint. Without such an allegation the respondent not only would be unable to properly prepare his defense, but a conviction under such a complaint might not bar a further prosecution for the same offense upon a subsequent complaint containing an allegation as to the reason for the suspension. Furthermore, the court, upon conviction, would be unable to determine the appropriate penalty to impose. For the reasons stated we find the complaint in this case insufficient.

The entry will be

Demurrer sustained.

BERNARD D. LARSEN

vs.

MELVIN LANE

Kennebec. Opinion, March 17, 1960.

New Trial.

A verdict, on motion for new trial, must stand unless there is found no credible evidence to support it.

ON MOTION FOR NEW TRIAL.

This is an action of assumpsit before the Law Court, following a plaintiff's verdict, upon motion for new trial.

Motion for new trial denied.

Niehoff & Niehoff, for plaintiff.

John J. Jabar, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

TAPLEY, J. On motion for new trial. This is an action in assumpsit wherein plaintiff seeks payment for labor and services in doing electrical work. The action was tried before a jury at the June Term, 1959 of the Superior Court, within and for the County of Kennebec. The jury returned a verdict favoring the plaintiff in the sum of $1192.60. Defendant filed a motion for a new trial directly to the Supreme Judicial Court sitting as a Law Court.

The plaintiff is an electrician, doing business in Waterville. The defendant, Mr. Lane, is engaged in the meat business and at the time of this action operated a chain of stores known as Bi-Rite Meat Market. The Waterville store of Bi-Rite Meat Market experienced difficulty with the electrical system and Mr. Larsen was called. The building was not owned by defendant, Mr. Lane. In order for the Bi-Rite Market to receive electric current it was necessary to do electrical work which, in part, would benefit other portions of the building with which Mr. Lane was not concerned.

The defendant contends that there was insufficient evidence on the part of the plaintiff to show the necessary elements constituting an agreement on the part of Mr. Lane requiring him to pay the account and that the jury verdict was based on guesswork and conjecture.

Plaintiff testified of conversation between himself and defendant, Mr. Lane, regarding the electrical work to be done and the payment for it:

"Q. Will you tell the Court and jury who first contacted you relative to this work?

A. I was called into the store on a blown fuse by one of the clerks, and the electric entrance was practically burned up and had to be changed.

Q. Did you have conversation with Mr. Melvin Lane?

A. Yes, sir.

Q. What was the conversation?

A. We had to go back to the building owner first and the Levines said they would only furnish the main entrance box, and it was all they would furnish for the job.

Q. Did you convey that information to Mr. Lane?

A. I went back to the store and told Mr. Lane—he was back of the meat counter—and told him it would run to considerable size and he told me to make out two separate bills and mail them to him and he would take care of them."

The burden is on the moving party to demonstrate that the verdict is clearly and manifestly wrong. *Day* v. *Isaacson,* 124 Me. 407. The verdict must stand unless there is found in the record no credible evidence to support it. *Lyschick* v. *Wozneak,* 149 Me. 243.

In the case of *Bowie* v. *Landry,* 150 Me. 239, at page 241, this court said:

> "A verdict by a jury on a properly submitted issue should not be set aside even when there is strong doubt of the actual occurrence or existence of a fact found by a jury. If the evidence is conflicting, their finding will not be disturbed on that ground. A new trial will not be granted unless the verdict is clearly wrong. Where there is evidence to support a verdict and there is nothing in the case which would justify the substitution of the judgment of the court, who did not see nor hear witnesses, for that of the jury who did, and it appearing that the parties have had a fair trial without prejudicial error in law, the verdict should not be disturbed."

It is apparent from the record in the case at bar that there is conflicting testimony on the one side and the other, and of conflicting testimony the court said in *McCully* v. *Bessey,* 142 Me. 209, at page 212:

> "The values of conflicting bits of testimony are for the jury, and the burden of showing, to the satisfaction of the Court that the verdict is manifestly wrong, is upon the one seeking to set it aside."

A review of the record discloses a sufficiency of credible evidence to support the jury finding.

Motion for new trial denied.

CLARA M. HUGHES, ET AL.
vs.
MARY BLACK, ET AL.

Penobscot. Opinion, April 11, 1960.

Exceptions. Rules of Court. Courts. Judges. Disqualifications. Interest. Bias and Prejudice. Attorneys. Fees. Waiver and Estoppel.

A bill of exceptions should include all that is necessary to enable the Law Court to decide whether the rulings complained of were erroneous.

Rule 86 of New Rules governs the applicability of the New Rules to pending actions.

Old Rule 16 which governed motions is now replaced by New Rule 43 (E). Motions based on facts not of record may be heard on affidavits, or if directed upon oral testimony or depositions.

No judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.

At common law, the only ground for recusation of a judge was pecuniary interest or relationship.

The interest must be direct, definite and capable of demonstration, not remote, uncertain, contingent, unsubstantial, speculative or theoretic.

In this state it has been held that in addition to interest or relationship a deep seated prejudice or bias may be ground for disqualification as being an "other lawful cause." R. S., 1916, Chap. 82, Sec. 98.

R. S., 1954, Chap. 10, Sec. 22, subsection XXV is applicable to the matter of qualifications of judges and ". . . consanguinity or affinity within the 6th degree according to the civil law or within the degree of 2nd cousins inclusive except by written consent of the parties, will disqualify."

Where there is interest or relationship the disqualification is conclusively presumed, in other cases it must be shown.

The true test on qualification, is whether the relative has an interest *as a party* to the cause or proceeding, or stands in the condition of a party.

The fact of relationship between a judge and attorney is not ground for disqualification except in matters where the court fixes counsel fees in which latter event the attorney becomes a party.

Objections on the ground of disqualifications should be timely and seasonably made upon discovery or such objections may be waived or the party making them may become estopped.

ON EXCEPTIONS.

This was a bill for partition before the Law Court upon exceptions by the defendants. Exceptions dismissed.

E. Donald Finnegan

Harry Stern

Edward Stern

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. This case is before us upon exceptions of the defendants, Catherine Hughes Sexton and Patrick Sexton. There is nothing in the record to indicate the nature of the action except that in the motion for disqualification of the presiding justice, there is a brief statement to the effect that the litigation involves a bill for partition. The only other information we have is that contained on the cover of the record submitted, which indicates that this was a bill for partition brought by Clara M. Hughes, et al., against four defendants, two of whom are pressing exceptions in this court.

It appears from the bill of exceptions that at some undisclosed date, these two defendants, who are now before this court, filed a motion praying that the presiding justice disqualify himself for the alleged reason that he is the uncle of the attorney for the complainants.

The bill of exceptions shows that by decree entered December 11, 1959, the presiding justice overruled the motion. His decree contains a statement to the effect that the attorneys for all the parties had been notified of the time and place of the hearing upon the motion for disqualification, and that at that time neither the present defendants nor their counsel appeared.

The bill of exceptions further indicates that on December 7, 1959, the presiding justice, by a decree, accepted the fourth report of the receiver and ordered fees to be paid to the receiver and to counsel for the plaintiffs. The record does not contain the report nor the basis of any request for counsel fees.

To this action on the part of the presiding justice, the defendants purport to take exceptions.

The record is so meager that it is impossible for us to determine the issues without pure conjecture. There is nothing in the record to indicate when the motion for disqualifi-

cation was filed, the nature of the proceedings, and the date of their institution. Neither are the docket entries made a part of the record.

However, as the bill of exceptions includes an interlocutory decree accepting the fourth report of the receiver, we must necessarily assume that the litigation in question had been in process for a substantial period of time.

That this bill of exceptions is not in compliance with established procedure is clearly apparent.

In the recent case of *Inhabitants of Owls Head* v. *Dodge, Jr.*, 151 Me. 473; 121 A. (2nd) 347, this court reiterated the well-known rules applicable to bills of exceptions in the following words:

> "The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable the court to decide whether the rulings or decision of which he complains were or were not erroneous. Failing to do so, his exceptions must fail. The Law Court has jurisdiction over exceptions only when they clearly present the issues to be considered. The bill itself should show the claims and contentions of the parties, and enough of facts, allegations, or claims, as to be clearly understood."

See also *Wallace* v. *Gilley*, 136 Me. 523; 12 A. (2nd) 416; *Heath, et al., Applts.*, 146 Me. 229, 233; 79 A. (2nd) 810; and *Sard* v. *Sard, et al.*, 147 Me. 46, 55; 83 A. (2nd) 286.

The litigation before us was begun prior to December 1, 1959, at which time the old Rules of Court were in existence. The presiding justice acted upon the motion for disqualification on December 11, 1959, only a few days after the New Rules of Civil Procedure went into effect, so that it may be said that when action was taken to bring this case before this court, we were in a period of transition from the old to the new. See Rule 86 Maine Rules of Civil Procedure regarding applicability of new rules to pending actions.

Prior to December 1, 1959, we had Rule of Court 16, which read in part as follows:

> "No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys."

There is nothing in the bill of exceptions to indicate that this rule was complied with. The new rule now in existence is Rule 43 (e) which reads as follows:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

If counsel for the defendant did not verify by affidavit the facts alleged in his motion, undoubtedly the presiding justice, under the provisions of the present rule, could have heard the motion on oral testimony. However, this did not occur because, as pointed out in the decree of the presiding justice overruling the motion, neither defendants nor their counsel appeared.

In spite of the inadequacies of the bill of exceptions, because of the great importance which the issue sought to be raised has for the members of the bar, the judiciary and general public, we have concluded to consider this cause upon the merits.

A cardinal principle inherent in American jurisprudence is that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent, to the end that litigants may have a hearing or determination by an impartial tribunal. The law is justly jealous of the absolute disinterestedness of tribunals. Due process of law requires a hearing before an impartial and disinterested tribunal. Next in importance to the duty of rendering a

righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.

We proceed, therefore, to specify some of the rules applicable to the disqualification or recusation of a judge. There appears to be a diversity of opinion in the decisions regarding the reasons for which a judge could be disqualified at common law. In the case of *Russell* v. *Belcher,* 76 Me. 501, 502, decided in 1884, this court had this to say:

> "At older common law, personal interest formed the only ground for challenging a judge. - - - - It was not objectionable for a judge to sit in a cause to which a relative was a party."

However, in the case of *Bond* v. *Bond,* 127 Me. 117, 122; 141 A. 833, this court said:

> "At common law, the only ground for recusation of a judge was pecuniary interest or relationship."

See also 30A Am. Jur., Judges, § 142, to the effect:

> "While the general rule at common law is that a judge is not disqualified by relationship to a party or to a person interested in the result of the litigation, there are statements in some of the cases to the contrary. Thus, it is held that even in the absence of specific constitutional or statutory provision, a judge is disqualified where a party to the action is closely related to him."

That relationship within certain specified degrees is now a cause for disqualification of a judge in this State is indicated by the decision in *Russell* v. *Belcher, supra.*

In any event, there has never been any doubt about the principle that no judge or tribunal should sit in any case in which he or it is directly or indirectly interested.

The interest which is meant is a pecuniary one and such a pecuniary interest disqualifies a judge no matter how

small it may be. A pecuniary or property interest is one in the event or subject matter of the action or in the judgment to be rendered therein whereby the judge will be directly affected by a pecuniary gain or loss. 30A Am. Jur., Judges, § 100.

However, the interest must be direct, definite and capable of demonstration; not remote, uncertain, contingent, unsubstantial, speculative or theoretic. *Cunningham* v. *Long,* 125 Me. 494, 497; 135 A. 198; 30A Am. Jur., Judges, § 101.

It is, therefore, clear that when a judge has a pecuniary interest in the subject matter of the cause before him, he is disqualified.

While, as has been noted, the only grounds at common law for the recusation of a judge were a pecuniary interest and relationship, it has also been held that deep seated prejudice or bias may be a cause for disqualification.

> "Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges. Unbiased judges are of first importance to litigants and the public. At common law, bias or prejudice on the part of a judge, not the result of interest or relationship, is not supposed to exist, and generally it does not incapacitate or disqualify a judge to try a case, unless the constitution or statute so provides." 30A Am. Jur., Judges, § 169.

In this State we have no statute making bias or prejudice a reason for disqualification. The issue of bias and prejudice was discussed and determined by this court in *Bond* v. *Bond,* 127 Me. 117; 141 A. 833. At the time of the institution of this litigation, we had on our statute books Section 98, Chapter 82, R. S., 1916, which read in part as follows:

> "Whenever the justice of either of the superior courts is disqualified by interest, relationship *or other lawful cause* from trying any cause pending in his said court, said case shall thereupon be transferred to the docket of the supreme judicial

> court for the county, and be disposed of in said court according to law." (Emphasis supplied.)

In the case of *Bond* v. *Bond, supra,* a motion was filed for disqualification on the theory that the bias and prejudice of the presiding justice was a "lawful cause" for disqualification. The court held that the words in the statute "or other lawful cause" as ground for transferring a case included such prejudice or bias as would prevent a judge from impartially presiding in a case. The court went on to say that interest or relationship are the only grounds on which disqualification of a judge is conclusively presumed. In all other cases it must be shown. The court further held that the presiding justice must himself in the first instance determine whether such disqualifying bias or prejudice exists; and unless it clearly appears or its presence is the only inference which can be drawn from the testimony in support of a motion to transfer (or disqualify), it cannot be said on exceptions that there is error in law in a denial of the motion.

It is interesting to note that in *Russell* v. *Belcher, supra,* the court said that the matter of judicial disqualification for any cause was not regulated by any written law in this State, and this statement in this case, which was decided in 1884, appears in spite of the fact that Section 98, Chapter 82, R. S., 1916 was in force at the time the opinion in *Russell* v. *Belcher, supra,* was rendered. It will be noted that Section 98, Chapter 82, R. S., 1916, provided for a transfer of a cause to the Supreme Judicial Court. This statute was in effect, of course, when the Supreme Judicial Court held *nisi prius* terms and this section went out of existence with the establishment of the present Superior Court.

While it is pointed out in *Bond* v. *Bond, supra,* that the presiding justice must himself determine whether disqualifying bias or prejudice exists, it is our feeling that if deep

seated prejudice or bias can be shown, that this is a cause for disqualification of the judge.

> "Under the modern law, - - - - -, a judge may be disqualified to try a case by his own interest therein, by his relationship to one or more of the parties or persons interested, by bias or prejudice, or by prior participation in or connection with the cause. 30A Am. Jur., Judges, § 97.

We give consideration now to relationship between the judge and parties to the case as a reason for disqualification.

> "Under constitutional or statutory provisions in practically all the states, a judge is disqualified to act in any cause wherein he is related to one of the parties within certain specified degrees of consanguinity or affinity, - - -." 30A Am. Jur., Judges, § 142.

Section 22, subsection XXV, Chapter 10, R. S., 1954, reads as follows:

> "When a person is required to be disinterested or indifferent in a matter in which others are interested, a relationship by consanguinity or affinity within the 6th degree according to the civil law, or within the degree of 2nd cousins inclusive, except by written consent of the parties, will disqualify."

In spite of the fact that it has been pointed out that the matter of judicial disqualification for any cause, is not regulated by any written law in this State, it would seem that this section of the statute is applicable to judges. This was decided in *Russell* v. *Belcher, supra,* where the fundamental law set forth in the Constitution was referred to. Article I of the Constitution of the State of Maine is entitled "Declaration of Rights." Section 19 of Article I provides that "right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."

The case of *Russell* v. *Belcher, supra,* spells out the nature of the relationship on the part of a judge which will dis-

qualify him. In that case a judge of probate appointed an administrator with the will annexed upon the estate of a testatrix whose deceased husband was the judge's uncle. It was held that the judge was legally competent to make the appointment.

> "But there must be reasonable limit in the degree of relationship that disqualifies, and to the conditions under which such a disqualification applies. The degree of relationship would be determined by the general provision of our statutes, reading thus: (Section 22, subsection XXV, Chapter 10, R. S. 1954.)
>
> "The more important question is, under what circumstances is a judge debarred from acting when a relative has an interest? The limit at which an absolute disability attaches should be clearly marked and easily defined. The common good requires it. It is generally allowed that the same interest which would debar a judge from sitting, if personal to himself, does not necessarily prevent his sitting where a relative has the interest. A judge cannot sit if he has any interest whatever. He may sit in some cases where a relative has an indirect interest. There are many instances where a judge may legally act when from motives of delicacy he would decline to do so.
>
> "The true test is, whether the relative has an interest *as a party* to the cause or proceeding before the judge, or stands in the condition of a party. In *Aldrich, appellant, supra,* it is said: 'There is not the same reason that the remote or contingent interest of a relative or connection should exclude the judge from acting. It is only when the relative is a party or has a direct or apparent interest in the matter to be passed upon by the judge, that the condition arises that works a disqualification.'" *Russell* v. *Belcher,* 76 Me. 501, 503.

We have seen that relationship within certain degrees between the judge and others who are interested is a reason for disqualification. Now what about relationship between the judge and an attorney?

> "In the absence of a statute to the contrary, relationship between a judge and an attorney of record for one of the parties to a suit will not disqualify the judge, at least when the attorney has no pecuniary interest in the judgment, - - - ." 48 C. J. S., Judges, § 86.
>
> " - - - in the absence of a statute or constitutional provision to the contrary, the mere fact that a judge is related to one or more of the attorneys in a cause tried before him is no ground for his disqualification." 30A Am. Jur., Judges, § 157.

There being no such prohibitive statute in Maine, the mere fact that there is a relationship between the judge and an attorney is not a reason for disqualification of the judge.

However, a different situation is presented when an attorney who is a relative of the judge asks the court to fix his fee. It would appear that in such cases that is a reason for disqualification.

> "It is generally held that where a party to a suit applies to the court for an allowance of counsel fees, his attorney becomes a 'party' within the meaning of a statute disqualifying a judge because of his relationship to a party, and the judge related to such attorney is thereby disqualified." 30A Am. Jur., Judges, § 164.

See also 50 A. L. R. (2nd) § 11, Page 161.

It is our conclusion that if the motion for disqualification in the instant case had been timely filed, and proof of the alleged relationship between the judge and the attorney representing the plaintiffs or the receiver, established, that there would have been cause for disqualification.

However, there is nothing in the record to show that the motion was filed prior to the allowance of the counsel fees. Moreover, while the date of the filing of the motion does not appear in the record, in view of the fact that the decree awarding counsel fees was joined with the decree accepting the fourth report of the receiver, we must conclude that the

motion was filed long after the institution of the litigation in question.

> "An objection should be timely and seasonably made promptly on discovery of the disqualification; otherwise the right may be lost." 48 C. J. S., Judges, § 94c.
>
> "At common law, while it was recognized that a judge who was interested in the action or of kin to either party was disqualified from sitting in the cause, his judgment was generally considered to be erroneous only, and not void, so that the objection might be waived by the parties either expressly or impliedly." 30A Am. Jur., Judges, § 210.

That disqualification of a person "required to be disinterested" may be waived or that a party may be estopped from filing objections to the qualification of such person, appears to be the law in this State.

Under Section 60, Chapter 89, R. S., 1954, relating to proceedings on appeals from certain decisions of the county commissioners, it is provided that the court may appoint a committee of "three disinterested persons," who shall view the route involved, hear the parties and make their report whether the judgment of the commissioners should be in whole or in part affirmed or reversed.

In *Stevens* v. *County Commissioners,* 97 Me. 121, 127; 53 A. 985, a petition for a writ of certiorari was brought to quash the proceedings of the county commissioners for the reason that one of the county commissioners, who took part in the adjudication, was related to three of the signers of the petition within the 6th degree of marriage or consanguinity in violation of Section 22, subsection XXV, Chapter 10. The petition was denied upon the theory that if a litigant stands mute and does not timely raise the issue of disqualification, he is estopped from complaining. The court said:

> "There is another phase of the case which, we think, is fatal to the petitioner's contention. It does

> not appear by the plaintiff's bill that she did not know, at the very beginning of the proceedings, the relationship of the original petitioners to commissioner Smith. Her petition is entirely silent as to when she made the discovery of the alleged disqualifying relationship." *Stevens* v. *County Commissioners,* 97 Me. 121, 127; 53 A. 985.

See also *Blaisdell* v. *York,* 110 Me. 500, 512; 87 A. 361.

We see no reason why the theory of waiver and estoppel is not applicable when the disqualification of a judge is in issue. In the case before us, the fact that there is nothing in the record to indicate a timely filing of defendants' motion supports a finding that the defendants have either waived any objection to the qualification of the judge or are estopped to advance such objection.

The entry will be:

Exceptions dismissed.

STATE

vs.

WILLIAM D. RAND

Cumberland. Opinion, May 5, 1960.

Indecent Liberties. Assault and Battery. Indecent Assault. Consent. Aggravation.

The touching of the private parts of a nine year old child through her clothing without her consent constitutes an assault and battery indecent in character. R. S., 1954, Chap. 130, Sec. 21.

The guilty intention in assault cases may be inferred from the act.

There is no age of consent in the assault statute.

Where the defense is not "consent" it is not error for the court to fail to instruct on consent.

There is no separate and distinct crime of indecent assault at Common Law.

Exceptions to the denial of a directed verdict and appeal from the denial of a new trial present like questions.

ON EXCEPTIONS AND APPEAL.

There is a criminal action for criminal assault. The case is before the Law Court upon exceptions and appeal. Appeal dismissed. Exceptions overruled. Judgment for the State.

Arthur Chapman, County Attorney
Millard E. Emanuelson
Arthur Peabody

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WILLIAMSON, C. J. This criminal case is before us on appeal from denial of a motion for new trial and on exceptions following conviction of assault and battery on an indictment brought under R. S., c. 130, § 21. The statute reads:

> "**Assault, and assault and battery, definitions.** — Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault; and if such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment; and when the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed."

The act is declaratory of the common law. *Rell* v. *State of Maine*, 136 Me. 322, 9 A. (2nd) 129.

The presiding justice considered the offense was "of a high and aggravated nature," and sentenced the respondent to imprisonment in the state prison. *State* v. *McKrackern,* 141 Me. 194, 41 A. (2nd) 817.

THE APPEAL

"The issue raised on the appeal is whether in view of all the evidence, the jury was justified in believing beyond a reasonable doubt that the respondent was guilty." *State* v. *Dipietrantonio,* 152 Me. 41, 54, 122 A. (2nd) 414. We may also set aside a verdict on appeal for "manifest error in law" in the trial, including errors in the charge or in the failure to give instructions, although no exceptions were taken, and "injustice would otherwise inevitably result." The phrases quoted from *State* v. *Wright,* 128 Me. 404, at 406, 148 A. 141, are cited with approval and emphasis by former Chief Justice Merrill, speaking for the court, in *State* v. *Morin,* 149 Me. 279, 283, 100 A. (2nd) 657. See also *State* v. *Newcomb,* 146 Me. 173, 78 A. (2nd) 787; *State* v. *Hudon,* 142 Me. 337, 52 A. (2nd) 520.

The victim of the alleged assault, a girl nine years of age, was permitted to testify after examination by the court and counsel for the State and respondent. In brief, the child testified that she went to the home of the respondent, a neighbor, to play with his daughter on her return from school; that the respondent took her in his lap, fondled her, and touched her between her legs; that he committed other indecent acts in her presence; that later his daughter came from school and they played together; and that the next day she told her mother.

There was also evidence, which the jury was entitled to believe, that the child made a statement in the presence of her mother and father, a police officer, and the respondent, in part to the effect that the respondent put his hands on the

outside of her clothing on her private parts, and that the respondent admitted the truth of the child's statement. The respondent, married for 13 years, on the witness stand denied touching the child, and admitted an indecent act in her presence.

The respondent argues that there was no assault under the statute on the ground that there was no evidence indicating the child was placed in fear or was emotionally disturbed by the acts of the respondent. He points out that the child stayed at the respondent's home for some time after the acts complained of and did not tell her mother until the next day.

The short and certain answer lies in the language of the statute. We cannot readily understand how the respondent could have acted with more deliberate or total disregard for the rights of the child. His acts the jury could well find were wanton, willful and insulting.

The respondent also denies that he intended "to do some violence" to the child. He does not deny his "existing ability" to harm her. What intention could the respondent have had other than an evil intention to indulge his own lustful desires? By his indecent acts he violated the person and dignity of the child in a manner abhorrent to society.

The common law, and our statute drawn therefrom, do not leave children to the evil desires of men without penalty. The guilty intention in assault may be inferred from the act, and was so inferred in this instance. *State* v. *Sanborn*, 120 Me. 170, 113 A. 54; 4 Am. Jur., *Assault and Battery*, § 26; 6 C. J. S., *Assault and Battery*, §§ 71, 74.

The respondent also urges error in the failure of the court to instruct the jury that he was entitled to acquittal if the child was capable of giving consent and consented to the touching. No request for such an instruction was made to

the court, and understandably so. There is not the slightest suggestion in the record that the child was capable of giving consent, or consented. The respondent seeks to ground his innocence on the innocence of the child; and this he may not do.

We do not draw an arbitrary age line between capacity and lack of capacity in a person to consent to acts of the nature described. There is no age of consent in the assault statute as in statutory rape (R. S., c. 130, § 10 — 14 years), or in indecent liberties (R. S., c. 134, § 6 — 16 years — with respondent 21 years or over).

It is sufficient in this instance that there is no evidence whatsoever to suggest consent, that the respondent did not request an instruction thereon, and that no injustice resulted to the respondent from lack of such an instruction. The defense was not consent, but that the respondent did not touch the child.

The argument of the respondent that the State is attempting to prove an indecent assault, a crime unknown at common law and thus not within our assault statute, *supra,* is not persuasive. At common law there is no separate and distinct crime of indecent assault. *State* v. *Comeaux,* 60 So. 620 (La.). The respondent points to special legislation covering indecent assaults in nearby states. Massachusetts Annot. Laws, c. 265, § 13 B; Connecticut General Statutes, c. 944, § 53-217; Vermont Statutes Annotated, c. 51, § 2602. Our indecent liberties statute, *supra,* with its limitation of ages, elimination of consent as a defense, and limitation of the offense to indecent liberties with the sexual parts, is a statute of like general purpose with indecent assault statutes.

The present case is, however, brought under the assault statute, and not the indecent liberties statute. Although the acts proven may not constitute an offense under the indecent

liberties statute, *supra,* it does not follow that they do not constitute an assault and battery. 4 Am. Jur., *Assault and Battery,* § 27; 6 C. J. S., *Assault and Battery,* § 75. Surely the respondent in touching the private parts of the nine year old child through her clothing without her consent committed an assault and battery indecent in character.

THE EXCEPTIONS

The exception to the denial of a motion for a directed verdict made at the end of the State's case, was waived on introduction of evidence by the respondent. *State* v. *Johnson,* 145 Me. 30, 71 A. (2nd) 316. The respondent lost nothing, however, by not renewing his motion at the close of the evidence. Exceptions to denial of a directed verdict so made and an appeal from the denial of a motion for a new trial "present like questions and 'accomplish precisely the same result.' " *State* v. *McKrackern, supra,* at 197; *State* v. *Smith,* 140 Me. 255, 283, 37 A. (2nd) 246, 258.

The only remaining exception not waived by the respondent reads:

> " 'If, on the other hand, you found as a fact that the Respondent did unlawfully put his hands between the girl's legs and touched her privates, that would constitute an assault in conjunction with all the other evidence if you found beyond a reasonable doubt that an unlawful assault did take place' . . . on the ground that such instruction amounts to a charge on an indictment for indecent liberties; and that said instruction prejudices the Respondent for the reason that there is no evidence by the child or any other person that the Respondent touched the privates of the child."

It is not necessary that we consider whether the language is descriptive of indecent liberties under the statute. The jury was warranted in finding that the respondent put his hands on the child's private parts through her clothing.

This was the touching to which the justice made reference. See *State* v. *McKrackern, supra,* at 205.

The respondent was not harmed by the instruction.

The entry will be

Appeal dismissed.

Exceptions overruled.

Judgment for State.

AETNA CASUALTY & SURETY CO.
vs.
EASTERN TRUST & BANKING CO.

Penobscot. Opinion, May 17, 1960

Contracts. Bonds. Sureties. Subrogation. Assignments. Accounts. Banks. R. S., 1954, Chap. 113, Sec. 171. 31, U.S.C.A. 203.

An application assignment by a contractor to a surety company upon performance and payment bonds (40 U.S.C.A. Sec. 270a) of "all rights, privileges, and properties of the principal in said contract" is governed by the Assignment of Accounts Act R. S., 1954, 113, Sec. 171 which statute by its terms is made applicable to "contracts," so that a subsequent assignee bank holds moneys paid to it upon its subsequent assignment in trust for the benefit of the surety company even though such bank had no notice of the original application assignment.

The acknowledgment by the original assignee surety of notice of the subsequent assignment (under 31 U.S.C.A. 203) to the bank "subject to complete reservation of our rights" did not create an estoppel by its failure to point out the application assignment rather it should have placed the subsequent assignee on guard.

The Federal Assignment of Claims Act (31 U.S.C.A. 203) renders invalid against the United States any assignments not perfected in

accordance with the Act, but assignments not so perfected are effective among the parties, other than the United States.

ON APPEAL.

This is a bill in equity before the Law Court upon appeal. Appeal sustained. Remanded for entry of a decree in accordance with this opinion. Cost to be taxed prior to appeal against defendant; on appeal against the plaintiff.

Locke, Campbell, Reid & Hebert

Mitchell & Ballou

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WILLIAMSON, C. J. This is a controversy between a surety and a bank over payments received by the bank as assignee of two construction contracts. The case is before us on appeal by the bank from a decree in equity establishing a trust in such payments to cover losses of the surety.

Under the familiar rule the case is heard anew on the record. Facts found by the sitting justice stand "unless shown to be clearly erroneous." *Andrews* v. *Dubeau et al.*, 154 Me. 254, 146 A. (2nd) 761, and cases cited. We are not of course precluded by the rule from finding additional facts on which to base our decision.

James M. Blenkhorn entered into contracts with the United States of America for construction of facilities at Loring Air Force Base (the Loring contract or job) dated December 31, 1954, and with the James W. Sewall Company for construction of a building in Old Town (the Sewall contract or job) dated May 11, 1955.

The plaintiff became the surety on performance and payment bonds on the Loring contract pursuant to the Miller

Act, 40 U.S.C.A. § 270a, and on a performance bond on the Sewall contract.

> "As part of the transactions (to quote from the finding of the sitting justice) by which plaintiff became surety for Blenkhorn, and in consideration of plaintiff becoming surety on his bonds, as aforesaid, Blenkhorn executed and delivered to plaintiff application-assignments, dated December 31, 1954, and June 6, 1955, respectively, . . wherein Blenkhorn 'subrogated' the plaintiff as surety, as of the respective dates of the instruments, 'to all rights, privileges and properties of the principal in said contract' and Blenkhorn assigned, as of the date of each instrument, 'all the deferred payments and retained percentages arising out of this contract, and any and all moneys and properties that may be due and payable' to Blenkhorn upon the occurrence of any one of five events, one of which was Blenkhorn's failure to pay bills incurred on the work when they became due and payable whether the plaintiff might be liable for such bills or not, and the assignment included any moneys that 'may thereafter become due and payable on account of the contract, or account of extra work or materials supplied in connection therewith,' and Blenkhorn agreed that all such moneys and proceeds of such payments should be the sole property of the plaintiff, to be by it credited upon any loss, damage, charge and expense sustained or incurred by it under any bond of suretyship it had executed for Blenkhorn."

The sitting justice also found that "Blenkhorn's failure to pay bills for labor and materials incurred on the work when they became due and payable occurred at the very inception of the work so that the assignments which Blenkhorn gave to plaintiff were operative according to their terms from the date plaintiff became bound on each of its bonds."

As we read the record, there is nothing to indicate that Blenkhorn was in default from the outset. The finding, how-

ever, is not decisive. It sufficiently appears that under each contract there was a default before the assignment to the bank later discussed.

The defendant in fact had no knowledge of the application-assignments until the present bill in equity was brought in June 1957.

Blenkhorn completed the work under the contracts, but failed to pay subcontractors and material men. The plaintiff, as required by the payment bond on the Loring contract, on April 17, 1956, paid the bond penalty of $44,950 pro rata among the claimants, amounting to 85% of the claims, and as required by the performance bond on the Sewall contract reimbursed the Sewall Company on February 14, 1956 in the amount of $4,925 for its expense in discharging lien claims. The plaintiff's loss is thus established at $49,875.

We turn to the facts surrounding the payments to the defendant on which the claimed liability is based. For convenience we will discuss the Loring and Sewall contracts separately, unless otherwise indicated.

LORING CONTRACT

Prior to August 1, 1955, Blenkhorn assigned certain progress payments to the defendant, and from the payments received by him from the United States paid the defendant on his loans as follows:

Assignment	Payment by U. S.	Payment to Bank	
April 8 — loan	$ 9,200	$ 9,200.45	April 15 — $ 9,200
May 3 — "	12,750	16,439.55	May 11 12,750
July 28 — renewal loan	8,000	12,670.00	Aug. 12 3,086.71
			$25,036.71

The three assignments were not perfected under the Assignment of Claims Act, 31 U.S.C.A. § 203, and were not

known to the plaintiff until after the commencement of the present litigation.

The last assignment from Blenkhorn to the defendant, dated August 11th, was perfected under the federal statute, *supra*, with notice to the United States and to the plaintiff surety. The assignment covered "all the assignor's rights, title and interest in, and to all monies due or to become due from the United States of America. . ." under the Loring contract, and reads in part:

> "The Assignor covenants that it will receive any moneys advanced hereof by the Assignee as a trust fund to be first applied to the payment of claims of subcontractors, architects, engineers, laborors, and materials, that may arise out of performance of said contract, and to the payment of premiums on any surety, bond or bonds signed with the United States of America or any Department or Agency thereof, and that it will apply the same to such payments only before using any part of the advances for any other purposes."

The plaintiff acknowledged receipt of the notice and of a copy of the instrument of assignment, "subject to complete reservation of our rights." All remaining payments on the Loring contract were paid directly by the United States to the defendant, as follows:

Sept. 15, 1955	$ 3,420.00
Oct. 19, 1955	7,700.00
Mar. 12, 1956	1,931.52
Jan. 22, 1957	4,630.16
(final payment)	$17,681.68

The $3,420 item was at once credited to Blenkhorn's checking account and was neither retained by the defendant nor applied on Blenkhorn's loans. The $7,700 item was retained by the defendant and applied with other moneys on January 4, 1956, on Blenkhorn's loans. The $1,931.52 item

was applied in part to cover checks, overdrafts and small loans with a small balance remaining in Blenkhorn's favor. The final payment of $4,630.16 has been held by the defendant in a treasurer's check pending decision in this case.

The payments received by the defendant under the Loring contract and claimed by the plaintiff total $42,718.39.

SEWALL CONTRACT

On August 2, 1955, Blenkhorn assigned the proceeds of the Sewall contract to the defendant. The first payment of $6,098.55 on September 9, 1955 from Sewall Company to the defendant was applied at once on Blenkhorn's notes. The second payment of $2,161.40 on October 15 was retained by the defendant and applied with the Loring item of $7,700 and other money on Blenkhorn's loans on January 4, 1956. The payments total $8,259.95.

The plaintiff, as we have seen, seeks to reach the payments to the defendant on both contracts amounting to $50,978.34. None of the proceeds of the loans made by the bank to Blenkhorn were traced to either the Loring or the Sewall contracts.

Default by Blenkhorn first came to notice of the plaintiff on the Sewall contract on October 12, and on the Loring contract on October 24. Until then the plaintiff had no reason to believe that the application-assignments were in operation. The defendant, although without knowledge of the application-assignments until the commencement of this litigation, knew there were performance and payment bonds on the Loring contract by virtue of the Miller Act, and from mid-August knew there was a performance bond on the Sewall contract.

To gain a clearer picture, it will be helpful to examine the relationship of the defendant with Blenkhorn from the first

of August 1955. The defendant then agreed to make Blenkhorn loans to meet the weekly payrolls on several jobs and assignments were taken of several contracts as security, in addition to the Sewall and Loring contracts. The defendant knew, or should have known, on August first that there were unpaid bills on the Sewall and Loring jobs. At the very least, the defendant was put upon inquiry to ascertain the facts.

The defendant's auditor makes this plain in the following testimony:

> "We felt that if we could loan him his payrolls and he could continue to operate his business eventually when he collected his retents he would be in a position where he could pay everybody off."
>
> * * * * * * * * *
>
> "I don't think I was looking so much at jobs as I was the amount of money he owed people. For example, Page on cement, and possibly Bancroft & Martin on steel, and that sort of thing. I was more interested in how much total he owed each individual than the jobs they wanted. As far as we were concerned it was all one big file."

There was no attempt by the defendant to compel the application of the proceeds of the loans to the payroll of the Sewall or Loring or any particular job. In the expressive phrase of the auditor "it was all one big file." The position of the defendant in paying no attention to the particular contracts is more understandable in light of the advice from Blenkhorn on August first, that on twelve contracts, including Sewall and Loring, he had drawn $311,000 with a balance due or to become due of $530,000.

In the Loring assignment of August 11th, Blenkhorn agreed to use advances for the limited purposes of paying for labor, materials and other charges arising under the contract. There is no suggestion (and indeed the evidence

proves otherwise) that the defendant made advances on the strength of this agreement, or intended that Blenkhorn should carry out its terms. The very purpose of the loans was not to provide for the payroll or other charges on the Loring job (or on the Sewall job), but to meet payrolls generally.

Blenkhorn's financial difficulties were brought sharply home to the defendant about October first when the defendant set off Blenkhorn's checking account balance of over $9,000 against his notes. Tax liens had been filed by the United States shortly before the setoff. The auditor tells us "that is what tipped over the whole apple cart."

We have then over $50,000 paid by the United States and the Sewall Company on the Blenkhorn contracts reaching the defendant. Of this amount over $42,000 has been applied on Blenkhorn's indebtedness, of which no part of the proceeds was used so far as the record discloses, to pay claims for labor, materials or other purposes entitled to protection under the bonds. In round figures the balance of $8,000 includes $3,400 transferred to Blenkhorn's checking account and $4,600 held awaiting decision. Blenkhorn, as we have seen, failed to pay bills arising from the Loring and Sewall contracts with loss to the plaintiff surety of $49,875.

We are concerned with three statutes.

(1) The Miller Act, 40 U.S.C.A. § 270a. Under this Act Blenkhorn was required to furnish performance and payment bonds on the Loring contract with the United States.

(2) The Assignment of Claims Act, 31 U.S.C.A. § 203. Under this Act a contract with the United States (such as the Loring contract) may be assigned to a financial institution (such as the defendant bank), with notice together with a copy of the assignment to the surety. The United

States, under the Act, cannot require restitution of any amounts received by the assignee, as here the defendant.

(3) The Maine Assignment of Accounts Receivable Act, R. S., c. 113, § 171, which reads:

> "**Assignment of Accounts.** — Every written assignment made in good faith, whether in the nature of a sale, pledge or other transfer, of an account receivable or of an amount due or to become due on an open account or on a contract, all hereinafter called 'account,' with or without the giving of notice of such assignment to the debtor shall be valid, legal and complete at the time of the making of such assignment and shall be deemed to have been fully perfected at that time. Thereafter no bona fide purchaser from the assignor, no creditor of any kind of the assignor and no other assignee or transferee of the assignor in any event shall have or be deemed to have acquired any right in the account so transferred or in the proceeds thereof or in any obligation substituted therefor which in any way shall affect the rights therein of the original assignee. In any case where, acting without knowledge of such assignment, the debtor in good faith pays or otherwise satisfies all or part of such account to the assignor, or to such creditor, subsequent purchaser or other assignee or transferee, such payment or satisfaction shall be acquittance to the debtor to the extent thereof, and such assignor, creditor, subsequent purchaser or other assignee or transferee shall be a trustee of any sums so paid and shall be accountable and liable to the original assignee therefor."

The plaintiff contends it should prevail as assignee under the application-assignments against the defendant under later assignments, and also as surety under principles of equitable subrogation. The decision of the sitting justice was in substance based on both grounds.

In our opinion the Maine Assignment of Accounts Receivable Act, *supra,* controls, and under its terms the defendant,

as second assignee, became trustee for the plaintiff, the first assignee.

The Maine Act covers the assignment of contracts such as the Loring and Sewall contracts. The defendant urges that the Act is limited to accounts receivable and so is not here operative. The Act, however, specifically applies to a "contract." We cannot say in face of the plain words of the statute that contracts, such as the construction contracts before us, are not within its reach.

The application-assignments to the plaintiff were valid and effective assignments of the contracts when made within the meaning of the Maine Act. Each became operative on two conditions: first, if money became payable to Blenkhorn under the contract, and second, if Blenkhorn defaulted on his contract within the terms of the assignment. Clearly the first condition does not destroy the present effectiveness of an assignment. No more does the presence of the second condition. In each instance the operation of the assignment hinges upon acts of the assignor. The assignment was good. *American Employers Ins. Co.* v. *School District* (N. H.), 107 A. (2nd) 684. See also 4 Corbin on Contracts § 901.

The effectiveness of the application-assignment does not depend upon prior notice to the debtor, that is to say to the United States, or the Sewall Company. The Maine Act expressly provides that the assignment "with or without the giving of notice . . . to the debtor" shall be valid and deemed perfected. The second assignee, as here the defendant, takes subject to the first assignment, and "shall be a trustee . . . and accountable . . . to the original assignee therefor." Notice of the default or of the application-assignment is not required to establish liability in the second assignee.

The application-assignment of the Loring contract was not rendered invalid against the defendant by 31 U.S.C.A. § 203. The United States may disregard an assignment not

perfected under the statute, and so it may be said that the application-assignment was ineffective or invalid against the United States. The assignment nevertheless retains its normal force and strength among the parties, other than the United States. *McKenzie* v. *Irving Trust Co.*, 323 U. S. 365, 65 S. Ct. 405, 407; *California Bank* v. *U. S. F. & G. Co.*, 129 F (2nd) 751, 753 (C. C. A. 9); *Martin* v. *National Surety Co.*, 300 U. S. 588, 57 S. Ct. 531; *Bank of Arizona* v. *National Surety Corporation*, 237 F. (2nd) 90 (9th C. A.); *United States Cas. Co.* v. *First Nat. Bank of Columbus*, 157 F. Supp. 789 (D. C. Ga.); *American Fidelity Co.* v. *Nat. City Bank of Evansville*, 266 F. (2nd) 910 (D. C. Cir.).

We conclude, therefore, that under R. S., c. 113, § 171, the plaintiff as a prior assignee from Blenkhorn must prevail over the defendant as a subsequent assignee. The amounts received by the defendant as assignee are held in trust for the plaintiff, unless there are compensating equities in favor of the defendant.

The defendant strongly urges that the plaintiff is estopped to assert the application-assignment of the Loring contract by its acknowledgment of the notice of the assignment to the defendant "subject to complete reservation of our rights."

The argument is necessarily limited to transactions under the Loring assignment of August 11. There is no suggestion of any failure on the part of the plaintiff to advise the defendant of the application-assignments with reference to the earlier Loring or the Sewall assignments.

> "The burden of proof is upon the one who asserts the estoppel. This burden must be maintained by proof that is clear. . . Not only must the proof be clear but estoppel cannot rest upon mere conjecture. . . This rule as to the quantum of proof, which is another way of stating that the proof of an estoppel must be full, clear and convincing, ap-

> plies to every essential element necessary to the creation of estoppel. The estoppel here sought to be enforced against the plaintiff is based upon its failure to report to the defendant, within a reasonable time after receiving the freight bills in question, its failure to make collection. In other words, the defendant relies upon an estoppel based upon silence. Silence may give rise to estoppel but only when there is a duty to speak."
>
> *B. & M. Railroad* v. *Hannaford Bros., et al.*, 144 Me. 306, 314, 68 A. (2nd) 1.

Such a reservation by a surety, says the defendant in substance, told nothing of the application-assignment with its rigorous conditions operative upon Blenkhorn's default. The application-assignment remained hidden, it is said, in the fine print of the bond application when it was the duty of the plaintiff to bring it into view.

In our view the finding of the sitting justice, implicit in his decision, that there was no estoppel proved against the defendant is fully substantiated by the evidence, and stands approved. The acknowledgment by the plaintiff does not, it is true, spell out the existence of an application-assignment. At the least, however, the language is calculated, as we read the record, to place the defendant on guard. What were the rights reserved by the plaintiff? The defendant had it chosen could readily have made inquiry. The acknowledgment by the plaintiff did not deny the possibility of a prior application-assignment to the plaintiff surety.

Further, the defendant has not established that the plaintiff's failure to disclose the application-assignment caused the loss. On the contrary, the direct cause of the defendant's loss lies in the diversion of the loans from the Loring contract to the payrolls in general as agreed upon and intended by the defendant and Blenkhorn. If Blenkhorn had carried out the plain provisions of the perfected assignment, the proceeds of the loans would have gone to the job, would have

benefited the plaintiff surety, and the defendant would have been entitled to apply moneys received from the United States in payment of the loans.

None of the cases called to our attention involve the application of a *non-notification* assignment statute such as R. S., c. 113, § 171. Three cases heavily relied upon by the defendant are distinguishable from the instant case for this reason alone. In each instance the bank under assignment perfected in accordance with 31 U.S.C.A. § 203 was successful in retaining payments from the United States against the surety. In *Bank of Arizona* v. *National Surety Corporation, supra,* the proceeds were received by the bank before notice of the prior application-assignment to the surety. In *United States Cas. Co.* v. *First Nat. Bank of Columbus, supra,* there was no showing of default by the contractor making the application-assignment operative before payment by the United States to the bank. The proceeds of the loans had gone into the job in question. In *American Fidelity Co.* v. *Nat. City Bank of Evansville, supra,* the bank retained progress payments from the United States received before default by the contractor against the surety who was not claiming under an application-assignment. It also appeared there was no fraudulent diversion of the proceeds of the loan from the particular contract in question.

The payments to the defendant under the Loring contract may be placed in three classes.

First — the defendant received $25,036.71 on three assignments dated before August first. The payments with the assignments first came to plaintiff's attention at the hearing. Although the claims were not asserted in the plaintiff's bill, nevertheless the sitting justice considered and ruled upon them. Under the circumstances it would be a useless and unnecessary act to return the bill for amendment. Compare Maine Rules of Civil Procedure, Rule 54 (c).

The defendant would deny the early assignments. It urges that they were ineffective, and that Blenkhorn paid the defendant simply as an ordinary creditor and not by virtue of the assignments.

The defendant cannot escape the burden of the assignments so readily. Except with reference to the United States, the assignments from Blenkhorn to the plaintiff and to the defendant were entitled to their proper force and effect. It cannot now keep as a creditor that which it could not retain as an assignee. The defendant in taking the assignment placed itself within the bounds of the Maine statute, *supra.*

Second—the $3,420 payment under the August 11th assignment was, in our opinion, erroneously charged to the defendant in the final decree. The defendant did no more than release part of its security to the contractor who was so far as the defendant was then aware entitled to receive and use it in ordinary course of business. The situation under the first three assignments when the contractor was the conduit of payments from the United States to Blenkhorn to the defendant as assignee is analogous. Here the defendant was the conduit of payment from the United States to the defendant to Blenkhorn. In each instance we brush aside the conduit and find in the one case a payment from the United States to the assignee, and in the other to the contractor.

Third — the remaining payments of $14,261.68 to the defendant under the perfected assignment fall within the operation of R. S., c. 113, § 171. The plaintiff assignee prevails over the defendant as the subsequent assignee. There is no estoppel against the plaintiff for the reasons stated above.

The total amount held in trust for the plaintiff upon the Loring contract is $39,298.39, consisting of $25,036.71 re-

ceived on three assignments prior to August 11th, and $14,261.68 on the August 11th perfected assignment.

On the Sewall contract, under R. S., c. 113, § 171, the plaintiff is entitled to recover the loss of $4,925 arising from the satisfaction of mechanic's liens and the balance as well insofar as necessary to meet the Loring contract loss. The application-assignment was given to indemnify the plaintiff for loss not only on the Sewall contract, but on all other contracts as well.

The losses and funds available may be summarized:

Claims paid by plaintiff		Held in trust by defendant	Balance
Loring contract	$44,950	$39,298.39	- - - -
Sewall "	4,925	8,259.95	$3,334.95
	$49,875	$47,558.34	

The balance or excess over loss on the Sewall contract goes therefore to the plaintiff on the Loring contract loss. In short, Sewall money reimburses the plaintiff for Loring losses, but not, it is to be noted, until Sewall losses have been paid.

The controversy, it is to be noted, is between the surety and the bank. Responsibility of the surety, if any, to the creditors is in no way in issue in this case.

Liability of the defendant thus rests on the application of the Maine assignment statute, *supra*. It is unnecessary therefore that we consider the alternative grounds suggested by the plaintiff based on suretyship and on the application-assignments entirely apart from the Maine assignment statute, *supra*. We express no view on the extent, if any, to which liability attaches on these grounds.

Under the circumstances we consider it equitable that the defendant be charged with interest from the commencement

of the bill in equity on June 17, 1957, and not from the earlier dates on which the plaintiff paid the losses. There is, as we have noted, no evidence that the defendant knew the fact of the application-assignments, on which indecision rests, until the bringing of the bill, or that any demand for payment was made before then. In addition, claims of over $25,000 were not raised until hearing.

SUMMARY

The loss of the plaintiff surety on the two bonds is $49,875 with interest. Between the plaintiff and the defendant, the defendant holds the moneys received on the assignments in the amount of $47,558.34 with interest from June 17, 1957, in trust for the plaintiff.

Execution shall issue on failure of the defendant to make payment as ordered.

The entry will be

> *Appeal sustained. Remanded for entry of a decree in accordance with this opinion. Costs to be taxed prior to appeal against the defendant; on appeal against the plaintiff.*

ROXA B. PALMER
vs.
ALICE E. FLINT AND FEDERAL LAND BANK OF SPRINGFIELD

Cumberland. Opinion, May 19, 1960.

Joint Tenancies. Tenancies in Common. Vested and Contingent Remainders. Life Estates.

Under statutes favoring the creation of tenancies in common but not abolishing joint tenancies, it is generally held that any language clearly indicating an intention to create a joint tenancy will be sufficient regardless of where it appears in the deed.

In this state any joint interest in either real or personal property is not recognized, except that of co-partner, tenants in common, and joint tenants.

The use of the word "heirs" in the phrase "and the heirs of the survivor forever" does not, without more, preclude a severance of the property and thus create a life estate in the grantees with a contingent fee in the survivor.

If the intention of the parties to create a joint tenancy, clearly expressed in the deed, is in conflict with technical rules of construction, then the intent take precedence.

ON APPEAL.

This is a petition for declaratory judgment. The case is before the Law Court upon appeal from a decree of a single justice. Appeal allowed. Bill of Complaint sustained. Case remanded to sitting justice for entry of decree in accordance with this opinion.

Donald S. Smith, for plaintiff.

Festus B. McDonough, for defendant, Alice E. Flint
Philip G. Willard, for Federal Land Bank of Springfield

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, DUBORD, SIDDALL, JJ. SULLIVAN, J., did not sit.

SIDDALL, J. This is a petition for a declaratory judgment to determine the right or status of the parties hereto in certain real estate located in Yarmouth, Cumberland County, Maine. On August 1, 1940, the Federal Land Bank of Springfield, one of the defendants, conveyed this real estate to Nathan H. Palmer and his wife, Alice E. Palmer (now Alice E. Flint), the other defendant. The granting and habendum clauses in this deed, with the exception of immaterial punctuation, both read as follows: "Unto the said Nathan H. Palmer and Alice E. Palmer as joint tenants, and not as tenants in common, to them and their assigns and to the survivor, and the heirs and assigns of the survivor forever." The deed contained a covenant of warranty, that the grantor, its successors or assigns "shall and will warrant and defend the same to the said grantees, their heirs and assigns forever." Alice E. Palmer obtained a decree of divorce from Nathan H. Palmer on September 27, 1951, and by quitclaim deed without covenant dated September 29, 1951, she conveyed the premises to Nathan H. Palmer. Nathan H. Palmer conveyed the property to Frank L. Palmer who reconveyed to Nathan and his sister, Roxa B. Palmer, the plaintiff herein, "as joint tenants and not as tenants in common, to them and their heirs and assigns, and to the survivor of them, and to the heirs and assigns of such survivor forever." Nathan H. Palmer died on May 21, 1957. The plaintiff asked that the court determine, (1) the rights or status of the parties in and to said premises, (2) that if it should appear that said deed from the Federal Land Bank of Springfield did not convey an estate of the true character which the grantor intended to convey and the grantees intended to receive, that the deed be reformed in accordance with the true intention of the parties.

The single justice hearing the case found and decreed that the parties in said deed did not purpose to grant or receive any form of conveyance other than that utilized by them; that the quitclaim deed of Alice E. Palmer to her former husband Nathan H. Palmer was inoperative to convey her contingent remainder; that the state of the title in the premises is an estate for the life of Alice E. Flint in Roxa B. Palmer, remainder in fee to Alice E. Flint (Palmer).

The real controversy in this case is between the plaintiff Roxa B. Palmer and the defendant Alice E. Flint. We summarize the contentions of these parties although the conclusions reached by us make a discussion of all of them unnecessary.

The plaintiff contends:

(1) That the deed from the Federal Land Bank of Springfield created in the grantees an estate in joint tenancy in fee simple with all the common law incidents thereto.

(2) That it was the intention of the parties that the Federal Land Bank of Springfield should create in them an estate in joint tenancy in fee simple with all the common law incidents thereto.

(3) In the event that it should be determined that the deed created a joint life estate in the grantees with the remainder over to the survivors, then such remainder is vested and not contingent.

(4) That the deed from Alice E. Palmer to Nathan H. Palmer was intended to convey and did convey all of her interest in the premises in the remainder or otherwise and that Nathan H. Palmer was thereby seized in fee simple of the entire interest in said premises so that upon his death Alice E. Flint acquired no interest therein.

The defendant contends:

(1) That the sitting justice was correct in his findings that the parties to the deed did not purpose to grant or receive any form of conveyance other than that utilized by them.

(2) That the conveyance from the Federal Land Bank of Springfield conveyed a joint life estate to the grantees with a contingent remainder in fee to the survivor.

(3) That the quitclaim deed of Alice E. Palmer to her former husband was inoperative to convey to him her contingent remainder.

There is no doubt that the entire fee in the property was conveyed by the Land Bank of Springfield. The necessary words of inheritance for that purpose were used. The problem before us is the determination of the respective estates of the grantees in the fee conveyed.

Under the common law of England, joint estates were favored. Conveyances to two or more persons were construed to create a joint tenancy unless a contrary intent was apparent from the wording of the instrument. With the substantial abolishment of tenures, however, joint tenancies became disfavored, and as a result statutes have been enacted in practically all of our states, either abolishing or changing the common law rule. Our state as early as 1821 enacted legislation modifying this rule. The statute relating to conveyances to two or more persons, in effect on the date of the deed in question, August 1, 1940, reads as follows:

> "**Conveyances to two or more. R. S., c. 78, Sec. 13.** Conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint tenancy shall be so held." R. S., 1930, Chap. 87, Sec. 13.

This provision is now found in R. S., 1954, Chap. 168, Sec. 13.

We note that the 96th Legislature in 1953 (P. L., 1953, Chap. 301, now R. S., 1954, Chap. 168, Sec. 13) amended this statutory provision by adding thereto the following:

> "A conveyance of real property by the owner thereof to himself and another or others as joint tenants or with the right of survivorship, or which otherwise indicates by appropriate language the intent to create a joint tenancy between himself and such other or others by such conveyance, shall create an estate in joint tenancy in the property so conveyed between all of the grantees, including the grantor. Estates in joint tenancy so created shall have and possess all of the attributes and incidents of estates in joint tenancy created or existing at common law and the rights and liabilities of the tenants in estates in joint tenancy so created shall be the same as in estates in joint tenancy created or existing at common law."

Joint tenancies have been entirely abolished by legislative action in some states, and courts in these states have at times been obliged to set up an estate of a different character in order to effectuate the intent of the parties to a deed to create an estate in survivors. In many cases the right of survivorship as a necessary element of a joint tenancy has been discussed without reference to the principle of severance which seems of primary importance in the instant case. In some cases the word "survivor," without the use of the words "as joint tenants and not as tenants in common," as used in this case, has been the only indication of an intention to create a joint tenancy. In some jurisdictions estates by the entireties are recognized. Statutes modifying the common law differ in essential details in respect to the creation of joint tenancies and in respect to the necessity of the use of words of inheritance to create a fee. For these reasons an extensive review of the decisions in other jurisdictions is of little benefit. In the construction of the terms of the deed in the instant case we are concerned

with factors, hereafter discussed, which appear to be peculiar to our own problem.

We note, however, some of the divergent views taken by the courts in the construction of deeds involving the issue of joint tenancy.

In some jurisdictions a conveyance to two persons and the survivor of them, in the absence of words of inheritance applying to both grantees, or other circumstances indicating an intention to create a fee simple in each, has been construed to create a cotenancy in the grantees for their lives, with a contingent remainder in the survivor. Tiffany on Real Estate, Sec. 191 (2nd Ed.) ; 1 Washburn on Real Property, Sec. 866 (6th Ed). See also *Rowerdink* v. *Carothers,* 334 Mich. 454, 54 N. W. (2nd) 715, containing a review of Michigan cases, among them the case of *Jones* v. *Snyder,* 218 Mich. 446, 188 N. W. 505, in which the court held that a deed to four persons "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivor of them, forever" created a joint tenancy for life in the grantees, with a contingent remainder in fee simple to the survivor; *Ewing's Heirs* v. *Savany,* 3 Bibb (Ky.) 235; *Finch* v. *Haynes,* 107 N. W. 910, 911.

Many jurisdictions hold that where the language of a deed evidences an intention to create a right of survivorship, the deed will be given that effect, although it did not create a common law joint tenancy by reason of the absence of one of the four unities of interest, time, title, and possession. See Annotation, 1 A. L. R. (2nd) 247.

In *Therrien* v. *Therrien,* 46 A. (2nd) 538 (N. H.) a warranty deed given by a wife to her husband recited in the granting clause that the property was "to be held by him with this grantor in joint tenancy with full rights of ownership vesting in the survivor," and the habendum clause con-

tained the following language: "to him the said grantee as joint tenant." In a petition for a declaratory judgment brought by the surviving husband against the children of the deceased wife and grantor, the court held that this language clearly expressed an intention to create a joint tenancy, and it was so construed. It is noted that the technicalities of real estate conveyancing have been relaxed in New Hampshire, and this fact is emphasized by the court's reference to the following quotation from *Dover, etc. Bank* v. *Tobin's Estate,* 86 N. H. 209, 219, 166 A. 247, 248.

> " 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.' Holmes, Collected Legal Papers (1920) 187. 'Even in the case of real estate, where the common-law presumption as to joint tenancy has been abolished by statute [R.L. c. 259, Sec. 17], the language used * * * will be interpreted in the light of the circumstances surrounding the transaction.' *Dover, etc., Bank v. Tobin's Estate,* 86 N.H. 209, 210, 166 A. 247, 248."

In *Hart* v. *Kanaye Nagasawa,* 24 P. (2nd) 815, (Cal.), a conveyance was made to five grantees. The granting clause named the grantees "and to their heirs and assigns forever." The habendum clause after the names of the parties contained the following language: "in joint tenancy, with full and absolute title to his or her, the last survivor of the said parties of the second part, and to the longest liver of the said parties of the second part, and to his or her heirs, administrators or assigns forever." In construing the deed the court said:

> "We have no hesitancy in holding that the Harris deed conveyed the fee in joint tenancy. The granting clause purports to convey the fee-simple title to the five grantees without limitation. The haben-

> dum clause simply defines the estate granted as a joint tenancy, with right of survivorship. . . . Giving the words used their ordinary and usual meaning, they can be interpreted but one way — that is, they create a joint tenancy, with the right of survivorship expressly provided for. The estate contended for by appellant — a joint life estate with contingent remainder to the survivor — is of such an unusual nature that before a court would be justified in holding such an estate had been created, clear and unambiguous language to that effect would have to be used. Here there is no ambiguity or uncertainty in the words used. Nowhere in the deed did the grantors purport to be retaining or reserving any estate in themselves; nowhere in the deed is there any reference directly or indirectly to an estate in remainder; nowhere in the deed is there any reference at all to a life estate. Although not perhaps conclusive, these factors are of some importance in construing the words used. Another factor should be mentioned. Section 1105 of the Civil Code provides: "A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Nowhere in the deed her [sic] involved is there any reference to any such lesser estate, and so we must presume a fee was intended to pass."

In *Hilborn* v. *Soale, et al.*, 44 Cal. App. 115, 185 P. 982, 983, a deed of real estate to grantees, husband and wife "as joint tenants with the right of survivorship," to have and to hold to the said grantees" and to the survivor or [of] them forever," was held to create a joint tenancy, and not a life estate in the grantees and a contingent remainder in fee to the survivor. The court also held that an execution sale of the interest of one of the grantees severed the joint tenancy and left the purchaser at the execution sale and the other grantee as tenants in common.

In *Shepley* v. *Shepley*, 324 Ill. 560, 155 N. E. 334, a conveyance to grantees "with full rights of survivorship, and

not as tenants in common," was held to create an estate in joint tenancy. In construing the Illinois statute, similar to our own, modifying the common law rule favoring joint tenancy, the court said:

> "It is not necessary to use the exact words of the statute, in order to indicate an intention to create a joint tenancy. It is sufficient if the language employed be such as to clearly and explicitly show that the parties to the deed intended that the premises were to pass in joint tenancy."

In *Coudert, et al.* v. *Earl,* 18 A. 220 (N. J.), the language used in the deed was as follows—the purchases were described by name "as joint tenants." The granting part of the deed contained the following language: "as joint tenants, their heirs and assigns," and the habendum clause contained the following recitation, "in joint tenancy, their heirs and assigns, to them and their proper use." The court held that the language used was sufficient to create an estate in joint tenancy without the use of the words "and not an estate of tenancy in common."

Under statutes favoring the creation of tenancies in common but not abolishing joint tenancies it is generally held that any language clearly indicating an intention to create a joint tenancy will be sufficient regardless of where it appears in the deed. See 26 C. J. S. p. 968; 48 C. J. S. 918; 14 Am. Jur. p. 85, 86. Difficulty arises, however, in those jurisdictions where such intent conflicts with technical rules of construction, particularly with reference to the creation of estates of inheritance.

In this jurisdiction any joint interest in either real or personal property is not recognized, except that of copartners, tenants in common, and joint tenants. *Garland, Appellant,* 126 Me. 84, 93, 136 A. 459. Tenancies in the entirety have not been recognized since the enactment of the

statute authorizing married women to hold property. *Robinson, Appellant,* 88 Me. 17, 33 A. 652. An estate in joint tenancy is well recognized in this state. The statute does not abolish joint tenancies, but the intent to create such an estate must be clear and convincing. *Garland, Appellant, supra.* In the creation of joint tenancies, four essential elements are necessary, to wit: unity of time, unity of title, unity of interest, and unity of possession. *Strout, Admr.* v. *Burgess,* 144 Me. 263, 268, 68 A. (2nd) 241. The tenants must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. One of the characteristics of a joint tenancy is the right of survivorship. *Strout, Admr.* v. *Burgess, supra.* Another incident of joint tenancy is the right of severance. *Poulson* v. *Poulson,* 145 Me. 15, 70 A. (2nd) 868; *Strout, Admr.* v. *Burgess, supra.* Any joint tenant may convey his interest and a conveyance to a stranger destroys the unity of title, and also the unity of time, and the grantee becomes a tenant in common with the other co-tenant. If there are more than two joint tenants and one conveys his interest to a third person, the grantee becomes a tenant in common with the others although the others remain joint tenants as between themselves. Tiffany, Real Property, 2nd. Ed. p. 637.

Undoubtedly having this statute in mind, as well as the technical nature of an estate in joint tenancy at common law, the legal profession of this state for many years has utilized the words "as joint tenants and not as tenants in common" when desiring to effectuate a conveyance of property in joint tenancy. In recent years this practice has become increasingly prevalent. A high percentage of conveyances to husband and wife, or to persons in close relationship, especially of residential property, have contained these words in some part of the instrument of conveyance. They have been placed in deeds with the obvious intention of

creating an estate in joint tenancy with all of the well recognized attributes and incidents of such an estate at common law. Indeed, it may well be said that joint tenancies in this jurisdiction, for many practical reasons, are now being looked upon with favor rather than with disfavor. These deeds, if possible, should be construed as joint tenancies in the entire estate parted with by the grantor.

Does the use of the word "heirs" in the phrase "and the heirs of the survivor forever," and in no other part of the granting or habendum clauses of the deed, preclude a severance of the property and thus create a life estate in the grantees with a contingent fee in the survivor, as claimed by the defendant? We believe not. The intention to create a joint tenancy, so clearly expressed in this deed, carries with it the intent to endow such tenancy with all of the well recognized incidents of a joint tenancy at common law. If the intention of the parties to create a joint tenancy, clearly expressed as in this deed, is in conflict with technical rules of the common law in the construction of deeds, then that intent takes precedence over and overrides those technical rules which are attempted to be used to justify the creation of such an unusual estate as that claimed by the defendant. If the parties had desired to create the estate claimed by the defendant, they could have indicated such intent by apt language. They did not do so. The deed contained no reference to a life estate, nor did it refer to any estate in remainder.

We hold that the elements of unity of time, title, interest, and possession were present in the estate created by the deed, and that the deed conveyed the entire estate disposed of by the grantor, a fee, to the grantees as joint tenants with all of the incidents and attributes of such tenancy at common law. If our ruling in this respect be considered a departure from the technical rules of the common law, let it be said that it is made in the interest of the security of

property titles and in accordance with the intention of the parties clearly expressed in the instrument of conveyance.

Reformation of the deed is unnecessary. The conveyance from the defendant Alice L. Palmer (Flint) to Nathan H. Palmer disposed of her entire interest in the property and he thereby became the owner of the fee, which is now in the plaintiff.

The entry will be

Appeal allowed. Bill of complaint sustained. Case remanded to sitting Justice for entry of a decree of declaratory judgment for plaintiff in accordance with this opinion.

STATE OF MAINE
vs.
EDWARD LARRABEE

Cumberland. Opinion, May 20, 1960.

Driving under the influence.
Blood Tests. Statutory Construction.
Prima Facie Evidence.

The legislature by giving approval in P. L., 1955, Chap. 322 to an indirect method of analyzing blood *(by the breath)* did not intend to eliminate the most simple and direct way of doing it, namely by blood sample; and the 1957 amendment adding (by the breath, *blood or urine*) merely clarified what had always been intended. P. L., 1957, Chap. 308. The failure to enumerate "blood or urine" in the 1955 law did not curtail the *prima facie* provisions of R. S., 1954, Chap. 22, Sec. 150.

There is no constitutional objection to a statute making one fact presumptive or prima facie of another. R. S., 1954, Chap. 22, Sec. 150, which gives prima facie weight to the blood test as evidence that respondent was under the influence of liquor is not conclusive but is to be determined by the jury once it has been shown that the blood test is otherwise accurate and properly administered. At the close of the state's case a respondent may offer no evidence and submit the case to the jury to determine whether the evidence has overcome the presumption of innocence.

This opinion not to be construed in conflict with *Hinds* v. *Hancock Mutual,* 155 Me. 349.

ON REPORT.

This is a criminal action for driving under the influence. The case is before the Law Court upon agreed statement and report. Judgment for the State.

Arthur Chapman, County Attorney
Clement Richardson, Asst. Co. Attorney
Casper Tevanian
Richard Broderick

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. This case comes before us on report. By complaint dated March 23, 1957, Edward Larrabee was charged with operating a motor vehicle on a way in Falmouth in the County of Cumberland, on March 15, 1957, while under the influence of intoxicating liquor, in violation of Section 150, Chapter 22, R. S., 1954, as amended.

On the same day upon which the complaint was issued, the respondent was arraigned in Westbrook Municipal Court. Upon waiver of a hearing, a finding of guilty was entered, from which finding the respondent appealed to the next term of the Superior Court.

The case is submitted to this court upon an agreed statement of fact, in which it is admitted that the respondent operated a motor vehicle on a public way on the date alleged. It is further stipulated that shortly after his arrest, a sample of the respondent's blood with withdrawn from his arm with his consent; that as a result of a chemical test which is not questioned, it was found that there was 26/100% by weight of alcohol in his blood.

According to the agreed statement of facts, the State relies solely upon the weight to be given to the evidence of the result of the blood analysis to establish that the respondent was under the influence of intoxicating liquor.

The State contends that by force of the provisions of the statute making a finding of 15/100%, or more, by weight of alcohol in a person's blood prima facie evidence such person is under the influence of intoxicating liquor, that the respondent, not having rebutted the evidence of his blood alcoholic content, is to be found guilty.

The respondent takes the position that evidence of the blood analysis cannot be given prima facie weight.

The case is submitted to us upon the stipulation that if this court should find that the result of the blood analysis is to be given prima facie weight to the effect that the respondent was under the influence of intoxicating liquor, then judgment is to be entered for the State; and if this court finds that prima facie weight should not be given to the result of the blood analysis, then judgment should be entered for the respondent and the complaint quashed.

The agreed statement of facts concludes: "The sole issue involved is whether or not prima facie weight is to be given to the evidence of blood analysis when the blood was drawn from the respondent's arm and not through a 'chemical analysis of his breath.' "

The statute involved is Section 150, Chapter 22, R. S., 1954, as amended. The evolution of this section has been piecemeal.

By Chapter 94, P. L., 1955 the following sentence appearing in the 1954 revision: "Blood tests the expense for which has been paid for by, or charged to, the county or state may be admissible in evidence," was repealed.

Section 150 was amended by Chapter 322, P. L., 1955, whereby there was added after the second sentence the following:

> "The court may admit evidence of the percentage by weight of alcohol in the defendant's blood at the time alleged, as shown by a chemical analysis of his breath."

To the sentence provided by Chapter 322, P. L., 1955, were added the words "blood or urine" by Section 10, Chapter 308, P. L., 1957.

At the time of the alleged offense, by the respondent, the pertinent portion of the statute read as follows:

> "The Court may admit evidence of the percentage by weight of alcohol in the defendant's blood at

> the time alleged, as shown by a chemical analysis of his breath. Evidence that there was, at that time, 7/100%, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not under the influence of intoxicating liquor within the meaning of this section. Evidence that there was, at that time, from 7/100% to 15/100% by weight of alcohol in his blood is relevant evidence but it is not to be given prima facie effect in indicating whether or not the defendant was under the influence of intoxicating liquor within the meaning of this section. Evidence that there was, at the time, 15/100%, or more, by weight of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor within the meaning of this section. All such tests made to determine the weight of alcohol in the blood shall be paid for by the county wherein the violation of the provisions of this section was alleged to have occurred. The failure of a person accused of this offense to have tests made to determine the weight of alcohol in his blood shall not be admissible in evidence against him."

It is contended by the respondent that because the sentence added by Chapter 322, P. L., 1955 is limited to the admission of evidence of percentage by weight of alcohol as shown by a chemical analysis of the breath, the prima facie evidence provisions of the sentences next following do not apply to evidence of alcoholic content of the blood obtained, as was done in this case, by drawing blood from the respondent's arm.

To resolve the issue, it is necessary to construe the statute and the various amendments in the light of legislative intent.

However, before passing upon the question of legislative intent, we give consideration to the law relating to the admissibility of evidence of analytical tests for alcohol in a person's system.

In the first place, it is to be noted that there is no constitutional objection to a statute making one fact presumptive or prima facie evidence of another. Wharton's Criminal Evidence, 12th Edition, Vol. I, § 91, Page 176.

> "Although there is as yet a very limited amount of authority upon the question, so that a positive general rule cannot now be formulated, it may be said that the following decisions clearly indicate that where the prosecution seeks to establish the intoxication of an accused in a criminal case, evidence as to the taking of a specimen of a bodily fluid of the accused, of the alcoholic content of such specimen as determined by analysis, and expert opinion evidence as to intoxication based upon the presence of such alcohol in the accused's system, is admissible against the accused, if he voluntarily furnished the specimen of his blood, or urine or other bodily fluid, or submitted without objection to the taking of such specimen; provided, of course, that the identity of the specimen analyzed and the accuracy of the analysis are properly established." 127 A. L. R. 1514.

> "From the cases generally, it is apparent that, subject to compliance with conditions as to relevancy in point of time, tracing and identification of the specimen, accuracy of the analysis, and qualification of the witness as an expert in the field, there is rather general agreement that where the prosecution in a criminal case seeks to establish the intoxication of the accused, evidence as to the obtaining of a specimen of his body fluid at or near the time in question, evidence as to the alcoholic content of such specimen, as determined by scientific analysis, and expert opinion testimony as to what the presence of the ascertained amount of alcohol in the blood, urine, or other body fluid of an individual indicates with respect to the matter of such individual's intoxication or sobriety, is ordinarily admissible as relevant and competent evidence upon the issue of intoxication, at least where the accused voluntarily furnished the specimen for the

test, or submitted without objection to its taking." 159 A. L. R. 210.

"That an analysis of this kind and expert opinion evidence based thereon do have probative value upon the issue of intoxication or being under the influence of intoxicating liquor has quite generally been assumed or conceded in the cases which have reached the appellate courts." 159 A. L. R. 210.

Our own court has recognized in two recent opinions that the result of a blood test is admissible as evidence.

"Any person can have a blood test at any time, and the result can be testified to in court under the common law as a scientific fact. So can any relevant fact be testified to in the trial of a case, if not otherwise inadmissible by some rule of exclusion." *State of Maine* v. *Demerritt,* 149 Me. 380, 386; 103 A. (2nd) 106.

"Obviously, the statute (Section 150, Chapter 22, R. S. 1954) does but three things. (1) It establishes the prima facie effect of a showing of certain quantities of alcohol in the blood as tending to prove the presence or absence of influence from the alcohol consumed. (2) It provides protection for the respondent from any prejudice which might result from his refusal or failure to have tests made. (3) It provides for payment for such tests if they are made. The statute itself establishes no rights as to the making of tests and imposes no obligations on the part of either arresting officers or the respondent.

"The test, once properly made, becomes available to either the State or the respondent in exactly the same way that other material evidence is available. It may be said that it is distinguishable from other types of evidence only in one particular and that has to do with the timing of the taking of the blood sample to be tested. By the express terms of the statute, the thing to be ascertained is the per cent by weight of alcohol in the blood 'at the time' of the alleged offense." *State* v. *Munsey,* 152 Me. 198, 200; 127 A (2nd) 79.

It is significant to note that both of these decisions approving admissibility of evidence of the result of blood tests were made prior to the enactment of Chapter 322, P. L., 1955. In other words, this court has held that evidence of the result of a blood test was properly admitted in cases where a respondent was charged with operating a motor vehicle while under the influence of intoxicating liquor, when the portion of Section 150, Chapter 22, R. S., 1954, relating to the prima facie effect of a finding in excess of 15/100%, or more, by weight of alcohol in the respondent's blood, withdrawn from his body, stood alone, without the sentence which now precedes that portion of the statute relating to the admissibility of evidence of alcoholic blood content obtained by a chemical analysis of the breath.

Giving consideration to the section of the statute involved in the light of decisions of this court, we find that prior to the enactment of Chapter 322, P. L., 1955, the result of the analysis of a blood sample taken from a person's body pertaining to the amount of alcohol found therein was properly admissible in evidence. The original statute, before the enactment of Chapter 322, P. L., 1955 did not prescribe the nature of the test, but took it for granted that the blood would be analyzed. Obviously, the most direct way to analyze the blood is to examine a blood sample. When the legislature, by Chapter 322, P. L., 1955, gave approval to an indirect method of analyzing the blood (by the breath) it was not intended to eliminate the most simple and direct way of doing it. The legislature is presumed not to intend an absurd result. When the words "blood or urine" were added by Section 10, Chapter 308, P. L., 1957, the legislature was merely clarifying what it had always intended. Therefore, from 1955 to 1957, a blood test could still be made from analysis of blood samples (as well as by the breath) and the test then made was entitled to prima facie weight as evidence that the respondent was under the influence of

intoxicating liquor. There is nothing in Chapter 322, P. L., 1955 which curtails the effect of the prima facie provisions of Section 150, Chapter 22.

The provisions of Section 150, Chapter 22, R. S., 1954, as amended, in no manner change or reduce the burden upon the State of proving the respondent guilty beyond a reasonable doubt. In accordance with the general rule that the weight of evidence is determined by the jury, the weight of the result of the test under this statute is not conclusive, but is to be determined by the jury once it has been shown that the test is accurate and properly administered. The State still has the burden of proof and is required to establish every essential element of the crime charged beyond a reasonable doubt. At the close of the evidence offered by the State, the defendant has the choice of two courses to follow: (1) he may choose to offer no evidence and have the case submitted to the jury to determine whether the evidence of the State has met the degree of proof required and thus overcome the presumption of innocence, or (2) he may proceed to offer evidence on his own behalf. The ultimate burden of proof remains on the prosecution to prove the defendant's guilt beyond a reasonable doubt.

> "A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence which if believed by the jury would convince them of the defendant's guilt beyond a reasonable doubt, the defendant is in a position where he should go forward with countervailing evidence if he has such evidence. He is not required to do so even though a prima facie case has been established, for the jury must still find that he is guilty

> beyond a reasonable doubt before they can convict. That is, the burden of proof rests on the prosecution throughout the trial, and the jury cannot convict a defendant by default merely because he does not offer any evidence in his behalf." Wharton's Criminal Evidence, 12th Edition, Vol. I, § 13, Page 37.

Nothing in this decision is to be construed to be, in any manner, in conflict with the opinion of this court in *Hinds* v. *Hancock Mutual Life Insurance Company*, 155 Me. 349; 155 A. (2nd) 721, in relation to disputable presumptions, as distinguished from statutory declarations creating prima facie evidence. In the case before us, the respondent had the right to endeavor to rebut the effect of the prima facie provisions of the statute. He has seen fit not to attempt such rebuttal or contradiction. We are of the opinion that the prima facie provisions of the statute are entitled to the weight which supports a verdict of guilty.

The entry will be:

Judgment for the State.

STATE
vs.
DONALD F. LONDON

Aroostook. Opinion, May 27, 1960.

Manslaughter. Criminal Homicide.
Statutory Construction. Repeal by Implication.

Involuntary manslaughter under R. S., 1954, Chap. 130, Sec. 8, prior to the criminal homicide Act. P. L., 1957 as applied to death caused by operation of a motor vehicle occurs (1) when the operator is guilty of criminal negligence, or (2) when the homicide occurs in the performance of an unlawful act *malum in se* or (3) when the homicide occurs in the performance of an unlawful act *malum prohibitum* if the act proximately causes the death.

P. L., 1957, Chap. 333, Sec. 2 repeals by implication and supersedes R. S., 1954, Chap. 130, Sec. 8 so far as it relates prosecutions for criminal negligence but it does not effect the law of manslaughter as it has heretofore been applied in a homicide involving the operation of an automobile, where the basic element of the crime lies in the commission of an unlawful act *malum in se* or *malum prohibitum* unless the proof of the particular unlawful act relied upon as the basis for the manslaughter charge necessarily requires evidence essential to establish the crime of reckless homicide. In such event the offenses are identical and the later statute governs.

A misdemeanor and a felony may be included in separate counts of the same indictment although, if justice requires a prosecutor may be required to elect.

Legislative intent governs statutory construction.

Repeals by implication are not favored; they exist (1) where a later statute covers the whole subject and (2) where the later statute is repugnant or inconsistent.

Repeal by implication for repugnancy is ordinarily limited to the extent of the repugnancy.

Criminal negligence is that degree of negligence or carelessness which is denominated as gross or culpable, involving a disregard for the life or safety of others.

ON APPEAL.

This is an indictment for manslaughter before the Law Court upon appeal from the denial of a motion for new trial. Appeal sustained. New trial ordered.

Ferris A. Freme, County Attorney
Albert M. Stevens
Linwood E. Hand

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SIDDALL, J. The respondent was indicted and convicted of the crime of manslaughter following the death of another in an automobile accident. The State claimed that the re-

spondent was the operator of a vehicle in which the person killed was a passenger. The respondent seasonably filed a motion for a new trial. The motion was denied and respondent appealed.

One of the issues raised in the case now before us is whether or not P. L., 1957, Chap. 333, Sec. 2, hereafter called either the reckless homicide statute or the later statute, repeals or supersedes in part R. S., 1954, Chap. 130, Sec. 8, hereafter called either the manslaughter statute or the earlier statute.

R. S., 1954, Chap. 130, Sec. 8, provides:

> "**Manslaughter, definition.** — Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, . . . or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years."

It has been held that involuntary manslaughter insofar as it relates to a death caused by the operation of an automobile may be committed (1) when the operator is guilty of criminal negligence, (2) when the homicide occurred in the performance of an unlawful act *malum in se,* (3) when the homicide occurred in the performance of an unlawful act *malum prohibitum* if such act was the proximate cause of the death. *State* v. *Budge,* 126 Me. 223, 137 A. 244.

The respondent contends that the manslaughter statute insofar as it relates to deaths caused by the operation of an automobile was repealed or superseded by implication upon the enactment of P. L., 1957, Chap. 333, Sec. 2, the pertinent parts of which read as follows:

> "Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person, when the death of such person results within one year, shall be

> guilty of the offense of reckless homicide. . . . Reckless disregard for the safety of others as used in this section shall mean one's conduct is in reckless disregard for the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to the other."

The State contends that there is a difference in the elements of manslaughter arising out of the operation of an automobile and reckless homicide, and that the later statute neither repealed by implication nor superseded the earlier statute.

No interpretation of the reckless homicide statute with reference to its effect on the earlier statute has been made by our court. However, the issue raised in this case has been considered in other jurisdictions having similar statutes, and its resolution has resulted in conflicting opinions by respectable authorities. Before reviewing any of these cases, however, we wish to discuss some well settled principles of statutory construction relating to repeals by implication.

The fundamental rule of statutory construction is the legislative intent. *Hunter* v. *Tolman,* 146 Me. 259, 265, 80 A. (2nd) 401; *State* v. *Standard Oil Co.,* 131 Me. 63, 159 A. 116; *Inhabitants of Augusta* v. *Inhabitants of Mexico,* 141 Me. 48, 38 A. (2nd) 822. This rule has been accepted universally and does not need further citation of authority. It applies with equal force to the establishment or denial of a repeal by implication. Sutherland Statutory Construction (3rd Ed.), Sec. 2012.

It is well settled that a repeal by implication is not favored and will not be upheld in doubtful cases. *Inman* v. *Willin-*

ski, 144 Me. 116, 123, 65 A. (2nd) 1; Sutherland Statutory Construction (3rd Ed.), Sec. 2014; 50 Am. Jur., Statutes, Sec. 538; 82 C. J. S., Statutes, Sec. 288. It is, however, equally well established that repeals by implication exist when a later statute covers the whole subject matter of an earlier statute, or when a later statute is repugnant to or inconsistent with an earlier statute. This principle has been expressed in appropriate language in many cases in this state. Thus, in *State* v. *Intoxicating Liquors,* 119 Me. 1, 11; 109 A. 257, our court said:

> "Repeal by implication exists in two classes of cases, first, when the later statute covers the whole subject matter of the earlier, especially when additional remedies are imposed, and second, when the later is repugnant to or inconsistent with the earlier."

In *Eden* v. *Southwest Harbor,* 108 Me. 489, 493, 494, 81 A. 1003, the court used the following language:

> ". . . to effect a repeal by implication the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute or the two must be so plainly repugnant and inconsistent that they cannot stand together. *Goddard v. Boston,* 20 Pick. 407; *Smith v. Sullivan,* 71 Maine, 150; *Staples v. Peabody,* 83 Maine, 207."

We quote the following statement from the case of *Starbird* v. *Brown,* 84 Me. 238, 240, 24 A. 824.

> ". . . the precedents are numerous in support of a general rule which is applicable when it is claimed that one statute effects the repeal of another by necessary implication.
>
> The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legis-

> lative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere? *Brown v. City of Lowell,* 8 Met. 172; Bou. Law Dic. Statute."

See also *Maine Central Institution* v. *Inhabitants of Palmyra,* 139 Me. 304, 308, 309, 30 A. (2nd) 541; *Cummings, Appellant,* 126 Me. 111, 113, 136 A. 662; *Harris' Case,* 124 Me. 68, 126 A. 166; *Newport* v. *Railroad Co.,* 123 Me. 383, 387, 123 A. 172; *Opinion of Justices,* 120 Me. 566, 569, 114 A. 865; 50 Am. Jur., Statutes, Sec. 543; 82 C. J. S., Statutes, Secs. 291, 292.

The court will if possible give effect to both statutes and will not presume that a repeal was intended. *Eden* v. *Southwest Harbor, supra; Newport* v. *Railroad Co., supra; Opinion of Justices, supra.*

Where a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the conflict.

> "If a criminal act deals with the same subject as a prior act and is inconsistent with and repugnant to the prior act, the latter will be repealed by implication *to the extent of the inconsistency.*" 50 Am. Jur., page 567. (Emphasis supplied.)

> "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act *to the extent of the repugnancy.*" 82 C. J. S., page 489. (Emphasis supplied.)

Implied amendment or repeal of an earlier by a later statute is founded "on the reasonable inference that the legislature cannot be supposed to have intended that there should

be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law." *Knight* v. *Aroostook Railroad,* 67 Me. 291, 293.

These general rules applicable to all repealing statutes apply as well to penal statutes. "The repeal of a penal statute by express declaration, or by implication from later legislation does not present any problems which are peculiar to penal statutes alone, but the general rules applicable to all repealing statutes prevail." Sutherland Statutory Construction (3rd Ed.), Sec. 2031.

Where a later statute imposes a different penalty, either less or more, for the same or substantially the same offense, the later statute is ordinarily held to repeal the earlier one.

> "It is a well settled rule that, where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same, or practically the same, offense, the later statute repeals the earlier one, and this is true whether the penalty is increased or diminished." 82 C. J. S., page 520.

See also *State* v. *Davidson* (Idaho), 309 P. (2nd) 211 (1957); *State* v. *Lewis* (Tenn.), 278 S. W. (2nd) 81 (1955); *State* v. *Biddle* (Del.), 71 A. (2nd) 273 (1950); Sutherland Statutory Construction (3rd Ed.), Sec. 2031; 50 Am. Jur., Statutes, Sec. 567.

Before applying these general principles of construction to our own statutes, we deem it desirable to review briefly some of the cases relied upon either by the State or the respondent involving the question of repeals by implication in the enactment of reckless homicide laws.

Among the cases relied upon by the State are the following: *State* v. *Gloyd,* 148 Kan. 706, 84 P. (2nd) 966 (1938);

State v. *Barnett,* 218 S. C. 415, 63 S. E. (2nd) 57 (1951); *People* v. *Garman,* 411 Ill. 279, 103 N. E. (2nd) 636 (1952). In *State* v. *Barnett* the respondent was indicted for involuntary manslaughter. This case was dissimilar to the instant case in that the South Carolina reckless homicide law contained a specific provision, not found in our reckless homicide statute, to the effect that "it shall not affect, impair, or repeal" the statute fixing the punishment for involuntary manslaughter. Furthermore, in that state, contrary to the majority rule, simple negligence in the operation of an automobile was at that time sufficient to support a conviction for manslaughter. The court held that the legislature by the enactment of the reckless homicide law did not intend to repeal the common law offense of manslaughter, but, on the contrary, desired to preserve it. In *State* v. *Gloyd,* the respondent was convicted of manslaughter in the fourth degree, a felony. The legislature by an act later than the manslaughter act defined the crime of negligent homicide, a misdemeanor, in language similar to our own law. The court held that it was not the intention of the legislature that the force and effect of the statute denouncing manslaughter at common law should be abated by the enactment of a regulatory measure denouncing as a misdemeanor certain conduct which might have been manslaughter at common law. On the question of implied repeal the court stated, without further comment, that "the last act did not in any manner cover the field of the crimes act." In *People* v. *Garman,* an indictment against respondent contained several counts, among them one count charging reckless homicide and another charging involuntary manslaughter. Respondent was found not guilty of involuntary manslaughter, but was found guilty of reckless homicide. He prosecuted a writ of error, and one of the grounds relied upon was that the reckless homicide act charged the crime of manslaughter and that consequently, the verdict of the jury finding him not guilty of manslaughter required

his discharge as to the crime of reckless homicide. We note that under the Illinois statute the crime of reckless homicide is set forth in substantially the same language as our own statute, and that involuntary manslaughter relates to any "killing of a human being without an intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner." In denying that error existed, the court cited with approval the case of *State* v. *Gloyd, supra,* and found that the legislature in enacting the reckless homicide law intended to create a crime of a lesser degree than manslaughter. The court also found that the two crimes were separate and distinct and the defense of former jeopardy was not available to the respondent. In *Phillips* v. *State* (Ark.), 161 S. W. (2nd) 747 (1942), a case tending to substantiate the State's position, the respondent was found guilty of involuntary manslaughter in the operation of an automobile. Under the statutes of Arkansas involuntary manslaughter takes place "if the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection." The term "without due caution and circumspection" was construed to mean criminal negligence. A later act defined and made punishable the crime of negligent homicide. The respondent claimed the later statute superseded the earlier insofar as it related to homicide in driving an automobile. In holding that the General Assembly by the enactment of the later law did not intend to repeal the earlier law, the court reasoned that if the later act repealed the former, where one had been killed by an automobile, it also repealed any other law applying to a homicide committed in driving an automobile, and that the General Assembly had no such intent. The court held that the prosecution might have been predicated upon a violation of either statute, but did not discuss the possibility of a repeal *pro tanto.*

In support of his contention the respondent calls the court's attention to the following cases: *State* v. *Biddle, supra; State* v. *Morf,* 80 Ariz. 220, 295 P. (2nd) 842 (1956) ; *State* v. *Davidson, supra.* In *State* v. *Biddle,* the respondent was indicted for the crime of involuntary manslaughter. A later statute was passed by the legislature similar to our reckless homicide statute. The court found there was no distinction between the elements of the two crimes; that the two statutes provided for the punishment of identical acts and the same proof that would support an indictment under one statute would be required to support an indictment under the other. The court said:

> "We are faced with the situation of two statutes each providing that identical acts shall constitute a crime. However, Section 5161 provides that such acts shall constitute manslaughter and a felony, while Chapter 186 provides that such acts shall constitute negligent homicide and a misdemeanor. The difference in degree provided in the two statutes for the same offense, in our opinion, has created an inconsistency which cannot be reconciled on any reasonable basis."

In *State* v. *Morf,* the respondent was charged with the crime of involuntary manslaughter, a felony. The case was certified to the Supreme Court for decision on the question of whether or not the enactment of a negligent homicide law (a misdemeanor) operated as a repeal in part of a section of an earlier manslaughter law insofar as that section made the operation of a motor vehicle without due caution and circumspection proximately causing death, involuntary manslaughter. Repeal of any other criminal situation arising under the manslaughter statute was not involved. In Arizona, the manslaughter statute, as set forth in the opinion, defined that crime as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: * * * involuntary, in the commission of an unlawful act

> not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection."

The court, in finding a repeal by implication as to that part of the manslaughter statute under consideration, said:

> ". . . we have noted above that this court has not hitherto laid down a specific definition of 'without due care and circumspection'. However, it would seem to require some fine and perhaps tenuous reasoning to hold that the criminal negligence thereby required is not practically equivalent to that required by the later negligent homicide statute. . . . We find no substantial difference between the criminal negligence required to convict under both the felony and the misdemeanor statutes."

In *State* v. *Davidson,* the respondent was convicted of the crime of involuntary manslaughter by driving a motor vehicle in an unlawful, reckless, careless, and negligent manner, and at an excessive speed, and thereby causing the death of another. The Idaho statute, as set forth in the opinion, defined involuntary manslaughter as "the unlawful killing of a human being, without malice. * * * in the operation of a motor vehicle in a reckless, careless or negligent manner which produces death; * * *." Later the Idaho legislature enacted a negligent homicide law. The later act contained provisions for repeal of all acts or part of acts inconsistent therewith. The court held that the word "negligent" meant criminal negligence, "such negligence as amounts to a reckless disregard of consequences and of the rights of others," and that there appeared to be no fundamental difference between the two statutes except in the punishment allowed to be imposed upon conviction. The later act was held to govern.

Having discussed the general principles of law in respect to repeals by implication and their application in other

jurisdictions, we now turn to their bearing on the present case. Obviously our later statute only applies to homicides in the operation of automobiles and does not cover the entire subject matter of the manslaughter statute. We are therefore concerned only with the question of whether or not its provisions are repugnant or inconsistent with all or any part of the earlier statute insofar as they relate to homicides in the operation of automobiles, and if so, whether the conflict is so great that a legislative intent to repeal is evident. We confine our attention first to the effect of the later act upon prosecutions for manslaughter in which the State relies upon criminal negligence to establish the crime charged.

What are the elements of criminal negligence under our decisions? In *State* v. *Budge, supra,* a prosecution for manslaughter involving the operation of an automobile, the court, in its opinion, noted that one of the issues to be considered by the jury was whether the respondent was conducting himself "in such a reckless manner with such utter disregard of the safety of others as to be guilty of criminal negligence." In *State* v. *Ela,* 136 Me. 303, 308, 8 A. (2nd) 589, another prosecution for manslaughter arising out of the operation of an automobile, the court said:

> "This Court is not of the opinion that in this case the State has proved that the respondent, Lewis L. Ela, was guilty of the gross or culpable negligence which it is necessary to establish to sustain his conviction for manslaughter. Gross or culpable negligence in criminal law involves a reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue."

In *State* v. *Wright,* 128 Me. 404, 405, the prosecution was for manslaughter arising out of a shooting on a hunting trip. The court ruled that "criminality is not predicated

upon mere negligence necessary to impose civil liability but upon that degree of negligence or carelessness which is denominated gross or culpable."

An examination of the elements of the crime established by the later statute and of the elements of manslaughter by criminal negligence as set forth in our decisions discloses that the substance of the crime in each case is the operation of an automobile with reckless disregard for the safety of others, thereby causing the death of another. We find no distinction between the elements of the two crimes. The same evidence necessary to support an indictment under the later act would be sufficient to sustain an indictment for manslaughter based upon criminal negligence in the operation of an automobile, or *vice versa*. Thus, we find two statutes providing for the punishment of identical acts, the later by a fine of not less than $100 nor more than $1000, or by imprisonment for not less than 30 days nor more than 11 months, or by both, and the earlier act by a fine of not more than $1000 or by imprisonment for not more than 20 years. This being so, we feel that the reasoning advanced in those decisions holding that an implied repeal thereby resulted is preferable to that set forth in those cases which hold that two separate and distinct offenses exist. Accordingly, we are of the opinion, and so decide, that the later statute is repugnant and inconsistent with the earlier statute to such an extent that the legislature must have intended to repeal the earlier statute insofar as it applies to a prosecution for manslaughter based upon criminal negligence in the operation of an automobile.

In addition to discussing the effect of a violation of the pertinent motor vehicle laws, the court gave the jury full, complete, and clear instructions, as to the elements necessary to constitute criminal negligence in manslaughter cases arising out of the operation of an automobile, as the law had been theretofore applied in such cases. The jury re-

turned a general verdict of guilty. This verdict may have been predicated upon a finding of criminal negligence on the part of the respondent. In view of our conclusions a manslaughter prosecution arising out of the operation of an automobile cannot be based upon this ground. The respondent is entitled to a new trial.

It is unnecessary to take up any other aspect of this case. However, we feel that some comment should be made on the effect of the later statute on manslaughter cases based upon an unlawful act *malum in se* or *malum prohibitum*. An examination of the reckless homicide law discloses that it was a part of an act containing two sections, the first section being an amendment to R. S., 1954, Chap. 22, Sec. 151, of the motor vehicle laws and apparently designed to clarify the procedure for revoking the license of one convicted of manslaughter as the result of the operation of an automobile. Thus the legislature had before it for consideration at the time of enacting the reckless homicide statute, and as part of the same act, a provision relating to the revocation of the license of a person convicted of manslaughter in the operation of an automobile. Such a situation indicates a legislative intent to keep in effect to some extent the crime of manslaughter arising out of the operation of an automobile. Whatever the law may be in other jurisdictions, under our decisions reckless disregard for the safety of another is not necessarily an essential element of proof in a prosecution for manslaughter based upon a death occurring in the performance of an unlawful act. Prosecutions under the later law require elements of proof not necessarily essential under the earlier act. By the same token, prosecutions under the earlier act must be accompanied by elements of proof not necessarily required under the later act. The enactment of the later statute did *not affect* the law of manslaughter, as it has been heretofore applied in a homicide involving the operation of an automobile, where the basic

element of the crime lies in the commission of an unlawful act *malum in se* or *malum prohibitum,* unless proof of the particular unlawful act relied upon as the basis for the manslaughter charge necessarily requires evidence essential to establish the crime of reckless homicide. In such event, the offenses are identical, and the later statute governs.

Cases of homicide may arise in which the prosecutor feels that the evidence indicates the homicide occurred in the performance of an unlawful act, for example, while the operator of an automobile was intoxicated or under the influence of intoxicating liquor, and that the facts also indicate the existence of the elements of reckless homicide. A careful prosecutor, wishing to present the full facts to the jury for consideration, may well wonder whether a count charging felony and one charging misdemeanor may be joined in the same indictment. R. S., 1954, Chap. 145, Sec. 10, provides that when a person indicted for an offense, is acquitted of a part, and found guilty of the residue, he may be considered as convicted of the offense, if any, which is substantially charged by such residue, and be punished accordingly. It has been generally held under such statutes that counts for felony and misdemeanor growing out of the same transaction and of the same general nature and course of trial, may be joined. Whitehouse & Hill Criminal Procedure, Sec. 55; 27 Am. Jur. Indictments and Information, Sec. 132. See also 9 L. R. A. 182. Wharton's Criminal Procedure (10th Ed.), Sec. 339; 42 C. J. S. p. 1145, *et seq.* In a situation such as that set forth above, a homicide occurring in the same transaction is involved in both counts. The crimes are of the same general nature, although the penalties are different. Prior to the enactment of the reckless homicide law, all of the facts surrounding the homicide were presented to and considered by the jury upon proper instruction from the court. We can see no reason why a count in misde-

meanor and one in felony may not be included in the same indictment in such a situation. The court may, of course, in its discretion, if he deem it necessary for the promotion of justice, require the prosecutor to elect on which count he will proceed.

We are aware that we are presented with an anomalous situation. In prosecutions for manslaughter (a felony), predicated upon an unlawful act in the operation of an automobile, the unlawful act relied upon may in some cases be based upon conduct generally considered less culpable than that conduct necessary to establish reckless homicide (a misdemeanor). However, any remedy, if desirable, must come from the legislature.

The entry will be

Appeal sustained.
New trial ordered.

OLD COLONY TRUST COMPANY
EXECUTOR AND TRUSTEE UNDER
THE WILL OF EDWIN W. MCGOWAN
vs.
IRMA G. MCGOWAN, ET AL.

Kennebec. Opinion, June 1, 1960.

Probate. Wills. Trusts. Taxation. Apportionment. Inheritance Taxes. Federal Estate Taxes. Waiver. Widows. Acceleration. Debts. Charges of Settlement. R. S., 1954, Chap. 170, Sec. 20. Words and Phrases. Insurance. Non-Testamentary Items.

Maine Inheritance Taxes are neither "debts" nor "charges of settlement" within the meaning of R. S., 1954, Chap. 170, Sec. 20.

A widow who waives her husband's will receives no benefit from a "tax clause" neither may she receive equitable relief from the burdens of state inheritance taxes even though credit therefor is allowed in the computation of Federal Estate Taxes.

Federal Estate Taxes are not "debts" within the meaning of R. S., 1954, Chap. 170, Sec. 20. "Debts" are obligations created by decedent and founded upon contract express or implied.

"Charges of settlement" under R. S., 1954, Chap. 170, Sec. 20, embrace all ordinary costs and expenses of administration of an estate and such concept is broad enough to include Federal Estate Taxes.

Federal Estate Taxes are not taxes on succession or on receipt of a benefit; they deplete the estate instantly and are death duties on the interest which ceased by reason of death.

The "distributable assets" from which a widow's statutory share is taken is computed only after deduction of the Federal Estate Tax and the consequential tax burden upon the widow of a portion of such tax is not to be relieved because that portion of the estate which descends to her qualifies for marital deduction. In a sense the marital deduction belongs to the estate not the widow.

Maine has no apportionment statute.

Apportionment of the burdens of taxation involves public policy and should be left to the legislature.

Federal taxes upon non-testamentary insurance items is governed by Federal law (USCA Sec. 2206) and no contribution to such tax is required.

State law governs the duty of contribution by a widow as to Building and Loan shares and such non-testamentary items must share the burden of Federal taxation.

The words "total estate" in the instant case were intended by the testator to mean "total residuary estate" since such interpretation is consistent with testator's testamentary pattern.

The impact of a widow's waiver, in the absence of governing language in the will, should fall upon all beneficiaries proportionately.

Acceleration of a trust will be denied where such would defeat testator's intent or violate governing rules of law.

ON REPORT.

This is a petition seeking aid of the court in settling the interests of the parties in the estate of Edwin W. McGowan.

The case is before the Law Court upon report. Case remanded to the justice below for judgment in accordance with this opinion and for the allowance of costs and reasonable counsel fees to be paid out of the estate.

Weeks, Hutchins & Frye, for plaintiffs.

Linnell, Perkins, Thompson, Hinckley & Thaxter,
Ralph G. Boyd and William D. Weeks,
Hutchinson, Pierce, Atwood & Allen,
Verrill, Dana, Walker, Philbrick & Whitehouse,
Sanford L. Fogg,
Arthur T. Schmidt,
Hirshberg, Pettingill & Strong, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. On report. The will of Edwin W. McGowan, who died on May 12, 1955, was duly admitted to probate and thereafter the widow, Irma G. McGowan, seasonably filed her waiver and elected to claim her statutory interest. The Old Colony Trust Company, having qualified as Executor and Trustee, seeks the aid of this court in settling the interests of the parties who share the estate and in fixing the proportions of state and federal taxes to be borne by the respective takers.

The will is a lengthy one and for the most part expresses the wishes of the testator and defines the powers and duties of his trustee in clear and unambiguous language. There are certain important phrases, however, which create uncertainty, especially when read in the light of the widow's waiver—a contingency which the testator may well not have

contemplated. The testamentary pattern was to provide for (a) the payment of debts; (b) a specific legacy of $10,000 to one Dr. Hiden; and (c) creation of two trusts, the first of which will be referred to as the "Dartmouth Trust" and the second as the "Family Trust." In addition, there was life insurance in force, some payable to named beneficiaries and some to the testator's estate. There were also building and loan shares in the name of the testator which, like insurance proceeds, in the absence of appropriate testamentary disposition pass outside the will, but nevertheless play a part in settling the interests of the claimants. Real estate in Massachusetts passed to the widow as surviving joint tenant.

The parties in interest include the widow, the son, and the granddaughter of the testator, his nephews, the guardian *ad litem* of the infant parties and unborn children, and Dartmouth College.

The plaintiff first seeks instruction as to the composition of the widow's share. R. S., 1954, Chap. 170, Sec. 20, provides the applicable rule for descent of personal property which governs here since there was no real estate passing through the estate. The statute provides: "The personal estate of an intestate, except that portion assigned to his widow by law and by the judge of probate, shall be applied first to the payment of his debts, funeral charges and charges of settlement; and the residue shall be distributed" * * * (1/3 to the widow by reference to R. S., Chap. 170, Sec. 1, governing the descent of real estate). By force of R. S., Chap. 170, Sec. 14, the widow who has waived the provisions of a will in a case such as this takes a share composed as above set forth as though by intestacy.

In the instant case the widow applied for and was awarded $9,000 as her reasonable sustenance for a period of ninety days as provided by R. S., Chap. 156, Sec. 17. This sum will be first deducted before computing the widow's

share as expressly provided by the above quoted portion of R. S., Chap. 170, Sec. 20. The same statute directs the deduction of debts owed by the testator at his death and of his funeral expenses before computing the widow's fractional interest. The "charges of settlement," also to be first deducted, will include along with the usual costs of administration certain counsel fees and expenses attributable to this litigation as may later be determined. The widow suggests that some portion of this expense should be treated as pertaining only to trust matters and therefore not first deductible as a "charge of settlement," but in our view the matters pertaining to the composition of the trusts, the impact of taxes upon them, and related matters are so inseparably associated with other legal issues to be resolved that no such separation can fairly or properly be made. It will therefore be necessary to include all such allowable fees and expenses within the deductible category of "charges of settlement." It is well settled that the widow's statutory share takes precedence over any legacy and will be determined without regard to the specific legacy to Dr. Hiden. *Fogg, Appellant,* 105 Me. 480.

As already noted, there was in force insurance payable to the estate and certain building and loan shares in the testator's name. We find no language in the will which in our view purported or was intended by the testator to dispose of either the insurance proceeds or the shares. Accordingly, as provided by R. S., Chap. 170, Sec. 21, the insurance premiums paid within three years together with interest thereon form part of the estate of which the widow takes her fractional interest as a result of her waiver, but the balance of proceeds of insurance forms no part of the estate and by force of the insurance statute itself passes directly to the persons and in the proportions fixed by that statute. In short, the executor will disregard this excess of insurance proceeds in computing the widow's share of the estate. The

same treatment will be accorded the building and loan shares which pass by virtue of the provisions of R. S., Chap. 59, Sec. 177 (in effect at the date of death) and do not become part of the McGowan estate.

The executor will compute the widow's share without deduction for Maine inheritance taxes which are neither "debts" nor "charges of settlement" within the intendment of R. S., Chap. 170, Sec. 20. Having thus established her statutory interest, the executor will subsequently deduct and pay to the State of Maine the tax on the widow's "privilege of receiving property by * * * inheritance" before making distribution to her, all as required by R. S., Chap. 155, Sec. 14. See *MacDonald, Ex'r.* v. *Stubbs,* 142 Me. 235 at 240. The tax falls not upon the estate but upon the recipient, and the executor is in effect made a tax collector by the statute. Assuming for the moment the existence of a "tax clause" in the will, the widow who has waived the will neither claims nor receives any benefit therefrom. We will have occasion later to discuss the contention of the widow that she should have equitable relief from the burden of state inheritance tax because, as she argues, credit therefor is allowed in the computation of the federal estate tax. All parties agree that there is no practical likelihood of the assessment of a Maine "estate tax" but principles announced in this opinion would govern such an eventuality.

A much more difficult question is presented with reference to the status of the federal estate tax in the computation of the widow's share and the ultimate impact, if any, of that tax upon her interest. As already noted, the computation of the widow's interest depends upon the construction of R. S., Chap. 170, Secs. 1, 14 and 20 when read together as applicable to the situation which exists when the widow has renounced the will and only personal estate is involved. As we have seen, Sec. 20 provides that the widow's fractional share of the personal estate is subordinated to (a) that por-

tion which she receives otherwise by law or by order of the probate court; (b) the debts of the estate; (c) the funeral charges; and (d) the charges of settlement. We may disregard at once (a) and (c) in determining whether her interest is subordinated to the federal estate tax. We are satisfied also that such taxes are not included in the category of "debts." It has frequently been stated that taxes are not debts. The latter are obligations created by the decedent and founded upon contract express or implied. The former, however, are imposts levied to finance the lawful purposes of government and enforceable without the consent of the taxpayer. *Meriwether* v. *Garrett* (1880), 102 U. S. 472, 26 L. Ed. 197; *Hepburn* v. *Winthrop* (1936), 83 Fed. (2nd) 566; see *City of Augusta* v. *North,* 57 Me. 392; *Boston* v. *Turner* (1909), 201 Mass. 190, 87 N. E. 634. No different meaning was assigned to the word "debts" in Sec. 20.

The phrase "charges of settlement" has long been in the statute and has apparently never been construed. Obviously it embraces all of the ordinary costs and expenses of administration of the estate. We must now determine whether or not it includes more. The phrase does not stand alone but must be read in the light of the whole statute of which it forms a part. We note that after provision has been made for the categories described above as having priority, the statute contemplates that a "residue" is then available to be "distributed." In *Fogg, Appellant, supra,* a case dealing with a widow's election to renounce the will, the court lumped all the priority items together as "debts and expenses" and clearly recognized that the widow is taking a "distributive share" of a "residue" available for distribution as in cases of intestacy. This "residue" was referred to as a "net balance in the hands of the administrator" in *Smith, Appellant,* 107 Me. 247, and again in *Hussey* v. *Titcomb,* 127 Me. 423. We are satisfied that no such "net balance" can be computed until a deduction has first been made for the

federal estate tax. Moreover, by force of law the executor must discharge by payment the liability of the estate for the tax and there is certainly no "settlement" of the estate until he has done so.

In Wisconsin, a statute provided that a widow after waiver took a fraction of the "net personal estate." The court construed those words as meaning the estate which remained after the payment of all "charges" including the federal estate tax. *In re Uihlein's Will* (1953), 264 Wisc. 362, 59 N. W. (2nd) 641.

By its nature the federal estate tax is an excise tax on the transfer of the estate upon death, and the estate is regarded as being instantly depleted to the extent of the tax. It has been said that such taxes are death duties on the interest which ceased by reason of death. They are not taxes on succession or the receipt of benefit. *Moorman* v. *Moorman* (1954), 340 Mich. 636, 66 N. W. (2nd) 248; *Buffington* v. *Mason* (1951), 327 Mass. 195, 97 N. E. (2nd) 538. It seems certain that there can be no "residue" for "distribution" until after the depletion caused by the federal estate tax has occurred, and we are therefore constrained to construe the statutory phrase "charges of settlement" as broad enough to include the federal estate tax as one of those charges. Taft, J., dissenting in *Miller* v. *Hammond* (1952), 156 Ohio St. 475, 104 N. E. (2nd) 9, applied the same reasoning and concluded that the portion of the estate required for federal estate tax is never available to be "distributed," and a widow's statutory share of "distributable assets" can only be computed after deduction of the federal estate tax. We note with interest that the Taft theory later found support when the *Miller* case was subsequently overruled in *Campbell* v. *Lloyd* (1954), 162 Ohio St. 203, 122 N. E. (2nd) 695.

The widow vigorously contends that any result which compels her to bear any share of the burden of federal estate

tax is grossly inequitable since that portion of the estate which descends to her qualifies for marital deduction and adds nothing to the tax. This argument has frequently been advanced but has ultimately been rejected by most of those courts which have dealt with the problem. In this connection it is necessary to keep in mind the nature of the marital deduction. Sec. 2056(a) of the Internal Revenue Code, 26 USCA 2056(a), provides in part that in ascertaining the value of the taxable estate there is deducted from the gross estate "an amount equal to" the interest passing to the surviving spouse (as limited). The words used are words of measure, not of an *exemption* given to the surviving spouse, but of a *deduction* given to the estate. If we could translate the language of the section into terms of ownership we might say that the marital deduction must be thought of as belonging to the estate rather than to the surviving spouse. This concept seems to have guided the court in *YMCA* v. *Davis* (1924), 264 U. S. 47, 44 S. Ct. 291, a case in which the estate had the benefit of charitable deductions, but the charitable institutions which were residuary legatees were compelled to share the burden of the tax as thus reduced. The court pointed out that the charitable beneficiaries profited much by the charitable deductions but not to the extent of acquiring exemptions. The same underlying concept has relevance in the case of the surviving spouse and the marital deduction. See *Thompson* v. *Wiseman* (1956), 233 F. (2nd) 734.

Thus far Congress has not seen fit to allocate the burden of the federal estate tax, but has left it to "state law (to) determine the ultimate thrust of the tax." *Riggs* v. *Del Drago* (1942), 317 U. S. 95, 63 S. Ct. 109. The testator is free to allocate the burden by the provisions of the will, but such provisions do not aid a widow who elects to renounce the will and who cannot thereafter claim its benefits. The door is always open to states to enact apportionment stat-

utes and many have done so. Maine, however, has no such statute. As a matter of judicial policy we do not recognize such a compelling equity in the widow arising from the marital deduction as would lead us to a different construction of the statute which defines her interest.

In one or two instances courts, without the aid of apportionment statutes, have held that what they deem to be the underlying purpose of the marital deduction compels the exoneration of the widow from the federal estate tax. This was the basis of the opinion in *Lincoln Bank & Trust Co.* v. *Huber* (1951), 240 S. W. (2nd) (Ky.) 89, 91, which stated that the "apparent purpose behind the enactment of the (marital deduction) was to equalize the estate tax in non-community property states, with that of community property states, and to prepare the way for elimination from the tax burden (of) all those whose legacies or allotments do not create or add to the tax." This theory, although appealing, becomes somewhat less persuasive if we but recall that the tax is upon the *whole estate* and if we further bear in mind that Congress did not provide for this equality with community property states but only made it possible for any state to achieve that equality if it was so minded. It is interesting to note in passing that some states have enacted statutory apportionment but without providing exoneration for the surviving spouse who renounces the will. *Weinberg* v. *Safe Deposit & Trust Co.* (1951), 198 Md. 539, 85 A. (2nd) 50. We recognize that the theory of the Lincoln case prevailed also in *Pitts* v. *Hamrick* (1955), 228 F (2nd) 486, and in *In re Peters Will* (1949), 88 N. Y. S. (2nd) 142.

It is urged that in our recent opinion in *Bragdon, Trustee* v. *Worthley et al.*, 155 Me. 284, we recognized a rule of equitable apportionment and contribution broad enough in scope to exonerate this widow from federal estate tax burden. It is true that Bragdon recognizes that equitable principles require contribution under certain circumstances.

The nature of the federal estate tax and the nature of the marital deduction do not seem to us to raise such a compelling equitable right in the surviving spouse as to require her exemption from the tax as a matter of judicial policy. We think that whether or not a surviving spouse who elects to renounce a will should be wholly or partly relieved of the burden of federal estate tax is a matter of public policy which should be left to legislative determination. *Wachovia Bank & Trust Co.* v. *Green* (1953), 236 N. C. 654, 73 S. E. (2nd) 879; *In Re Uihlein's Will, supra; Weinberg* v. *Safe Deposit & Trust Co., supra.* We therefore conclude that in the instant case the federal estate tax must first be deducted as one of the charges of settlement before computation of the widow's fractional share. In so saying, however, we exclude those amounts which under Sec. 2206 of the Code, in the absence of a "tax clause" would have been recoverable from beneficiaries of insurance (other than the widow). Just as the widow cannot claim the benefit of testamentary provisions after her waiver, neither can she be penalized by the effect of any clauses in the will. Applying principles of equitable contribution, later to be touched upon, and again to prevent penalizing the widow because of any "tax clause," a like exclusion must be made as to the federal estate tax attributable to other non-testamentary items passing to persons other than the widow.

We may now revert briefly to the argument of the widow that she should have equitable relief from Maine inheritance taxes to the extent that credit is given for them in computation of federal estate tax. This contention is predicated on the assumption that the widow is first relieved for reasons of equity from any burden of the federal tax. Since the decision on this point is adverse to the widow's position, she cannot be afforded relief from the impact of Maine inheritance tax.

As already noted, the widow will receive certain proceeds of insurance and building and loan shares which pass as

non-testamentary assets. As to the insurance the obligation of the widow as to any contribution to federal estate tax is fully governed by the provisions of Sec. 2206 of the Code. Insofar as the insurance payable to the surviving spouse qualifies for marital deduction, no contribution attributable thereto shall be exacted by the executor. Sec. 2206 does not, however, relate to other non-testamentary items such as building and loan shares, and here state law governs the duty as to contribution by the widow to the payment of federal estate tax. In *Bragdon, Trustee* v. *Worthley et al.*, 155 Me. 284 at 294, we cited with approval a number of cases which have been decided since 1942 and which have held that in the absence of a controlling testamentary provision, non-testamentary items must share the burden of federal estate tax in the proportion which they bear to the testamentary estate. We are satisfied that unless this be the rule, great hardship may result in many cases. The testator can always provide otherwise when he so desires. We think the principles of equitable contribution, even without the aid of an apportionment statute, require that we hold in the instant case that the widow must contribute her proportion of the federal estate tax attributable to the building and loan shares which pass to her. Obviously, she will be entitled to credit for this contribution in the computation of her statutory share of the estate. Earlier in this opinion we applied the same principle in the case of beneficiaries other than the widow to prevent any adverse effect upon her by any "tax clause."

As to the beneficiaries other than the widow, they are entitled to the benefit of any "tax clause" contained in the will In the fifth clause thereof which disposes of the residue of the estate by dividing it into two trusts, the testator used the following language: "The Edwin W. McGowan, Jr. Trust Fund ("Dartmouth Trust," so-called) shall consist of a fund equal to such a sum as is one-third of my total estate

after the payment of *all* bills, expenses of administration *and estate taxes (but not federal taxes);* and the McGowan Family Trust Fund shall consist of the balance remaining, *reduced by federal taxes.*" (Emphasis ours.) All the parties agree that the italicized word "estate," when viewed in context, was intended by the testator to describe "state" as opposed to "federal" taxes. The language, viewed as a "tax clause," is at best inartistic but nevertheless we are satisfied that it sufficiently discloses the testator's intention to have all taxes, both "state" and "federal," *without limitation,* paid out of the residue of his estate. The widow, as noted, loses the benefit of this clause by her waiver, but all other beneficiaries, whether of testamentary or non-testamentary items, are fully exonerated thereby from the burden of all such taxes.

We turn now to the composition of the two trust funds as to which the parties hold divergent views. By the fifth clause, upon a condition now fulfilled, the testator gave:

> " * * * all the rest, residue and remainder of my properties, real, personal or mixed, wherever situate and however found, * * * to (the named trustee), IN TRUST, however, to be divided into two funds, to be determined and known as the EDWIN W. McGOWAN, JR. TRUST FUND and the McGOWAN FAMILY TRUST FUND. The (first trust) shall consist of a fund equal to such a sum as is one-third of my total estate after the payment of all bills, expenses of administration and estate taxes (but not federal taxes) ; and the (second trust) shall consist of the balance remaining, reduced by federal taxes."

Because of the ambiguity of the language employed, Dartmouth can and does make a strong argument that the words "total estate" refer to the "probate estate." The practical result of this interpretation would be to cast the entire burden of the widow's withdrawal of her statutory interest upon the "family trust." If we add to this burden the addi-

tional obligation of the "family trust" to absorb the federal estate tax, the "family trust" would be vastly depleted and in all probability inadequate to carry out fully all of what the testator seems to have intended to be the purposes of the trust. The words "total estate" are by no means words of art and have no exact or precise meaning. They might under appropriate conditions mean, for example, the "total taxable estate," or again and as contended by Dartmouth the "total probate estate," or yet again and as here contended by the "family" the "total residuary estate." As always in such cases as this we are not greatly aided by authority but must seek the intention of the testator in his use of these words by examination of the entire will.

At the moment when the words were used, the testator was addressing his mind to the disposition of his residuary estate. He had introduced the subject by employing a familiar language pattern commonly used to describe such an estate. He was placing the entire residue in trust in the hands of a single trustee "to be divided into two funds." The testator's own language in our view tends to refute the argument advanced by Dartmouth that he was in reality using a formula device to create a general legacy with priority status for Dartmouth and that the true residue was created by the phrase, "the balance remaining, reduced by federal taxes," which was to constitute the "family" trust fund. There are other "straws in the wind" which suggest the testator's intended testamentary pattern. By the sixth clause of the will he provided that in event he should not be survived by either wife, son, granddaughter or other issue of the son, the "Dartmouth trust" and the "family trust" were each to have one-half of the residuary estate. The importance of this clause lies in the fact that the beneficiaries of the "family trust" under these conditions would have been nephews. Under the fifth clause, however, the widow, son and granddaughter were all primary bene-

ficiaries of the "family trust" with important although limited rights as to both income and invasion of corpus. We cannot conceive that the testator ever intended that Dartmouth should fare proportionately better in competition with members of his immediate family than it would in competition with nephews. There is ample indication in the will that his wife and those closest to him by blood by no means occupied an inferior status as objects of his concern and intended bounty.

If on the other hand we assume that the testator by his use of the words "total estate" referred to his "total residuary estate," there is at once eliminated any apparent inconsistency in the testamentary pattern. It is clear that he had the impact of the federal estate tax in mind. He could assume correctly that this tax would consume approximately a third of the residuary estate and there would remain relative equality as between the "Dartmouth trust" and the "family trust." Some of the seeming ambiguity stems from the fact that the testator was attempting to divide his residuary estate and simultaneously to include an awkward substitute for the usual type of "tax clause," as well as an apportionment of the burden of taxes as between the two residuary estate funds. We are satisfied, however, that he intended that all state taxes, like bills and expenses, should be borne by the *whole* residuary estate, whereas the federal estate tax should diminish only the "family trust."

Moreover, the impact of the widow's waiver should properly fall proportionately upon the beneficiaries of the residuary estate in the absence of clear and express directions to the contrary by the testator. None can be found in this will. By the application of this rule, the unanticipated waiver is permitted to cause the least possible disruption to the testator's basic testamentary design. We conclude that after payment of all bills and expenses, the Hiden legacy, the net amount due the widow and all state taxes to

be paid by the estate, the balance will be divided with one-third constituting the "Dartmouth trust" and the remaining two-thirds being applied first to the payment of that portion of the federal estate tax which is to be borne by the estate, and second to the creation of the "family trust." We are satisfied that however inept and inaccurate the language of the will may have been, this was the result the testator intended.

The last issue for consideration involves the possibility of acceleration of the "Dartmouth trust" as a result of the widow's rejection of the will. The resolution of this issue requires an examination of the terms of this trust. In effect, the trustee was required:

1. During the life of the widow to pay her so much of the income of *both* trusts as *in its discretion* would best provide for her comfortable support, happiness and well-being.

2. During the life of the wife to pay to the testator's son Thomas and to Thomas' daughter so much of the income from *both* trusts, not required by the wife, as in the trustee's discretion might be needed for their support, education of children and burial expenses.

3. Upon the death of the wife to transfer any accumulated income in the "Dartmouth trust" to the "family trust," and to pay the principal fund to Dartmouth as a memorial fund in honor of the testator's deceased son.

The applicable rule was stated by the late Chief Justice Fellows in *U. S. Trust Co.* v. *Douglass et al.*, 143 Me. 150, 155. "This court has permitted acceleration of contingent remainders, after statutory waiver by the widow or widower, in those instances where the will has not expressed

or shown a contrary intention, where the testator's objectives have been attained, where the remaindermen were definitely ascertainable, and where the expressed or presumed intention of the testator was that the enjoyment of the remainders should not for any reason be postponed." In *Douglass* the court denied acceleration and rested its decision on two grounds, one of which has application here. In that case, as in this, the widow had limited rights to income during her lifetime, the balance of income being payable to other relatives. As the court said at page 156, "He (the testator) shows a desire to provide a continuing income for blood relatives during the lifetime of the widow." Dartmouth readily admits that its claim of acceleration rests on the assumption that as a practical matter the widow, if she had not waived, would have claimed and received the entire income from the Dartmouth fund. The argument follows that in reality there were no intervening interests between the widow and the ultimate remainderman, Dartmouth College. We do not make this assumption, and, as we read the will, neither did the testator. He not only provided rights to income in members of his family other than the widow but he went further and, anticipating that there might be unused income even after all these requirements were met, provided further that such income should be transferred to the "family trust." In short, he evidenced a clear intention that all the income during the life of the widow should benefit the family, either by direct payments to them, or by transfer to the "family trust." Acceleration now would defeat that intention and violate the governing rules laid down in *Douglass*.

Remanded to the justice below for judgment in accordance with this opinion and for the allowance of costs and reasonable counsel fees to be paid out of the estate.

THOMAS P. FOLEY, JR.
vs.
CITY COUNCIL OF PORTLAND, MAINE

Cumberland. Opinion, June 1, 1960.

Municipal Corporations. Police. Retirement Public Officers. Pensions.

A city ordinance enacted pursuant to P. and S. L., 1927, Chap. 75, which provides that police "*may* be retired upon pension . . . provided (they) have been honorably discharged . . ." is a discretionary pension ordinance and in the absence of a showing of abuse of discretion, the refusal of the city to retire one must stand.

There is no vested right in public office except as otherwise provided by the constitution.

ON REPORT.

This is a Writ of Mandamus before the Law Court upon report. Writ quashed. Petition dismissed.

Walter G. Casey, for plaintiff.

Barnett I. Shur, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

WEBBER, J. On report on an agreed statement of facts. The petitioner for the writ of mandamus is an officer in the Portland Police Department in good standing. At age 51, after more than 25 consecutive years of service, he sought voluntary retirement with a pension computed at half pay. The respondents in their official capacity as members of the City Council denied his request and the petitioner invoked this remedy in an effort to compel a favorable action.

Chap. 75 of the Private and Special Laws of 1927 was an enabling act which authorized the Portland City Council to

provide by ordinance for non-contributory pensions for members of the police force who had been honorably discharged by reason of, among others, having served on the police force not less than twenty-five consecutive years.

Pursuant to this authority, on July 18, 1927, an ordinance was duly enacted incorporating the language of the enabling act in the following manner:

> "That all members of the police force, including the Chief of Police, Captains, Lieutenants, Sergeants and Patrolmen, may be retired upon pension, not exceeding half pay, provided such members of the Police Force have been *honorably discharged* by reason of —
>
> FIRST: Having served on said Police Force not less than twenty-five consecutive years, or
>
> SECOND: Having served on the Police Force not less than twenty consecutive years and having reached the age of sixty-five years, or
>
> THIRD: Having been permanently disabled in the performance of duty."
>
> (Emphasis ours.)

Pursuant to the authority granted by appropriate amendments enacted by the legislature in Chap. 79 of the Private and Special Laws of 1957, the Portland City Council amended its ordinance on September 15, 1958 to provide:

> "Section 3. Any member of the Police Department * * * of the City of Portland on January 8, 1949, who did not elect to become a member of the Maine State Retirement System, shall have the following retirement rights and benefits:
>
> (a) Effective January 1, 1957, any such member who shall attain the age of 60 years and shall have served in said department, either as a provisional or permanent member thereof, not less than 25

> consecutive years *shall* be retired forthwith upon an annual pension equal to one-half of his final base pay; * * * Notwithstanding the foregoing provisions, no present member of said department(s) shall be *required* to retire for a period of two years from the effective date of this ordinance.
>
> (b) Effective January 1, 1957, any such member who shall attain the age of 58 years and shall have served in said department, either as a provisional or permanent member thereof, not less than 25 consecutive years *shall* have the right to retire upon an annual pension equal to one-half of his final base pay * * * provided further that the optional retirement privileges may be suspended by the City Council in times of national emergency declared by the President of the United States if the City Council determines that there is a shortage of manpower sufficient to justify it."
>
> (Emphasis ours.)

The respondents contend that since the 1958 ordinance was in effect at the time the petitioner lodged his request, it governs his case and he is ineligible because he has not attained age 58. The petitioner on the other hand argues in effect that he obtained vested rights by force of the 1927 ordinance, in the nature of contract, which rights cannot be diminished or impaired by later legislative or municipal action. The respondents, however, make a further contention which in our view is decisive of this case. They direct attention to the element of discretion contained in the 1927 ordinance and assert that the City Council has exercised that discretion properly although unfavorably to the petitioner.

It must be noted at the outset that the legislature in 1927 imposed no limitation by its enabling act which would prevent the City Council from enacting a discretionary pension ordinance. We have emphasized the word "may" in the 1927 ordinance since thereby the right of the City Council

to exercise a sound discretion was preserved. This is in direct contrast to the mandatory features of the 1958 amendment which stem from the use of the word "shall." It should also be noted that the 1927 ordinance required "honorable discharge" as the action of the City Council, whereas the 1958 amendment employs only the language of "retirement."

This court had occasion to examine the 1927 ordinance in *Ellsworth, Pet.* v. *City of Portland,* 142 Me. 200. In this case a Portland police captain with more than 25 years of service was seeking to prevent the City Council from honorably discharging him and thereby forcing his retirement on half pay without his consent. The decision, adverse to the petitioner, rested squarely on the discretion permitted by the 1927 ordinance. At page 205 of the opinion, the court said: "This amendment in our opinion gave to the city the right *at its option,* either on its own initiative or at the request of the individual member of the force, to honorably discharge any such officer coming within these provisions and to place him on the pension roll at not exceeding half pay. * * * Under any of these conditions, should not the city have the right to retire him on a reasonable pension, so long as there is no *abuse of discretion* in so doing? We think that the legislature intended to give the city that right, which it may exercise *in its discretion* in accordance with the circumstances of each individual case." (Emphasis supplied.) Obviously it follows that if the City Council had discretion as to whether or not to compel involuntary retirement, it had likewise discretion as to whether or not to grant honorable discharge with pension benefits when voluntarily requested. Many factors might properly be weighed in the exercise of a sound discretion such as the circumstances of the officer, his age and health, the need of his experience and training, the relative difficulty of maintaining a police force in the face of economic competition, and the public interest generally. The same considerations which prompted

the enactment of the 1958 pension provisions dealing with voluntary retirement might properly affect and even govern the exercise of a sound discretion in a case such as is presented here. It is apparent that in 1958 it was considered for the best interests of the officers, the department and the public that as a matter of policy, except in exceptional circumstances, trained and experienced men should be retained in the service until they had reached the age of at least 58 years. Certainly there is no showing here of any abuse of discretion. We conclude, therefore, that if the petitioner now has any rights by virtue of the 1927 ordinance (and as to this we express no opinion) such rights would be clearly limited by the discretionary authority reserved to the City Council, and, no abuse of discretion being shown, the decision of the City Council must stand.

The learned counsel for the respondent has supplied us with an exhaustive analysis of the cases dealing with the vesting of pension rights. His careful review indicates that, apart from statutes enacted in one or two states, nineteen jurisdictions have determined that there is no vested right in a pension before or after the granting thereof; that the courts of twelve states have held that there is no vested right in a pension until eligibility is established at the time of application for retirement; and the courts of four states have adopted the so-called California rule that there is a vested right in a pension subject, however, to change if compensating benefits are bestowed. In this connection we note with interest the words of Thaxter, J. in the *Ellsworth* case, *supra*, at page 202: "Whatever may have been the rights of the petitioner(s) under the statute (Portland Charter of 1923) as originally drafted, the legislature had the right to amend the powers of the city in this respect, and in our opinion the amendment passed in 1927 controls; *for, except as otherwise provided by the constitution, there is no vested right in a public office.*" (Emphasis ours.)

For the reasons noted above, it is not necessary to determine here whether or not the majority rule prevails in Maine since this petitioner would not be entitled to the requested relief even if it were open to him to resort to the provisions of the 1927 ordinance.

The entry will be

Writ quashed.
Petition dismissed.

CAMP WALDEN

vs.

ERNEST H. JOHNSON
STATE TAX ASSESSOR

Oxford. Opinion, June 2, 1960.

Taxation. Summer Camps. Sales Tax.
Statutory Construction. Words and Phrases.

The Sales and Use Tax Law which by its 1959 Amendment enlarged the scope of its coverage to include "any rental of living quarters in any hotel, rooming house, tourist or trailer camp" does not authorize the imposition of a tax against boys and girls summer camps where an entire lump sum admission fee is charged and living quarters are only incidental to a bona fide, organized, and disciplined program of instruction and recreation. (R. S., 1954, Chap. 17, Sec. 2 as amended by P. L., 1959, Chap. 350.)

Tax statutes are construed against the government and may not be extended by implication.

The term "tourist camps," "overnight cabin," "overnight camp" have been used interchangeably by the public and their main purpose is to provide temporary sleeping or housing accommodations with other services rendered as incidental. In a boys and girls summer camp the housing accommodations are incidental.

ON REPORT.

This is an appeal from the refusal of the Tax Assessor to abate a tax. The case is before the Law Court upon report. Appeal sustained. Judgment for appellant without costs. Tax abated. Case remanded to Superior Court for a decree in accordance with opinion.

Berman, Berman, Wernick & Flaherty,
Locke, Campbell, Hebert & O'Connor,
Hutchins, Pierce, Atwood & Allen, for plaintiff.

Ralph W. Farris, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SIDDALL, J. On Report. The appellant, a Maine corporation is engaged in the business of owning and operating a summer camp for girls located in Denmark, Oxford County, Maine, and known as Camp Walden.

The 99th Legislature by an act entitled "An Act Relating to Tax on Transient Rentals (P. L., 1959, Chap. 350), amended certain sections of the Sales and Use Tax Law (R. S., 1954, Chap. 17). The pertinent provisions of P. L., 1959, Chap. 350, are contained in sections 4 and 6 (amending R. S., c. 17, § 2), and read as follows:

Sec. 4.

" 'Retail sale' or 'sale at retail' means any sale of tangible personal property, in the ordinary course of business, for consumption or use, or for any purpose other than for resale, except resale as a casual sale, in the form of tangible personal property, **and any rental of living quarters in any hotel, rooming house, tourist or trailer camp.**' "

Sec. 6.

" 'Tourist camp' means a place where 4 or more tents or tent houses, or camp cottages or other structures are located and offered by a person to the public or any segment thereof for human habitation."

A tax of 3%, subject to certain exemptions which are not material to the issues of this case, was imposed "upon the total rental charged for living quarters, sleeping or household accommodations in hotels, rooming houses, tourist or trailer camps," P. L., 1959, Chap. 350, Sec. 7 (amending R. S., c. 17, Sec. 3).

After the passage of the act the appellee issued a bulletin entitled "Sales and Use Tax Instruction Bulletin #33" requiring camps making a lump sum charge for attendance, if the basis for the tax is to be less than the full charge, to break down its billing to show the charges for instruction, and for meals, as distinct from the charge for living accommodations. Such breakdown was required to be "realistic." Under these instructions the tax was to apply to the entire charge in the event that the bill was not broken down.

After the effective date of the legislation, the appellant entered into an agreement with a parent that her child could attend Camp Walden for the season of 1960, upon the payment of the required fee of nine hundred dollars. The parent was billed accordingly, without any breakdown, and the full amount of the bill was paid to the appellant, plus incidental charges, less a deposit of one hundred dollars. No sales tax was paid to the State Tax Assessor. The State Assessor assessed the appellant for a sales tax upon the entire amount of the transaction in the sum of twenty-seven dollars. The appellant duly filed a petition for reconsideration. The State Tax Assessor then refused to abate the assessment. The appellant duly appealed and filed an affidavit stating his reasons for appeal as required by R. S., 1954,

Chap. 17, Sec. 33, and served a copy thereof upon the appellee.

The case comes here upon an agreed statement of facts, to determine the sales tax liability, if any, under the facts agreed upon by the parties. The issues for consideration are as follows: (1) Under the provisions of R. S., 1954, Chap. 17, as amended, is the appellant liable for a sales tax? (2) If so, is the ruling of the appellee that the camp fee be broken down "realistically" or alternatively assessing the tax on the entire fee, arbitrary, unwarranted, and illegal?

The agreed statement recites at considerable length the nature of the business conducted by the appellant. The appellant, a Maine corporation, owns 45 acres of land located on Walden Pond in Denmark, Maine, consisting of land and numerous buildings including a main lodge, indoor gymnasium, infirmary, stable, thirteen so-called "bunks" for housing campers and counselors, canoe dock, shower house, small buildings for housing employees, and other incidental structures. The so-called bunks are wooden single story buildings without basements or foundations, with wide openings covered by screen paneling for summer use. Eleven of the bunks measure approximately 32′ x 20′. The remaining two are approximately 32′ x 32′. Four of the bunks have ten individual cots, seven have accommodations for twelve occupants, and two have accommodations for sixteen or seventeen persons. Only one has electric lights, and none has heating facilities or hot water. Each bunk has toilet and bathroom facilities but apparently no tubs or showers. The camp includes tennis courts, softball diamond, volleyball courts, riding ring, archery range, and bathing beach. The waterfront includes canoes, sailboats, rowboats, motorboats, and movable docks and floats. The camp is for girls between the ages of ten and sixteen, and the camping season lasts for approximately sixty days during the summer months. The average attendance for the last two years

has been 138. Each camper attends the camp for the entire season. Enrollment is completed prior to January 1st of the camp year, and no camper is accepted after the season has commenced. Prospective campers are selected after interviews. Physical examinations and certain inoculations and vaccinations are required of all campers and camp personnel. Two registered nurses are in attendance at the camp. No charge is made for the use of the infirmary or for the services of the nurses. Camp uniforms are required. Each camper brings her own bedclothing and makes her own bed. The camp staff in 1959 consisted of a director, assistant director, forty-two counselors (each of whom is assigned to a specific type of instruction), nurses, dietitian, cooks, dishwashers, waitresses, secretaries, bookkeepers, caretakers, grooms, and domestics. The adjustment of each individual is reviewed periodically and a written report sent to the parents at the end of the season. The schedule of each camper is prescribed, including the time of rising in the morning, meals, participation in activities, rest hour, and the time for retiring at night. Each camper is taken on trips away from camp for periods varying from six days and three nights to seventeen days and twelve nights, depending upon age. The schedule of instructions and activities is determined for each individual child. Among the activities provided are the following: swimming, canoeing and sailing, water skiing, basketball, softball, volleyball, tennis, horseback riding, archery, campcraft, dancing, dramatics, music, song writing, camp magazine, arts and crafts, nature studies, and tutoring. A single fee is charged for the entire camp season, covering all charges, with certain exceptions. The fee for 1960 is $900. The appellant has never broken down its charges as to instructions, use of facilities, trips, activities, meals, and living accommodations.

The fundamental rule in construing legislation is to ascertain the intention of the legislature and give effect thereto.

In the discovery of the legislative intent in the present case, we are guided by certain well established rules.

Words and phrases are construed according to the common meaning of the language, unless such construction is inconsistent with the plain meaning of the enactment. Rules of Construction, R. S., 1954, Chap. 10, Sec. 22, Par. I. See also *State* v. *Blaisdell,* 118 Me. 13, 15, 105 A. 359.

The intention of the legislature must be sought by an examination of all parts of a statute and not from any particular word or phrase. *Belfast* v. *Bath,* 137 Me. 91, 94, 15 A. (2nd) 249, citing *Rackliff* v. *Greenbush,* 93 Me. 99, 104, 44 A. 375.

The court, if possible, gives effect to every word, phrase, and clause contained in the statutory provision being interpreted. *Hudson Pulp and Paper Corp.* v. *Johnson,* 147 Me. 444, 448; 88 A. (2nd) 154.

It has been frequently said that " 'a thing within the intention, is as much within the statute, as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it.' " *Holmes* v. *Paris,* 75 Me. 559, 561. *Steele* v. *Smalley,* 141 Me. 355, 358, 44 A. (2nd) 213.

Statutes imposing taxes are construed most strongly against the government and in the citizen's favor and may not be extended by implication beyond the clear import of the language used. *Portland Terminal Co.* v. *Hinds, et al.,* 141 Me. 68, 72, 39 A. (2nd) 5.

Does the term "tourist camp" have a common and accepted meaning among the people of this state? It undoubtedly has such a meaning. The state of Maine with its varied scenery and recreational facilities has for many years attracted tourists from all parts of the country. The increase in automobile transportation and the improvement of our

highways has made our lakes, seashore, and countryside more accessible not only to our own citizens but also to myriads of visitors from other states. Many enterprising citizens, recognizing the requirement of living or housing accommodations on the part of those temporarily away from home, have found it profitable to construct so-called camps or cabins to provide such accommodations. Structures of this type were erected in many parts of the state, some more elaborate than others. Some owners provided but one cabin or camp, others provided many. The main purpose of these camps or cabins is to provide temporary sleeping or housing accommodations, and any other service rendered to the guest is merely incidental thereto. The terms "tourist camp," "tourist cabin," "overnight camp," and "overnight cabin" have been interchangeably used by the public as the accepted designation of the type of building used for such a purpose. A group of such buildings is generally spoken of as a "tourist camp." Likewise, a residence in which temporary guests are received for the same purpose is commonly known as a "tourist home."

During the past quarter of a century many boys' and girls' camps, so called, similar to that operated by the appellant, have been conducted in the lake and shore areas of the state. Some are operated by private individuals or corporations, others by charitable associations or corporations. Some offer more services than others, but all operate on the same principle. The purpose of such camps is to provide, under proper discipline, for periods ranging from weeks to an entire season, a supervised program of instruction and recreation for boys and girls. The program provided is the inducement to attend the camp. The housing accommodations are merely incidental to that program. A camp of this nature is commonly and generally known as a "boys' camp" or a "girls' camp." The designation "tourist camp" is not used in reference to a camp of this nature, and we must con-

clude that the general use of the term has no application to the type of camp conducted by the appellant.

Does the statutory definition change the generally understood meaning of the term "tourist camp"? We think not. The nature of the operation of these camps are so well known that we must assume that the members of the legislature knew that a total aggregate fee is paid to cover the entire services provided by the camp, including instruction, supervision, food, lodging, and other services rendered to the campers, and that only a small part of the entire fee could possibly apply to cover living quarters. We feel that the failure of the legislature to establish some method of allocating the charge for living quarters is some indication that it did not intend to tax the fees charged by these camps. Furthermore, it appears that P. L., 1959, Chap. 350, for the first time brought rentals within the purview of the sales tax law. In addition to tourist camps the act applies to rentals from hotels, rooming houses, and trailer camps. In the case of hotels and rooming houses, the essential service rendered consists in providing sleeping or living quarters, and in the case of trailer parks in providing a space for an automobile trailer used for lodging. In all cases any additional service is incidental to the main service rendered. The same is true of a tourist camp in the accepted meaning of the term. A careful reading of the entire act leads us to the conclusion that the legislature in defining the term "tourist camp" did not intend to change the commonly accepted meaning of the term; that it did not intend to extend its meaning to include the authorization of a tax against the owner of a camp conducted in the manner in which the appellant's camp was conducted, where an entire lump sum is charged and where the living quarters are only incidental to a bona fide, organized, and disciplined program of instruction and recreation.

We therefore find that the act does not authorize the imposition of a sales tax for rentals against the appellant.

The entry will be

Appeal sustained. Judgment for appellant without costs. Tax abated. Case remanded to Superior Court for decree in accordance with opinion.

IRIS LAWRENCE, P.P.A.
LESLIE LAWRENCE
vs.
OSKAR LARSEN

Aroostook. Opinion, June 2, 1960.

Negligence. Evidence. Duty.

In an action for injuries suffered by a child from an alleged fall into a newly constructed cellar, the court properly directed a defendant's verdict where the quality of the evidence was insufficient to support a finding that the child fell.

Cf. Special concurrence — no duty under the circumstances.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions to the direction of a defendant's verdict. Exceptions overruled.

Bishop & Stevens, for plaintiff.

Scott Brown, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

CONCURRING SPECIALLY: WEBBER, J., joined by WILLIAMSON, C. J.

TAPLEY, J. On exceptions. These actions were brought to recover for personal injuries sustained by Iris Lawrence, infant daughter of Leslie Lawrence, and for hospital and medical expenses incurred as a result of said injuries. They were tried together at the September Term, 1958 of the Superior Court, within and for the County of Aroostook. After all the evidence was in and all parties had rested, the defendant moved for directed verdicts. The motions were denied, the cases argued and, before submission to the jury, the court, upon further consideration of defendant's original motions for directed verdicts, granted them. The cases are before this court on exceptions to the directions of the verdicts.

At the time of the injury the father of the child, Leslie Lawrence, was employed by Lyle Wheeler who owned the premises occupied by Mr. Lawrence and, as part of his compensation for such employment, he was furnished a dwelling house on Mr. Wheeler's land. Mr. Wheeler planned to construct a foundation upon which to move his house occupied by Lawrence and employed Griffin Brothers to excavate preparatory to putting in the foundation. Oskar Larsen, the defendant, was employed by Mr. Wheeler to build the forms for the cellar, pour the concrete and move the dwelling onto the foundation. The concrete foundation was started and completed by the defendant between the middle of July and the latter part of July, 1956.

Mr. Lawrence occupied the dwelling with his wife and five children, the oldest being six years of age, the youngest about three months and Iris, at the time of the accident, was four years old. On the day the accident occurred Mr. and Mrs. Lawrence had gone to the County Fair and had left the children in the care and custody of a baby sitter

of the age of thirteen years who had performed that function on the average of three times a week. While the baby sitter was in charge of the children she permitted them to play in a pile of dirt close by the foundation of the cellar. While the baby sitter was in the house caring for the baby and the other four children were outdoors playing, she heard one of the children crying, whereupon she went out of doors to investigate and there she found Iris lying on the floor of the newly constructed cellar foundation. She climbed down a ladder which led from the top of the foundation to the cellar floor on the side opposite to where the child was lying, took her in her arms, carried her up the ladder and then into the house.

The foundation was by measurement 18 x 32 feet, with walls 8 inches in thickness, and with depth of approximately 6 feet. The floor of the cellar was of cement. The distance between the southerly end of the dwelling house and the northerly end of the cellar wall was approximately 10 feet. A week after the cement was poured the area was backfilled so that the top of the cellar foundation would be in some spots a foot above the ground and in others 18 inches. Mr. Larsen, the defendant, testified that after the foundation was completed he caused the forms to be removed from the cement walls, cleaned the lumber and placed it some 40 or 50 feet away from the foundation. He also testified that he warned the parents of Iris Lawrence that they should keep the children away from the cellar "so they wouldn't get hurt." After the concrete was poured, the forms were removed and the foundation permitted to go through a period of hardening. There was no fence or barricade around the cellar wall nor was the opening covered in order to keep the children from falling into the cellar should they by chance be playing on the top of the cellar walls. The defendant did not perform the work of moving the house onto the foundation as he was not equipped to do

such work. The accident happened about two weeks after the foundation had been constructed. Mr. Larsen further testified that it was part of his obligation to Mr. Wheeler, the owner of the premises, to engage someone to move the house, which he did by hiring a sub-contractor.

The question presented here is whether under the circumstances of this case there is sufficient evidence for jury presentation in order that they might determine negligence or lack of negligence on the part of the defendant.

Counsel for the defendant contends that the plaintiff has failed to prove a necessary element of her case, viz.: there is not sufficient evidence to establish by a preponderance of the evidence that she fell into the cellar. Plaintiff's declaration says in part:

> "And as a result of the aforesaid negligent acts of the defendant, by his duly authorized agents and employees the said Iris Lawrence, while lawfully on said premises and while exercising due care and caution, and being wholly unaware of the unsafe, dangerous and hazardous condition of the cellar excavation; and being unable to ascertain with all due diligence the unsafe, dangerous and hazardous condition of the said cellar excavation; fell into the said cellar excavation then and there having a depth of seven feet, and that by reason of the said Iris Lawrence's fall as aforesaid, ------."

thus the plaintiff alleges a *fall* into the cellar and this, being an essential allegation, must be proven. What proof then was adduced by the plaintiff to support this allegation? The only testimony bearing on this subject was that of the baby sitter, Pamela Fox, when she testified:

"Q. Did anything attract your attention about supper time?

A. Yes, that is when Iris fell in.

Q. Where were you at that time, in the house or out of the house?

A. In the house.

Q. Were any of the children in the house with you at that time?

A. The baby.

Q. The other four children were outdoors playing?

A. Yes.

Q. Tell the jury what you heard?

A. I either heard when she fell and she was crying or someone came in and told me, I can't remember.

Q. Did you hear any noise outdoors?

A. I can't remember.

Q. You say you heard some crying?

A. Yes, I heard her cry.

Q. What did you do?

A. I went out.

Q. What did you see when you got out there?

A. She was laying on the cellar floor.

Q. Now were there any walls or barriers up around this foundation wall?

A. No.

Q. In other words, it was all open?

A. Yes.

Q. After you saw her laying down what did you do?

A. I climbed down the ladder and carrier her up.

Q. You say there was a ladder down into the cellar?

A. Yes.

Q. Where was the ladder in relation to where Iris was laying?

A. She was laying near the other end where the ladder was. She wasn't laying where the ladder was but the other end of the cellar.

Q. She was lying on one end and the ladder was on the other?
A. Yes.

Q. Was she lying close to the wall?
A. Yes she was.

Q. Where were the other three children?
A. They were playing.

Q. How did you get Iris out of the cellar?
A. I carried her up the ladder."

This testimony of the baby sitter comprises all of the evidence in the case upon which the jury would be asked to make a factual determination that the child *fell* into the cellar. Is the nature and the quality of this evidence sufficient to support a jury finding of the fact? We think not. A finding based on this evidence must be one of conjecture, guesswork or even imagination. Under the evidence submitted it would be possible that the child was pushed by her playmates into the cellar or that she of her own volition descended into it by means of a ladder and while playing about the floor fell and sustained the injury. There is no direct evidence of a fall. Can the circumstance of the child being found on the cellar floor near the wall be sufficient upon which to base an inference that she fell into that position?

The case of *Mosher* v. *Inhabitants of Smithfield,* 84 Me. 334 is an action sounding in negligence wherein the plaintiff sued the Inhabitants of the Town of Smithfield to recover damages for personal injuries sustained when she was riding in a horse-drawn vehicle and was thrown from the vehicle when the horse fell in crossing a town bridge. The plaintiff alleged a defect in the bridge consisting of a hole and averred that the defect caused the fall of the horse. There was no direct testimony that the falling of the horse was caused by the defect in the bridge. The plaintiff was

the only witness. She testified, in substance, that after the horse was on the bridge he pitched forward and that was the last she knew. The court said on page 337:

> "And where different inferences are deducible from the same facts which appear, and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition upon which alone she would be entitled to recover. -----.
>
> "---------- How did this accident happen? No reason is assigned other than from inference. Nobody testifies that the horse went into the hole. The driver is not produced to testify to his manner of driving. For aught that appears, he may not have controlled the horse at all, or tried to do so. We do not know what he did or whether he did anything, — or whether he saw the hole or not.
>
> "There is evidence in the case that there was the appearance of a horse having fallen in the road just before entering upon the bridge. Two witnesses testify to this, and to finding a small strap in the road at that point, a short time after the accident. The plaintiff says the horse fell upon the bridge. But whether the horse ever came in contact with the alleged defect, thereby causing the injuries to this plaintiff, is left to conjecture. The horse may have stumbled from some cause entirely independent of the alleged defect. The case was left, therefore, to be decided by mere inference, without facts to determine which of the inferences, was correct."

"The enforcement of rights and obligations in a judicial proceeding, where the issue is drawn by the pleadings, depends upon the matters revealed by the evidence offered in support of the claims made by the parties. A verdict, judgment, or decree may not be based on a mere conjecture, suspicion, surmise, guess, supposition, or speculation, where there are a number of causes of any injury or different theories having different legal results,

> if there is no satisfactory foundation in the testimony for a conclusion as to any one of them. The proof must establish a connection between the act charged and the injury alleged as its effect before the plaintiff can be permitted to recover. Such causal connection must rest upon a firm foundation of proof. A possible cause cannot be accepted by a jury as the operating cause unless the evidence excludes all others or shows something in the way of direct connection with the occurrence." 20 Am. Jur. — Evidence — Sec. 1178.

Mahan v. *Hines*, 120 Me. 371 is an action of negligence wherein the administratrix sought recovery of damages for death of her intestate. Plaintiff's intestate, being somewhat under the influence of intoxicating liquor, was a passenger on the Bangor & Aroostook Railroad from Patten to Millinocket. The train stopped because of a semaphore or block signal about a mile north of Millinocket Station, at which time the deceased made his way to the vestibule in the rear of the smoking car. He was last seen alive going into the vestibule and standing facing the vestibule door which was closed. Soon after the train started his friends went to the vestibule to look for him but he was not to be found. A brakeman, upon the arrival of the train at the Millinocket Station, notified the assistant yard master "that it was reported that a man had jumped or fallen from the train at the northerly end of the yard." Later, about a quarter of a mile from the semaphore, they found what was left of the man's body. Plaintiff's contention was that the deceased had a right to assume that he had arrived at the station when the stop was made at the semaphore and that the sudden starting of the train either threw him off or he jumped and was in some way left injured or dazed beside the track and was picked up by one of the engines going north and thus came to his death. The court, on page 378, said:

"Inferences based on mere conjecture or probabilities will not support a verdict."

"Where different inferences are deducible from the same facts and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition on which alone there can be recovery." *Mills* v. *Richardson,* 126 Me. 244, at page 250.

"Both are conjectures, one seemingly as plausible as the other. And either might be the truth. But conjectures are not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative." *McTaggart, Admx.,* v. *Maine Central Railroad,* 100 Me. 223, at page 230.

In *Allen* v. *Maine Central Railroad Co.,* 112 Me. 480, at page 483, the court said:

"As said by the Court in Titcomb v. Powers, 108 Maine, page 349, 'To choose between two possibilities is guesswork, and not decision, unless there is something more which may lead a reasonable mind to one conclusion than the other.' There is nothing in the evidence that authorizes the conclusion that the cause of the fire was the locomotive engine of the defendant rather than the act of the Atwood boy. To choose between the two possibilities is guesswork and not decision. An examination of the evidence shows but a possibility in support of the plaintiffs' claims, and make it manifest that the verdicts cannot stand."

This court in *Edwards* v. *American Railway Express Company,* 128 Me. 470, at page 471, said:

"Mere conjecture or choice of possibilities is not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, nor until the evidence becomes inconsistent with the negative. To choose between two possibilities

> is guess work, not decision, unless there is something more which leads a reasoning mind to one conclusion rather than to the other."

Reference is made to *Coolidge, Admr.* v. *Worumbo Manufacturing Company,* 116 Me. 445; See *Freeport Sulphur Company, et al.* v. *Portland Gas Light Company,* 135 Me. 408; *Ramsdell, Admx.* v. *Burke,* 140 Me. 244.

The question of whether the child fell, was pushed or in some other manner was precipitated to the floor of the cellar comes within these well established principles of evidence as demonstrated by the above cited authorities and the fact finders would be required to determine the fact by conjecture or guesswork and a verdict based upon these elements could not be allowed to stand. This conclusion makes it unnecessary to determine any other question presented in the case.

The justice below was not in error in directing a verdict for the defendant.

Exceptions overruled.

CONCURRING OPINION
WEBBER, J.

We concur in the result. In our opinion, the case is governed by *Lewis* v. *Mains,* 150 Me. 75, 104 A. (2nd) 432. The evidence does not warrant a finding that the child was at the area of the cellar by express or implied invitation.

There is no dispute as to the essential facts which establish and limit the duty owed by the defendant. The child's father had permission to occupy a dwelling house on his employer's farm as one of the terms of his employment. There was no relinquishment by the owner of his right to enter upon a portion of the land area adjacent to the dwelling house and take exclusive control of that area for his own reasonable purposes. When the owner entered to build a new cellar and foundation wall on which to move the

dwelling house, that action constituted a withdrawal of any implied invitation to the employee and his family to make reasonable use of the area in question. Thereafter, since we have expressly repudiated the doctrine of "attractive nuisance" it was incumbent upon the plaintiffs, claiming damages suffered in the area thus set aside, to show wanton, wilful or reckless acts of negligence in order to ground recovery. Of such there is no evidence. We treat the defendant contractor as owing no greater duty to the plaintiffs than did the owner for whom the defendant acted.

Williamson, C. J., joins in this opinion.

APPLICATION OF LEO A. RICHER, RE: CONTRACT CARRIER PERMIT

Kennebec. Opinion, June 22, 1960.

P.U.C. Findings. Common Carrier. Contract Carriers. Standards.

A common carrier cannot complain that the Commission failed to find the existence of the contract carrier's "contract or agreement express or implied . . . (covering) the proposed service," where no such finding was requested. Such a finding is not required by R. S., Chap. 48, Sec. 23.

A decree which states "that the applicant has fulfilled the requirements of Sec. 23, Chap. 48 . . ." sufficiently indicates that the Commission has made the five (5) findings required by R. S., 1954, Chap. 48, Sec. 23.

In granting a contract carrier permit under R. S., Chap. 48, *convenience* alone does not satisfy the test. There must be *need* for the service rising above convenience of those whom it is proposed to serve. The adequacy and efficiency of common carrier service is also a controlling factor in determining whether the applicant has met the policy established by the Legislature. Where the Commission's findings are not based upon substantial evidence, the exceptions must be sustained.

ON EXCEPTIONS.

This is an application for a contract carrier's permit. The case is before the Law Court upon exceptions to certain findings and/or the lack thereof by the P. U. C. Second exception sustained. Case remanded to the P. U. C. for a decree upon the existing record in accordance with this opinion.

Scott W. Scully, for Maine Central Railroad.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. (SIDDALL, J., did not sit.)

WILLIAMSON, C. J. This case is before us on exceptions by the Maine Central Railroad Company and the Boston and Maine Railroad to a decree of the Public Utilities Commission "That a permit be issued to Leo A. Richer authorizing operation of motor vehicles as a contract carrier transporting, — Cement in bulk and in bags from Thomaston to, — 1) North Berwick and Sanford for Girard Genest; 2) Sanford for Patrick Genest; 3) Biddeford for Henry Bourque; . . " R. S., c. 44, § 67.

The statutory provisions governing the case read:

> **"Sec. 23. 'Contract carrier' defined; regulations. - -**
>
> * * * * * * * * *
>
> "It is declared that the business of contract carriers, which term is intended to include all persons, firms or corporations operating or causing the operation of motor vehicles transporting freight or merchandise for hire upon the public highways, other than common carriers over regular routes, is affected with the public interest and that the safety and welfare of the public upon such highways, the preservation and maintenance of such highways and the proper regulation of common carriers using such highways require the

regulation of contract carriers to the extent hereinafter provided:

"I. No contract carrier shall operate, or cause to be operated, any motor vehicle or vehicles for the transportation of property for hire on any public highway within this state without having obtained a permit from the commission;

* * * * * * * * *

"III. No application for a permit shall be granted by the commission until after a hearing, nor shall any permit be granted

(1) if the commission shall be of the opinion that the proposed operation of any such contract carrier will be contrary to the declaration of policy of section 19 to 33, or otherwise will not be consistent with the public interest, or

(2) will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory by rail or over the same general highway route or routes or

(3) that an increase in the number of contract carriers operating in the area to be served by the applicant will interfere with the use of the highways by the public . . .

(4) Permits granted by the commission shall authorize only such operations covered by the application as the commission finds to be justified by the evidence, and

(5) no permit shall be granted unless it appears that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of section 19 to 33, inclusive, and to the rules and regulations of the commission issued thereunder. . . . ." R. S., c. 48, § 23 (as amended in 1957.) (The numbers indicate the five findings required by statute and later referred to in the opinion).

> "**Sec. 19. Policy.** — The business of operating motor trucks for hire on the highways of this state affects the interests of the public. The rapid increase in the number of trucks so operated, and the fact that they are not effectively regulated, have increased the dangers and hazards on public highways, and make more effective regulation necessary to the end that highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public; and that the various transportation agencies of the state may be adjusted and correlated so that public highways may serve the best interest of the general public." R. S., c. 48, § 19.

EXCEPTION 1

The railroads contend they are "unable to determine the grounds of the . . . decree and whether or not the Commission has applied the statutory standards" from the failure of the Commission to make basic or essential findings, namely, the five findings stated in Section 23, *supra,* and a sixth, "that there was a contract or agreement expressed or implied for the use of the proposed services of the applicant."

The decree reads in part:

> "We believe that the applicant has fulfilled the requirements of Section 23, Chapter 48 of the revised Statutes of Maine, 1954, as amended, and should be authorized to transport cement as hereinafter set forth in our order. . "

The railroads gain nothing from the failure to make the sixth stated finding. It is not required by Section 23. Fur-

ther, the railroads did not request such a finding and may not now complain of its absence from the decree.

This court has said:

> ". . . it is clearly the duty of the Commission under the statute, at least, if requested by any of the interested parties, to set forth in its orders and decrees the facts on which its order is based, otherwise the remedy provided by the statute for any erroneous rulings of law may be rendered futile." *Hamilton* v. *Caribou Water Light & Power Company,* 121 Me. 422, 425, 117 A. 582.

See also *Casco Castle Co., Petr.,* 141 Me. 222, 42 A. (2nd) 43; *CMPCO. Re Contract Rate,* 152 Me. 32, 122 A. (2nd) 541.

The remaining five items are the findings required by statute as the basis for granting a permit. The question raised by this exception is not whether the required findings are supported by evidence, but whether they have been made by the Commission and are sufficiently set forth in the decree.

We think it plain from the brief sentence quoted from the decree that the Commission made the required findings. To fulfill the requirements of the statute is to meet the statutory standards.

It is of importance when a permit is denied that the applicant know wherein he has failed to meet the statutory standards. See *State* v. *Ballard,* 152 Me. 158, 125 A. (2nd) 861; *Merrill* v. *P.U.C.,* 154 Me. 38, 141 A. (2nd) 434. In the instant case, however, it cannot be said that the railroads in bringing the case forward for review in the Law Court have been handicapped. It would serve no useful purpose to remand the cause for entry of a decree with more words but without increase in substance. The first exception is overruled.

EXCEPTION 2

In the second exception the railroads object to the six findings by the Commission set forth in the first exception on the ground that there is no substantial evidence to support "the basic or essential findings upon which it must necessarily be based . . ."

There is no controversy over the applicable rule of law. "If a factual finding, basic of an order of the Commissioner, is supported by any substantial evidence, that is, by such evidence as, taken alone, would justify the inference of the fact, the finding is final." *Gilman* v. *Telephone Company,* 129 Me. 243, 248, 151 A. 440; *Hamilton* v. *Power Co., supra; State* v. *Ballard, supra.*

It is unnecessary that we consider findings (3), (5), and (6) in detail. We cannot say that under the applicable law the Commission erred in finding (3) that the proposed increase in contract carrier service would not "interfere with the use of the highways by the public."

Obviously the use of the highways would thereby be increased. The Commission was not required, however, as a matter of law to find interference by inference from the sole fact of the applicant's anticipated use of the highways. If such were the necessary result, we might well ask how any applicant for a permit as a contract carrier could meet the statutory standards.

Turning to finding (5) we are satisfied that the Commission could properly find the applicant was fit, willing and able to perform the services of a contract carrier and otherwise to conform to the statutes and regulations. There was substantial evidence that the applicant owned a truck and was prepared to operate a contract carrier service at rates approved by the Commission.

Finding (6) was not required by the statute, as we have seen in the first exception, and further, no request was made therefor by the railroads.

We are left then with three findings which the railroads assert are not supported by any substantial evidence; namely,

> "1) That the proposed operation will not be contrary to the declaration of policy set forth in Sections 19 to 32, inclusive, or otherwise will not be inconsistent with the public interest;
>
> "2) That the proposed operation will not impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory by rail or over the same highway route or routes;
>
> * * * * * * * * *
>
> "4) That the operations authorized by the permit granted by the Commission were justified by the evidence."

The record discloses no dispute over the underlying facts. The controversy arises over the conclusions to be drawn therefrom. We summarize the facts as follows:

Mr. Richer seeks a permit as a contract carrier to haul cement over the highways from Thomaston, Maine, the place of manufacture. His application was supported by the three cement dealers named in the decree. Mr. Girard Genest receives cement by rail in both carload and less than carload lots at sidings about three-quarters of a mile from his plant at North Berwick and about two and one-half miles from his plant in Sanford. Mr. Henry Bourque receives cement by rail at a siding about a mile from his Biddeford plant. Mr. Patrick Genest at Sanford, who has limited storage facilities purchases cement locally in bags.

Mr. Girard Genest and Mr. Bourque, the Commission found, "receive carload lots in the busy summer season but

at other times carry a small inventory and truck delivery is more suited to their needs." Mr. Girard Genest expressed his view in these words, "It is a matter of convenience mostly because there isn't too much difference in the cost. . . . Convenience in handling smaller quantities."

In one instance there was a slightly lower cost per bag by truck than by rail. All dealers testified that the proposed service would be a convenience. The sum of the testimony was to the effect that the rail service was adequate but that the trucking service would be more convenient.

In *Merrill, supra,* in which exceptions to the denial of a contract carrier permit were overruled, we stated the rules here applicable:

> "It is clearly not in the public interest and would be contrary to the over-all legislative policy to authorize contract carrier operations for which there is no demonstrable need. . . Without any evidence of need or of inadequacy or inefficiency of the common carrier service being furnished, the Commission could not have 'justified by the evidence' the issuance of the requested permit.
>
> "Had there been some evidence of need for the contract carrier service, it would have been for the Commission to determine in the exercise of a sound discretion whether or not the satisfaction of that need would be consistent with the public interest and the public policy announced by the Legislature. O'Donnell, Pet'r., 147 Me. 259, 264."
>
> * * * * * * * * *
>
> "Ballard, (supra) upon its facts, merely holds as we do here that contract carrier permits are not to be issued when there is no evidence of need of the service and the operations of common carriers serving the same territory are entirely adequate and efficient."

From our examination of the record we are unable to extract "some evidence (i.e. any substantial evidence) of

need for the contract carrier service" within the principles set forth in the *Merrill case, supra.* It would understandably be more convenient for the dealer to take delivery of cement at his plant than at the rail siding. Convenience alone, however, does not satisfy the test. There must be a need for the service rising above convenience of those whom it is proposed to serve, as here the dealers in cement, to warrant placing a contract carrier on the highway.

The Commission indeed has recognized the principle in the instant case in granting a permit for contract carrier service only to the dealers named and not generally "to points and places in York County," as requested by Mr. Richer. It is in the application of the principle to the facts, not in the principle, that we differ from the Commission.

The adequacy and efficiency of common carrier service is also a controlling factor in determining whether the applicant has met the policy established by the Legislature. In the instant case neither the adequacy nor efficiency of the rail service, apart from the lack of convenience in taking delivery at the rail sidings, is seriously questioned.

In our view of the record the evidence justified a finding of convenience, but not of need or lack of adequate and efficient rail service. In short, there was no substantial evidence to support the first and fourth findings.

Finding (2) touches upon the impairment of "the efficient public service" of the railroads. The volume of the traffic in cement from Thomaston, the point of origin, to points in York County, and specifically to points of delivery by rail to two of the dealers in North Berwick (Somersworth, N. H.), Sanford, and Biddeford is large. The greater portion of the haul is over the rails of the Maine Central Railroad, which has purchased and maintained special equipment for transportation of cement.

The only reasonable inference from the evidence on cement traffic moving by rail is that the proposed operation would cut the freight revenues in a substantial amount. Whether this loss would impair "the efficient public service" of the railroads presents a difficult and delicate question. Is the prospective loss of traffic in cement of significance when measured against the total business of the carriers? The Commission with its accumulated experience of years of regulation is especially fitted to answer this question. We cannot do so from the record. The prospective loss of freight, even of substantial volume, is not enough to compel a finding of impairment of public service.

In summary, finding (1) (policy) and finding (4) (justified by evidence) were not based on any substantial evidence of need of the proposed service by the three cement dealers or lack of adequate and efficient rail service. The second exception must therefore be sustained.

EXCEPTION 3

Exception was taken to the following ruling of law:

> "Shippers should not be deprived of the use of a more efficient method of operation merely because the institution of such operation would result in possible loss of some traffic now handled by rail carriers."

The railroads contend the ruling is erroneous in law in light of the second required finding under Section 23 relating to the impairment of "the efficient public service" of the common carriers.

The statement as a statement of law is unobjectionable. The "possible loss of some traffic" cannot well be the basis for a finding of impairment of "efficient public service." See *Schaffer Transportation Co.* v. *U. S.*, 355 U. S. 83, 78 S. Ct. 173. No doubt every contract carrier in an area served by a common carrier deprives the latter of some traffic.

The further contention, as we understand the exception, that the Commission under this rule of law "failed to consider the effect of the loss of traffic and revenue on the service rendered by the common carriers" is not borne out by the record. We think it clear that in reaching the findings discussed in the second exception, and particularly finding (2), the Commission necessarily considered evidence of prospective loss of traffic in terms of impairment of public service. The objection of the railroads is to the finding, not to the rule as stated. The third exception is overruled.

EXCEPTION 4

The railroads object to the following finding concerning the equipment and past operations of the applicant:

> "His (Mr. Richer's) equipment has been leased to Mr. Genest. The leasing arrangement has been investigated and declared legal by a State Trooper."

From our examination of the record, it appears that the finding with reference to the action of the state trooper was based solely on applicant's argument and not upon the evidence given by him or any other witness in the case. For this reason alone without in any way touching upon the materiality of the evidence, if otherwise admissible, the finding has no support in evidence. In any event, however, there was substantial evidence apart from that here in controversy on which the Commission could properly find as it did that the applicant had the ability to perform the proposed service. The railroads were not aggrieved by the ruling. The fourth exception is overruled.

The entry will be

Second exception sustained.

Case remanded to the Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

RALPH T. DANBY
D/B/A DANBY MOTORS
vs.
PAUL L. HANSCOM

Penobscot. Opinion, June 24, 1960.

Replevin. Exceptions.
Sales. Remedies. Attachment.

Findings of fact by a justice without a jury are final if supported by the evidence, and exceptions which do not properly raise questions of law must be dismissed.

One cannot affirm a sale of personal property by attaching it as belonging to another and at the same time claim title.

ON EXCEPTIONS.

This is a replevin before the Law Court upon exceptions. Exceptions dismissed.

Vafiades & Browntas, for plaintiff.

Charles E. Gilbert, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SIDDALL, J. This is an action of replevin brought by the plaintiff against the defendant, a deputy sheriff, for the recovery of a 1957 Buick automobile. The defendant filed a general denial, and in a brief statement claimed that title to the automobile was in O'Meara Motor Co., a Connecticut corporation, hereafter called O'Meara. The case was heard by a Justice of the Superior Court, by agreement, with rights of exceptions as to matters of law reserved.

The record discloses that the car in question was on March 9, 1960, delivered by O'Meara to one Moses upon

receipt of a check for $1400. The transaction took place in the state of Connecticut. On March 11, 1960, the plaintiff at Bangor, Maine, gave Moses a check for the automobile and took possession of it. The check given by Moses to O'Meara was dishonored. O'Meara then brought an action against Moses in Penobscot County upon an account annexed in the sum of $3275, $1400 of which was for the automobile in question and the balance for another automobile previously sold to Moses. Under this action the deputy sheriff was directed to attach the automobile in question, which was then in the possession of the plaintiff. The deputy sheriff made the attachment, and upon his return stated that he had attached the automobile on March 19, 1959, as the property of Moses, the defendant in that action. On the same writ, funds of Moses in the hands of Eastern Trust and Banking Company were trusteed. Moses was defaulted in the action, and judgment was entered in favor of O'Meara for $3297.39. The trustee was charged with the amount disclosed, $2339.62, less costs. At the hearing of the present case the court admitted over objection of defendant a document claimed by the plaintiff to have been given to Moses by O'Meara, and another document purporting to be a bill of sale from Moses to the plaintiff. Exceptions were reserved by the defendant. In substance the court found the plaintiff to be an innocent purchaser of the automobile and that the defendant had invested Moses with the "indicia of ownership" thereof. The court also ruled that by attaching the automobile, rather than by proceeding in replevin, the defendant had indicated an intention to affirm the sale to Moses, and that it was too late to deny Moses' authority to sell the automobile to the plaintiff. On July 24, 1959, judgment was given to the plaintiff for one dollar damage and the property replevied. The defendant filed exceptions under the rules of procedure then in effect.

The sole ground of error claimed by the defendant is set forth in his bill of exceptions in the following language:

> "And the defendant says that said judgment for the plaintiff is erroneous and prejudicial, and that he, the defendant, is a party aggrieved thereby, in that the evidence, viewed in the light most favorable to the defendant's contentions, should have warranted a judgment in his favor."

It is well established that exceptions reach only errors of law. *Heath, et al. Applts,* 146 Me. 229, 232, 79 A. (2nd) 810.

> "And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact; . . . . " *Laroche v. Despeaux,* 90 Me. 178, 38 A. 100.

Findings of fact by a justice sitting without a jury are final so long as they find support in evidence. *Richardson* v. *Richardson,* 146 Me. 145, 147, 78 A. (2nd) 505; *Wade & Dunton, Inc.* v. *Gordon,* 144 Me. 49, 51, 64 A. (2nd) 422; *Ayer* v. *Androscoggin & K. Railway Co.,* 131 Me. 381, 384, 163 A. 270; *Chabot* v. *Chabot,* 109 Me. 403, 404, 84 A. 892.

> "If the ground of exception to the finding of a single justice is that it was erroneous in law because there was no evidence to support it, or because his finding was made without any evidence, such ground must clearly appear in the bill of exceptions." *Heath, et al. Applts, supra,* at 233.

Having in mind these clearly established principles, we must conclude that the bill of exceptions filed in this case does not properly raise a question of law and therefore cannot be considered by this court.

A review of the record and briefs convinces us that the judgment of the court would have been held proper had the bill of exceptions been sufficient to include the questions of

law raised in defendant's brief and argument. There was ample evidence, if believed, to justify the conclusion that the plaintiff made a *bona fide* purchase of the automobile from Moses, and paid for and took possession of it. The defendant claims, however, that under the law of Connecticut, in which state the transaction between Moses and O'Meara took place, title to the property did not pass until the check given in payment therefor was honored. The defendant also raises the question of the admissibility of certain documents admitted over his objection. Assuming the correctness of the defendant's interpretation of the Connecticut law under the facts in this case, O'Meara by electing to attach the automobile in the hands of the plaintiff as the property of Moses, and making a valid attachment thereof, could no longer claim title to the property in himself. He could not at the same time treat the property as his own and as that of Moses. The situation is analagous to those cases in which a person who has a lien on real or personal property waives his lien by attaching the particular property upon which the lien attaches. See *Lord* v. *Crowell,* 75 Me. 399; *Whitney* v. *Farrar,* 51 Me. 418; *Libby* v. *Cushman,* 29 Me. 429. A discussion of the admissibility of the documentary evidence is not necessary. The judgment rendered was justified by the evidence and the defendant suffers no injustice by a dismissal of his bill of exceptions upon technical grounds.

The entry will be

Exceptions dismissed.

STATE OF MAINE, BY INFORMATION OF
FRANK E. HANCOCK, ATTORNEY GENERAL,
ON RELATION OF CAROL C. BANKS, ET AL.
vs.
EBEN ELWELL, ET AL.

Waldo. Opinion, June 24, 1960.

Quo Warranto. *Right of Withdrawal.*
Practice. *Rule 81 (b).*

The Attorney General may, after commencement of an information in the nature of *quo warranto* by relation of private citizens, dismiss or discontinue the information as of right, in his discretion, without the assent of the relators; and if he does withdraw the action is subject to dismissal.

The Rules of Civil Procedure do not alter the practice prescribed for proceedings in quo warranto. Rule 81 (b).

Whether the court might refuse dismissal to prevent grave injustice not decided.

ON EXCEPTIONS.

This is a quo warranto before the Law Court upon exception to the dismissal of the action. Exceptions overruled.

Frank E. Hancock, for State.

Eaton & Glass, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. On exceptions. This is an information in the nature of quo warranto commenced in the name of the State of Maine, against eleven individuals who it is alleged, are illegally holding themselves out as Directors of School Administrative District #3, purportedly elected under the

provisions of Section 111-I, Chapter 364, P. L., 1957, commonly known as the Sinclair Act.

The relators describe themselves as being six residents and taxpayers of the Town of Liberty, one of the eleven towns embraced in the purported School Administrative District.

The information attacks the legality of the organization of the School Administrative District. The information sets forth in substance that the issuance of a certificate of organization by the School District Commission for the State of Maine was not in compliance with the provisions of Sections 111-F and 111-G, of the aforesaid statute, and that as a result of failure to conform with the requirements of these sections, the rights of the relators, guaranteed by the Fourteenth Amendment to the Constitution of the United States, have been infringed. It is averred that the eleven respondents are usurping the management of the public schools of the towns involved.

The information inquires by what warrant the respondents claim to have, use and enjoy the offices of School Directors and prays that investigation be made of their status and confirmed by the court, if valid; otherwise that the respondents be ousted.

The information in the nature of quo warranto was signed by the relators on July 16, 1959, and a few days later was endorsed by the Attorney General and filed in the Superior Court within and for the County of Waldo. An order of notice was issued and service duly made upon the respondents. The cause was set for a hearing and upon the day of the hearing, the Attorney General withdrew his appearance. No objection was made by the respondents to this withdrawal. The respondents promptly moved for dismissal on the grounds that the Attorney General is a necessary party in every stage in such a proceeding. The

relators objected. Over their objections, the motion was granted and the cause dismissed. To this ruling, the relators excepted and the case is before this court upon these exceptions.

The only issue presented is whether or not the Attorney General may, after commencement of an information in the nature of quo warranto by relation of private citizens, dismiss or discontinue the information as of right, in the exercise of his discretion, without the assent of the relators.

Although this issue has been resolved in other jurisdictions, insofar as this court is concerned, it appears to be of novel impression.

The relators advance three main contentions in support of their position, viz.:

(1) After an information in the nature of quo warranto, duly endorsed by the Attorney General, has been filed in court, it becomes the prerogative of the relators to pursue the case to a final determination.

(2) If the Attorney General is to be regarded as a party to the proceeding, he cannot cause an information in the nature of quo warranto to be dismissed without the concurrence of the relators, and

(3) The Attorney General has exhausted his discretionary power once he has permitted an information in the nature of quo warranto to be filed in court, and he cannot thereafter cause a proceeding to be dismissed without concurrence of the relators.

Before giving consideration to the issue involved, some discussion of the nature of quo warranto proceedings and the history of this extraordinary remedy may be of interest.

> "The writ of quo warranto is an ancient common law, prerogative writ and remedy. Indeed, it is

> one of the most ancient and important writs known to the common law. The ancient writ was in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right, or, in the case of nonuser, long neglect, misuser, or abuse of a franchise, a writ commanding defendant to show by what warrant he exercised such franchise, never having had any grant of it, or having forfeited it by neglect or abuse." 74 C. J. S. Quo Warranto, § 1 (b).
>
> "The ancient writ of quo warranto was succeeded by an information in the nature of quo warranto which was also employed to try the right to an office or franchise." 74 C. J. S. Quo Warranto, § 1 (c).

The origin of the writ may be traced to a very early date in the history of the common law. The earliest case upon record is said to have been in the ninth year of Richard I, A. D., 1198. It was frequently employed during the feudal period, and especially in the reign of Edward I, to strengthen the power of the crown at the expense of the barons. As time went on, the encroachments and abuses of the ancient writ of quo warranto to accomplish the ambitions and selfish aims of sovereignty were limited and checked by statutory enactments.

Prior to the statute of Anne, enacted in 1711, an information in the nature of a quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the crown, and it was never used as a remedy for private citizens, desiring to test the title of persons claiming to exercise a public franchise.

The information, as a means of investigating and determining civil rights between parties, may be said to owe its origin to the statute of Anne, which authorizes the filing

of the information, *by leave of court,* (emphasis supplied) upon the relation of any person desirous of prosecuting the same, for alleged usurpation of a public office or franchise.

For an interesting discussion of the history of quo warranto, see High's Extraordinary Legal Remedies, Chapter XIII, and also Spelling Extraordinary Relief, Book IV, Chapter LVII.

The history of our statutes relating to quo warranto goes back to Section 2, Chapter 54, Laws of 1821 by which Chapter the Supreme Judicial Court was established. Section 2 gives the court power to issue all writs of prohibition and mandamus, according to the law of the land, and also power to issue all processes necessary to the furtherance of justice or the regular execution of the laws. Presumably, under this last sentence the court, upon application, as provided in the statute of Anne, would have had power to issue a writ of quo warranto.

By Section 5, Chapter 96, R. S., 1840 the Supreme Judical Court was given "power to issue writs of error, certiorari, mandamus, prohibition, and quo warranto."

By the provisions of Section 1, Chapter 107, R. S., 1954, the Supreme Judicial Court and the Superior Court, are given concurrent original jurisdiction in proceedings in quo warranto.

By Chapter 63, P. L., 1911, there was enacted into law, the same provisions now included in Sections 21 and 22, Chapter 129, R. S., 1954, with the exception that the current statute permits making processes in quo warranto returnable to the Superior Court as well as to the Supreme Judicial Court.

It may be of interest to note in passing that our New Rules of Civil Procedure do not alter the practice prescribed for proceedings in quo warranto. Rule 81 (b).

As pointed out in *Burkett, Petitioner; Leach* v. *Ulmer*, 137 Me. 120, 122, 15 A. (2nd) 858, the procedure in this State is instituted by the filing of an information in the nature of quo warranto. However, there are still some states wherein, by virtue of the fact that the Statute of Anne forms a part of their common law, or by force of special statutes, the person desiring to use this process files an application therefor with a court. This different method of instituting quo warranto proceedings is perhaps one reason for the diversity of opinions bearing upon the subject in various jurisdictions. Some courts have ruled that once a court has exercised its discretionary power over an information in the nature of a writ of quo warranto to inquire into the title to a public office, in the name of the state, by a private relator, the court has expended its discretionary power and the issues of law or fact raised by the pleadings must be tried and decided. In view of the fact that one of the arguments of the relators is that once the Attorney General has exercised his discretion in lending his name to proceedings in quo warranto, the relators have the right to proceed without him, further reference to this point will subsequently be made.

While, as previously pointed out, the procedure used in this State to test the title to a public office is an information in the nature of quo warranto, brought without the necessity of prior application to a court, it would appear, that the Statute of Anne forms a part of our common law in this State and that a private citizen might file application with the court seeking authority to bring an action of quo warranto in the name of the State of Maine.

> "In this jurisdiction, although proceedings in quo warranto have usually been begun by filing an information, as the reported cases show, the ancient practice of making application for a writ of quo warranto by petition is recognized and, by implication, authorized. R. S., Chap. 116, Sec. 21. (§

> 21, Chap. 129, R. S. 1954) This statutory provision has made no change in quo warranto as known to the common law." *Burkett, Petitioner; Leach* v. *Ulmer, supra.*

It is conceded by both sides that an information in the nature of quo warranto, claiming usurpation of a public office, insofar as this State is concerned, can be instituted only at the discretion of the Attorney General, with his consent, and upon his official responsibility. For judicial support of this doctrine, we need look no further than to our own decisions.

> "The writ of quo warranto or an information in the nature thereof issues in behalf of the State against one who claims or usurps a public office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility. *Prince v. Skillin,* 71 Me. 361. This rule has been modified in this state only to the extent that when in quo warranto proceedings the title to office in a private corporation is involved the attorney-general need not be a party thereto. R. S., Chapter 116, Sec. 22." (Now Chapter 129, Section 22.) *Burkett, Petitioner; Leach* v. *Ulmer, supra.*

> "Generally speaking, the institution of a quo warranto proceeding - - - - is a matter within the discretion of the Attorney General - - - - and, in the absence of a statute providing otherwise, the proceeding cannot be instituted or maintained without his consent." 74 C. J. S., Quo Warranto, § 18.

In support of contentions of the relators that after an information in the nature of quo warranto, duly endorsed by the Attorney General, has been filed in court, it is then the prerogative of the relators to pursue their case to a final determination, it is argued that well recognized procedure in actions of this kind indicates that it is the relators

who actually conduct and bear the brunt of the litigation. A large number of cases are cited in which the process of quo warranto, upon relation of the Attorney General, was instituted by persons claiming to be entitled to a public office held by an alleged usurper. In our opinion these cases are not in point and have no particular bearing upon the issue.

The Maine Legislature enacted a statute in 1880 authorizing a person who claimed to be elected to a county office to proceed as in equity against the person holding or claiming such office. This was § 1, C. 198, P. L., 1880. This section was amended by C. 260, P. L., 1893, extending the application of the statute to include municipal officers. These statutory provisions relating to contested elections are now included as § 84 to 88, inclusive, C. 5, R. S., 1954.

Before the enactment of these statutes pertaining to contested elections, the only existing process by which the right of a person claiming to be elected to a county or municipal office could be inquired into was by quo warranto, upon relation of the Attorney General.

> "Before the passage of the act under consideration, (§ 1 C. 198 P. L. 1880) the only existing process by which right of one unlawfully holding an office could be inquired into, was by quo warranto. This writ issues in behalf of the State against one who claims or usurps an office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney general on his own motion or at the relation of any person, but on his official responsibility. It lies against an officer appointed by the governor and council or elected by the people. It removes the illegal incumbent of an office, but it does not put the legal officer in his place. It is insufficient to redress the wrongs of one whose rights have been violated.
>
> "To restore a person to an office from which he has been unjustly removed or unlawfully excluded, the

> proper process is by mandamus. By this, the rights of one lawfully entitled to an office, which has been illegally withheld, may be enforced. *Strong, Petitioner,* 20 Pick. 497.
>
> "By quo warranto the intruder is ejected. By mandamus the legal officer is put in his place. The act c. 198, accomplishes by one and the same process the objects contemplated by both these results. It ousts the unlawful incumbent. It gives the rightful claimant the office to which he is entitled. It affords a speedy and effectual remedy instead of the tedious and dilatory proceeding of the common law." *Prince* v. *Skillin,* 71 Me. 361, 366.

See also *Racine* v. *Hunt,* 116 Me. 188, 100 A. 911, and *Russell* v. *Stevens,* 118 Me. 101, 106 A. 115.

Most of the cases cited by counsel for the relators in reference to the use of quo warranto in contested elections, arose before the enactment of the statutes giving to one who wishes to contest an election, authority to proceed as in equity, and in such cases it is to be expected that the one contesting the office would actually assume the burden of the litigation.

> "An information in the nature of quo warranto must be carried on in the name of the people, but it is not necessary that the people should present or prosecute the information." *People ex rel Moltz* v. *Barber,* 289 Ill. 556, 124 N. E. 594, 596.

The remaining cases called to our attention upon this point have no application to the issue now before us.

Based presumably upon the premise set forth by counsel for the relators that it has been the practice, in cases where private individuals are actively interested, for such individuals to conduct the litigation in quo warranto proceedings instituted upon the relation of the Attorney General, the relators advance the statement that "from the review of the Maine cases it is apparent that by long-established rule

in this jurisdiction the Attorney General is not regarded as an essential participant in quo warranto proceedings after the information passes from his hands into the hands of the court."

Such a contention is without support of any authority and is in utter disregard of the history and very nature of quo warranto. The Attorney General in actions of this kind is neither a nominal plaintiff nor a co-plaintiff with the relators. He is the person essential to the institution and maintenance of the process of quo warranto and the ordinary rules existing between co-plaintiffs as to the power of dismissal without authority of the others is not applicable.

The law appears to be well established, that in the absence of a statute, the Attorney General directs and controls the proceedings.

> "Ordinarily, the Attorney General or other officer authorized to act on behalf of the State may direct and control the proceedings on an information in the nature of quo warranto." 74 C. J. S., Quo Warranto, § 27.
>
> "By the common law the relator in an information could not take any step in the cause in his own name, independently of the Attorney General. That officer was the only person whom the court would recognize, and he might dismiss the proceeding if in the discharge of his official duty he thought it proper to do so." *People ex rel Galloway* v. *Franklin County Bldg. Ass'n* 329 Ill. 582, 161 N. E. 56; *Hesing* v. *Attorney General,* 104 Ill. 292.
>
> "At common law the Attorney General, and, under the Quo Warranto Act of 1937, the Attorney General or the State's Attorney of the proper county, have an absolute, arbitrary discretion to determine whether they will institute quo warranto proceedings or not, in all cases which are of purely public

> interest. No leave of court is necessary, and the discretion vested in the State's prosecuting officers can not be controlled, coerced, or reviewed by the individual citizen." *Rowan* v. *City of Shawneetown,* 378 Ill. 289, 38 N. E. (2nd) 2, 5.
>
> "In other words, as far as the prosecution of the action is concerned, that the Attorney General is in absolute and complete control of the conduct of the proceedings, and that no matter what the nature or the extent of the interest which the relators may have therein, they are not 'parties to the action,' and consequently can exercise no control with reference thereto." *State ex rel. Cage* v. *Petroleum Rectifying Co. of California,* 68 P. (2nd) 984, 985.
>
> "This is an information at common law, not regulated by any statute, for the usurpation of an office, which the attorney general has the right to file *ex officio* in the name and behalf of the Commonwealth, at his own discretion, and leave to file which the court has no authority to grant or to withhold; and the mention of relators is mere surplusage, and does not affect the validity of the information or the form of the judgment to be rendered thereon." *Commonwealth* v. *Allen,* 128 Mass. 308, 310.

See also *Goddard* v. *Smithett, et al.,* 3 Gray (Mass.) 116, 123.

We pass now to the third main contention of the relators to the effect that "the Attorney General has exhausted his discretionary power once he has permitted an information in the nature of quo warranto to be filed in court, and he cannot thereafter cause a proceeding to be dismissed without concurrence of the relators."

We are of the opinion that the relators have confused judicial discretion with the discretion of public officers.

> "Judicial discretion is the capacity of the individual judge presiding over a particular court to perceive and apply to the facts of each case in

> judgment the law of the land, so that in each case the rights of the parties under the facts of the case may be declared and enforced according to the law of the land, and it is the exercise of the court's own judgment, within the law. It has been referred to frequently as a legal discretion, and cautious reasoning, and not a personal or individual discretion." 27 C. J. S., Discretion, Page 294.
>
> "When applied to public functionaries, the term (discretion) refers to the power or right, conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others, - - - -."
>
> 27 C. J. S., Discretion, Page 290.

The Maine cases cited by the relators, viz., *Charlesworth* v. *American Express Company,* 117 Me. 219, 103 A. 358, and *Hill* v. *Finnemore,* 132 Me. 459, 172 A. 826, involve judicial discretion and are not in point.

The relators cite § 606, High's Extraordinary Legal Remedies, for authority in support of the contention that once discretion has been exercised in granting or withholding leave to file an information, discretionary power has been exhausted. This section refers to the decision in *State* v. *Brown,* 5 R. I. 1. However, it is to be noted that this section in High's Extraordinary Legal Remedies and the Rhode Island decision refer, not to the discretion of the Attorney General, but to the discretion of the court, after the court has allowed an information to be filed. It is to be recalled that in some states, both under common law and statutory provision, leave to file an information in the nature of quo warranto may be granted or withheld by a court upon application therefor. Judicial discretion on the part of the court is not the same as the discretion vested in an Attorney General.

It should be noted that in some states, it is provided by statute that a person may bring an action of quo warranto

where his interest is merely that of a citizen, voter or taxpayer, and still in other jurisdictions it is also provided by statute that a person may institute an action of quo warranto where he has a special interest, different from that of the general public in the office in question. See 74 C. J. S., Quo Warranto, § 30 (1) (a).

Moreover, in some states it is also provided by statute that there is a distinction in the power of the Attorney General to discontinue an action where a private right is combined with a public right. See *State ex rel Security Savings & Trust Company* v. *School District No. 9,* 148 Oregon 273, 31 P. (2nd) 751; and *Rowan* v. *City of Shawneetown, supra.*

The relators cite *State ex rel Black* v. *Taylor, et al.,* 106 S. W. 1023 (Missouri), and *State ex rel Perkins, et al.* v. *Long, et al.,* 204 S. W. 914 (Missouri), in support of their third main contention.

In the first case, after holding that in the absence of a statute conferring authority, a private citizen cannot proceed by quo warranto in his own name without the interposition of a proper state officer, it was held that where the Attorney General, or a prosecuting attorney, shall exhibit an information in the nature of quo warranto, and where an information has been filed by either officer, he cannot discontinue the proceedings without the consent of the relators. The court further said that where the prosecuting attorney permitted the use of his name in an information in the nature of quo warranto, he could not at the trial control the litigation and demand the dismissal of the proceeding, but that the court would control the process.

In the second case, it was held that in an action or information in the nature of quo warranto against a school district that the real party in interest is the relator, and that he may go ahead regardless of the attitude of the prosecut-

ing attorney, However, these decisions are based upon statutes existing in the State of Missouri.

Section 2631, Article XIII, Chapter 22, Revised Statutes of Missouri, 1909, provides in part as follows:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of *quo warranto*, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney."

It is to be noted, therefore, that these decisions have no bearing upon the issue in the State of Maine where we have no applicable statute.

We are of the opinion that the institution of an information in the nature of quo warranto, upon the relation of the Attorney General, is a matter within the discretion of the Attorney General, and that the action cannot be maintained without his consent. He may, therefore, withdraw from the proceeding at his discretion, without the assent of the relators, and if he does so, the action is subject to dismissal, either on motion of the Attorney General, or, as was done in this case, upon motion of the respondents. Conceivably, a situation might arise in which the litigation has progressed to such a point where a dismissal might cause a grave injustice to the relators or the respondents. It is unnecessary for us to decide what our opinion might be in such a suggested state of circumstances. In the instant

case, the withdrawal of the Attorney General, and the dismissal of the action, upon motion of the respondents, occurred before any action had been taken by the court upon the merits of the process.

The ruling of the presiding justice was in accordance with the law.

Exceptions overruled.

LIMESTONE WATER AND SEWER DISTRICT
vs.
LIMESTONE WATER AND SEWER COMPANY

Aroostook. Opinion, June 27, 1960.

Municipal Corporations.
Districts. Election. Warrants.

An objection that voters of the *town* rather than *district* were notified and warned of an election to be held, is purely technical and without merit where the *town* and *district* are geographically coextensive and the voters of each are identical.

Where the enabling act provides for the election of a "*board of trustees*" a warrant characterizing the members as "*directors*" is not invalid because of mere misnomenclature.

ON REPORT.

This is a petition brought pursuant to P. and S. L., 1957, Chap. 59, Sec. 11, before the Law Court on report. Motion to dismiss denied. Remanded to Superior Court for further proceedings on the petition in accordance with this opinion.

Bruce S. Billings, for plaintiff.

Butler, Merrill & Bilodeau, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. On report. This was a petition brought by the Limestone Water and Sewer District to take the entire plant, property and franchises of the Limestone Water and Sewer Company for public use. The petition was brought pursuant to the provisions of the Private and Special Laws of 1957, Chap. 59, Sec. 11 and was addressed to a justice of the Superior Court who reported the case for determination of questions of law. Chapter 59 is the charter of the newly created district. The respondent company has made issue of certain alleged irregularities in the formation of the district and asks that the petition be dismissed. The parties are not in serious disagreement as to the applicable rules of law, but dare not proceed further without resolution of their legal difficulties. We are furnished with an agreed statement of facts.

Sec. 18 of the charter provided for its submission to the legal voters of the district at an election or elections, the first of which was to be held not later than November 1, 1958. Such an election would be valid only if at least 20% of the eligible voters of the district participated.

The first attempted election was held on September 9, 1957. The warrant directed a constable to "notify and warn the inhabitants of the Town of Limestone qualified to vote in town affairs." As noted above, the charter, however, provides that submission shall be to the "legal voters of the *district*" and further requires the following:

> "The board of registration shall prepare and furnish separate check lists for such of the voters *within said district* as are then legal voters of said town and reside *in said district,* and all notices, warrants or other proceedings shall be varied accordingly so as to show that only such voters as

> reside *in said district* as aforesaid are entitled to vote upon the above question." (Emphasis ours.)

Obviously there was no technical compliance with this requirement. The agreed statement shows, however, that the legal voters of the town and the legal voters of the district are the same persons. The district and the town are geographically co-extensive. The identical legal issue here presented was considered and decided in *Norway Water District* v. *Water Company,* 139 Me. 311, wherein the court disposed of this issue at page 322 in these words:

> "While it is claimed that the election as notified and held was by voters of the town of Norway, and not voters of the Water District, the fact cannot be gainsaid that the check list as prepared contained only the names of voters of the District, and ballots were cast by none others. This was specifically admitted during the hearing by counsel for the respondents. The objection is purely technical and without merit."

We conclude, therefore, that the election of September 9, 1957 satisfied the charter requirement that the first election must be held not later than November 1, 1958. It did not, however, serve as an effective referendum because the required percentage of qualified voters did not participate.

The second election held on March 10, 1958 produced no effective result and need not be considered here.

The final election was held on April 13, 1959 and for the first time the required percentage of the voters of the District exercised the franchise and a substantial majority voted to accept the charter. In this case also the form of warrant was the same as that issued for the first election. For the reasons already stated, we hold that the legality of the election was not thereby destroyed. The underlying legal philosophy was well and clearly expressed in *East Bay Util. Dist.* v. *Hadsell et al.,* 196 Cal. 725, 239 P. 38, a portion

of the opinion in which is quoted with evident approval in *Norway Water District* v. *Water Company, supra* at page 320.

One final issue remains to be considered. Sec. 8 of the charter provides in part: "All the affairs of said district shall be managed by a board of *trustees* composed of 3 members, who shall be bona fide residents of the town of Limestone, and who shall be elected by written ballot within 60 days after the acceptance of this act by the inhabitants of said district as hereinafter provided * * *." (Emphasis ours.) Pursuant to this requirement a warrant was issued for an election of "three (3) *directors* for the Limestone Water and Sewer District, as provided for in chapter 59, Sec. 8, Laws of Maine, 1957, and under procedure set forth in Chapter 90A, Sec. 37 of Revised Statutes of Maine, 1954." (Emphasis ours.) Were the persons elected "directors" legally elected "trustees" as required by the charter? We answer in the affirmative. While recognizing that circumstances may arise in which the technical distinction between "directors" and "trustees" could be important and even controlling of the result, this is not such a case. Here is involved nothing more than nomenclature. Sec. 8 of the charter, specifically referred to in the warrant, called for the election of "trustees" with no mention of "directors." Could there have existed any doubt that the purpose of the election was to choose the three guiding and managing officers of the district, called "trustees" in the charter and "directors" in the warrant? Could any voter of the district have been under any reasonable misapprehension when he cast his vote? We think not. Here again we are dealing with nothing more serious than a technical inaccuracy without legally fatal consequences. We hold that the persons elected on May 15, 1959 were elected to and now hold the offices of "trustees" within the meaning of Sec. 8 of the charter.

The entry will be

Motion to dismiss denied.

Remanded to the Superior Court for further proceedings on the petition in accordance with this opinion.

COLE'S EXPRESS, ET AL.
vs.
O'DONNELL'S EXPRESS

Kennebec. Opinion, June 27, 1960.

P.U.C. Contract Carriers. "Grandfather Clause." Evidence. Words and Phrases.

The Commission upon consideration of a tariff rate schedule is fully authorized and empowered to investigate, on its own motion, the matter of lawful operations and practices. (R. S., 1954, Chap. 48).

A respondent upon the filing of a rate schedule asserts inferentially that it is authorized to perform the transportation and may be required to prove such facts. (R. S., Chap. 44, Sec. 71.)

It is proper for the Commission to refuse to admit evidence of subsequent operations where no evidence of operations has been produced covering the "grandfather clause" test period.

"Liquid Petroleum" is not a compressed gas as are oxygen and acetylene.

ON EXCEPTIONS.

This is an action before the P. U. C. The case is before the Law Court upon exceptions. Exceptions overruled.

Raymond E. Jensen, for Cole's Express and for Fox & Ginn and Bemis Express.

Frank M. Libby, for Commission.

Douglas M. Morrill, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN DUBORD, SIDDALL, JJ.

WEBBER, J. In 1958 O'Donnell's Express, a corporation engaged in motor truck transportation, filed a tariff schedule with the Public Utilities Commission. The proposed rates covered services to be performed as a contract carrier transporting propane gas in steel cylinders from Portland and South Portland, Maine to Fort Fairfield, Fort Kent, Houlton, Presque Isle and Sherman Mills, Maine and returning the empty steel cylinders to points of origin. O'Donnell held no specific permit to offer the particular service but relied upon the scope of the permit issued to its predecessor, George C. O'Donnell, as a matter of right under the so-called "grandfather clause." This was an unclarified permit authorizing operation as a contract carrier "within the general area and/or for the general purposes" within which Mr. O'Donnell had been regularly engaged in transporting freight and merchandise for hire over the highways of Maine from March 1, 1932 to June 30, 1933, the statutory test period. P. L., 1933, Chap. 259; R. S., Chap. 48, Sec. 23, Subsec. III as amended.

The intervenors, admittedly certified common carriers serving in the same area, requested that the commission investigate and reject the rates on the ground that O'Donnell was without authority to engage in the proposed transportation. The commission first examined the original permit as well as the clarifying testimony of George C. O'Donnell given on August 31, 1933 which is part of the record here. Being still unable to determine the scope of the business which O'Donnell might do as a matter of right under its permit, the commission, having previously suspended operation of the proposed tariff schedule for a period of three months, set the matter for hearing and ordered the respondent O'Donnell to appear and show cause, if any it had,

why it should not cease and desist from performing or attempting to perform the transportation service in question.

After hearing, the commission concluded that the respondent had failed to show that it had ever been authorized to perform this particular transportation service and thereupon ordered the respondent to cease and desist therefrom. Several exceptions raise issues for consideration here.

The respondent contends that the complaint lodged by the intervenors was really addressed to the schedule of rates filed and that the commission should have done no more than to reject the proposed tariff or prescribe minimum rates. It is urged that the commission was without power or authority to go further and upon its own motion order the respondent first to show cause and ultimately to cease and desist. It is apparent from a reading of the provisions of R. S., Chap. 48 that the commission is fully empowered to investigate, even upon its own motion, the unauthorized and unlawful operations or practices of carriers, and after a full hearing, to order that such carriers cease and desist. In this case the rates filed were meaningless if the carrier was without authority to haul the freight and the commission quite properly proceeded to a full and final determination of the basic underlying question.

The respondent complains that it should not have been compelled to assume the burden of proving that it was authorized to perform the transportation in question. When, however, the respondent filed its rate schedule, it asserted inferentially that it was so authorized. When the commission put the matter in issue by its show cause order, the burden of proof devolved upon the respondent by application of the provisions of R. S., Chap. 44, Sec. 71:

> "In all trials, actions and proceedings * * * growing out of the exercise of the authority and powers

> granted herein to the commission, the burden of proof shall be upon the party adverse to the commission or seeking to set aside any determination, requirement, direction or order of said commission complained of as unreasonable, unjust or unlawful as the case may be."

The respondent insists that while the commission purported to act under the provisions of R. S., Chap. 48, Sec. 23, Subsec. IV as amended, which deals primarily with the filing and approval of reasonable rates and charges, it actually heard and decided the case as though it arose under the provisions of Subsec. III as amended which is concerned essentially with the granting and clarification of permits to contract carriers. The respondent cannot and does not assert that it did not have ample notice of the issues to be determined at the "show cause" hearing. In fact it came to the hearing prepared to try this issue, the scope of its authority under its permit, and offered relevant evidence in an effort to demonstrate to the satisfaction of the commission that it had authority to carry propane gas and empty cylinders between the points shown in its proposed rate schedule. It is apparent from the record that the commission held itself ready at all times to pass upon the rates filed if it could first satisfy itself that the respondent had authority to perform the service covered by the rates. There is nothing mutually exclusive as to the two subsections and when, as here, the extent of authority is inseparably connected with the approval of rates, the commission has not only the power but the duty to determine the preliminary issue before turning to any consideration of the rate schedule.

The commission clarified the original permit issued as of right under the "grandfather clause" only to the extent necessary to resolve the limited issue of authority raised by the filing of the rate schedule. There was no necessity to do more in this proceeding and no more was requested. The respondent has in no way been deprived of the right af-

forded by Subsec. III to request that the commission further and fully clarify its permit. There is no reason to assume that the commission would not grant any such request upon a reasonable showing of necessity therefor and in a resulting hearing the respondent would have opportunity to offer evidence of the full extent of its operations during the test period. The respondent is in no way prejudiced by the limited scope of the clarification engaged in by the commission in this proceeding.

The respondent has excepted to the exclusion of certain exhibits. These were slips purporting to show with the aid of some extrinsic evidence five shipments of propane gas cylinders, some full and some empty, in interstate commerce between November 8, 1933 and December 22, 1933. Subsec. III provides in part that at a hearing for the purpose of clarifying the so-called "grandfather rights" of a contract carrier, "evidence of *regular operation* as a contract carrier from March 1, 1932 to June 30, 1933 may be submitted, and the carrier may supplement same by evidence of *regular operation* subsequent to said period." (Emphasis ours.) It must be noted at once that there was no other evidence offered of any transportation of either propane gas or empty cylinders therefor. This problem was before the court in *Public Utilities Comm.* v. *Gallop*, 143 Me. 290, wherein we said at page 300:

> "In order to throw light upon the true meaning of the original permit, the subsequent operation must be a *regular operation and it should be an operation based upon, connected with, and explanatory of the services performed during the test period.* To meet this test, and to make the evidence of subsequent regular operation admissible, the groundwork therefor should be laid by the introduction of sufficient evidence of operations *during the test period* so that the relevancy of the offered testimony may appear at the time when offered. It was upon this theory, and the failure by the respond-

> ent to connect or relate his offered evidence pertaining to subsequent operations with operations within the test period, that the commission excluded the testimony, which exclusions form the basis of exceptions * * * ." (Emphasis supplied.)

So here no foundation had been laid for the admission of evidence bearing on *subsequent* operations since no evidence had then been or was ever offered of either a "regular operation" or in fact any operation at all involving propane gas during the test period. The commission correctly excluded the exhibits.

The commission found:

> "The evidence presented in the instant proceeding by respondent is not sufficient to warrant a finding that gases generally and incident thereto empty cylinders were being transported by respondent either during or subsequent to the test period so-called."

Respondent says that this finding was contrary to all of the evidence. The commission accurately summarized the evidence by saying:

> "The record before us indicates that respondent transported seven less-than-truck-load shipments of oxygen and acetylene gas in steel cylinders from Portland to Houlton, Maine, and sixteen less-than-truckload shipments of empty cylinders from Houlton to Portland, Maine during the period April 12, 1932 to February 4, 1933 inclusive. There is no showing by respondent that it transported propane gas (LP) in intrastate commerce during the test period so-called; in fact, it appears extremely doubtful that this product was available for transportation in quantity prior to 1936. Nor is there evidence of record that respondent undertook the transportation of this product when it did become available. * * *
>
> "To be entitled to transport gases generally there should be a comprehensive showing that di-

> versified types of gases were being hauled with reasonable regularity. * * * It follows then that the mere showing of the transportation of a limited number of shipments consisting of oxygen and acetylene gases during the test period without more does not sustain a finding that respondent possesses the authority to transport the particular item propane (LP) gas.
>
> "Although there is no arbitrary formula by which to determine the number of shipments necessary to establish regular operation, the standard 'regular operation' carries the connotation of substantial as distinguished from incidental, sporadic or infrequent service. See *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942). We are of the opinion that respondent has failed to meet this standard. It would then appear that by performing the transportation here at issue, respondent is instituting a new operation for which it lacks the necessary authority from this Commission."

We are satisfied that the commission thus correctly stated and applied the applicable law.

Moreover, the commission noted that propane "gas" is in reality a liquid in the course of transportation and "is not considered a compressed gas as are oxygen and acetylene gases, neither of which is liquefied." Safety factors and other practical problems of transportation are by no means the same as between the gases and this liquefied petroleum product. Our review of the record satisfies us that the commission's findings of fact were fully supported by substantial evidence and its rulings of law were correct.

Exceptions overruled.

C. M. T. COMPANY, INC.
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Kennebec. Opinion, June 27, 1960.

M.E.S.C. Agricultural Labor. Exemptions. Hatchery Employees.

A broiler producer's hatchery employees working at a leased henhouse upon the farm of another do not qualify for agricultural exemption under the M.E.S.C. law which limits the agricultural exemption to "services performed on a farm in the employ of the operator of such farm . . ." P. L., 1957, Chap. 381, Sec. 2.

N. B. in 1959 the 1957 amendment was repealed and the M.E.S.C. law restored to its previous status.

ON APPEAL.

This is an appeal from a ruling of the Maine Employment Security Commission. Appeal denied. Judgment for the Commission.

Weeks, Hutchins & Frye, for plaintiff.

Milton L. Bradford,
Frank A. Farrington, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. The appellant C. M. T. Company, Inc. is engaged in the business of producing "broiler" chickens from the egg to the processed bird ready for market. The company leases a henhouse in which is produced about 10% of the eggs required in the company's operation. The company has no interest in the other activities carried on at the farm where the leased henhouse is located. The remaining egg

requirements, about 90% of total, are filled by purchase from independent producers. The eggs are incubated and hatched in a building devoted to that and to no other purpose and which is owned and operated by the company. This "hatchery" so-called is located on a six acre tract on which no ordinary farm operations are conducted. The company owns or controls several farms on which about 10% of the hatched chicks are raised to the size and weight necessary for "broilers." The remaining chicks, again about 90% of total, are raised on the farms of persons who contract with the company to undertake this service and who are ultimately paid a contract price based on the poundage of birds delivered to the company to be processed as "broilers." The company has no interest or concern in any of the other farm operations conducted by these independent contract growers. There are a number of employees of appellant who operate the company's "hatchery" and the issue here is whether or not their employment during part of 1958 and 1959 constituted "agricultural labor" exempt from the provisions of the Maine Employment Security Law.

Until an amendment was enacted in 1957, the term "agricultural labor" was defined by the applicable portions of R. S., 1954, Chap. 29, Sec. 3, Subsec. I as including "all services performed: A. On a farm, in the employ of any person, in connection with * * * the raising * * * of * * * poultry. * * * C. In connection with * * * the hatching of poultry * * * ." Obviously, "hatchery" employees were not engaged in taxable employment under the express terms of this definition of "agricultural labor" which was made exempt by other provisions of the law. The 1957 amendment, however, provided a new definition of "agricultural labor," the pertinent provisions of which were:

> " 'Agricultural labor' includes all services performed *on a farm in the employ of the operator of such farm,* in connection with * * * the raising

> of * * * poultry * * * . * * * The term 'farm' shall include * * * poultry * * * farms * * * ." P. L., 1957, Ch. 381, Sec. 2. (Emphasis ours.)

This definition remained in effect until in 1959 by further amendment the original definition was restored. We are here concerned only with the relatively short period during which the 1957 definition was in effect. It is apparent that this definition was far more restrictive than that which obtained before and since and the "hatchery" employees were then engaged in taxable employment unless the "hatchery" constituted a "farm" within the meaning of the statute.

The appellant admits that the "hatchery" taken alone could not properly be considered a "farm" but urges that when viewed as an essential part of appellant's total enterprise, it is part of what should properly be considered as one great farming enterprise or "farm" within the meaning of the statute.

It would be difficult to define with precision what constitutes a "farm" in this day of mechanized agriculture. In the instant case, however, our task is made somewhat easier by the fact that the "hatchery" alone has attributes which give it a commercial and industrial aspect rather than an agricultural one. Aside from the artificially induced hatching of eggs and the care and feeding of newly born chicks for a very brief period, not one of the operations usually associated with a "farm" is conducted there. Under such circumstances where the "hatchery" alone was considered, the court held it not to be a "farm" in *Wilson* v. *Oklahoma Employment Security Commission* (1951), 204 Okla. 501, 231 P. (2nd) 664. We need only inquire whether or not the "hatchery" by integration into the operation of several farms has lost its status as an independent commercial activity.

We cannot agree with the contention of the appellant that the farms of the contract growers are "operated" by it with-

in the meaning of the statute and it seems important that 90% of the company's chicks are raised on the farms of these completely independent growers. In short, the appellant's business consists almost entirely of three parts, (a) the buying of eggs from independent producers, (b) the hatching of eggs at appellant's "hatchery," and (c) the raising of the birds by contract with independent farmers. We see here no integration of the "hatchery" operations into the operations of a "farm" or "farms" owned or operated by the appellant. In addition, as we have seen, the company raises about 10% of its eggs for hatching in a leased henhouse on a farm, all the other operations of which are conducted independently by the farmer lessor; and the company raises about 10% of the chicks on its own farms. The latter activities are so limited in scope when balanced against the company's method of conducting most of its business that they seem incidental thereto and entirely inadequate to deprive the "hatchery" of its commercial status.

The legislature in 1957 could have had no other purpose than to restrict the scope of the agricultural exemption to rather narrow limits. The language employed closely limited exempt employment to services performed "on a farm in the employ of the operator of such farm," quite significantly eliminating the specific exemption previously given to services in connection with the "hatching of poultry" wherever performed. In 1956 we had held that the exemption afforded by the then existing law extended to services of employees of a concern like this appellant when rendered on the farms of the contract growers. *Maplewood Poultry Co.* v. *M. E. S. C.*, 151 Me. 467. In that case, speaking of the "broiler" industry, we said at page 472:

> "It may be necessary that because of the tremendous growth of this industry in Maine, in a comparatively few years, and the necessary employment of possibly hundreds of persons, that the law should be changed to cover them. However,

> that is not for this court; that duty devolves on the legislature to amend the law, if it sees fit, by what it may deem to be appropriate legislation."

Whatever the legislative motivation may have been, the language of the 1957 amendment was certainly calculated to remove many employees of the industry from the scope of the exemption. We are satisfied that until the exemption was again broadened in 1959, the legislature intended that the words "on a farm in the employ of the operator of such farm" should be given the somewhat restricted meaning which we have attributed to them in this opinion.

Appeal denied.

Judgment for the Commission.

AUBURN WATER DISTRICT
vs.
PUBLIC UTILITIES COMMISSION ET AL.

Kennebec. Opinion, July 6, 1960.

P.U.C. Water Rates. Municipal Corporation. Contracts. Bonded Indebtedness.

The regulation of Public Utilities lies with the Legislature, not the Executive or Judiciary.

Utility rate contracts between utilities and towns are subject to the regulations of the Public Utilities Commission, unless excepted by the Legislature in express terms or by necessary implication.

The usual principles governing the regulation of rates of privately owned utilities do not operate in the case of the publicly owned water district.

The P.U.C. must act within the limits of authority given by the Legislature even though it might seem to the Commission unfair to present users to require them to pay within 30 years indebtedness

incurred to pay for extensions or other property with a much longer useful life.

ON PETITION.

This is a petition in equity to review the action of the P. U. C. denying approval of water rates for the City of Auburn. Cause remanded to the P. U. C. So ordered.

Frank W. Linnell,
Paul Choate,
G. Curtis Webber, for the Water District.

Peter Kyros, for the Commission.

SITTING: WILLIAMSON, C. J., TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ. WEBBER, J., did not sit.

WILLIAMSON, C. J. This is a petition in equity under R. S., c. 44, § 69, by the Auburn Water District to review a decision of the Public Utilities Commission denying approval of rates established by the trustees. The Commission denied the petition on the ground that the annual water rate of the City of Auburn and the 30 year limitation on the life of the bonds of the District, both fixed by statute, make it impossible for the Commission to perform its duty to set reasonable rates.

The District and the Commission agree that the sole questions concern the city water rate and the limitation on the life of the bonds. There is no disagreement upon the facts. At oral argument counsel for both parties advised the court that it would be unnecessary for the court to examine the testimony taken before the Commission, as only issues of law are here raised.

The Auburn Water District, a quasi municipal corporation of the type well known throughout Maine, was granted a charter by the Legislature in 1923 (P. & S. L., 1923, c. 60,

"An Act to Incorporate the Auburn Water District"). The charter provides "All the territory and people constituting the city of Auburn except that portion of said city and the people therein within (certain boundaries) shall constitute a public municipal corporation. . ." (§ 1). The public water facilities at that time owned by the city were transferred to the new district. (§ 2.)

As consideration for the transfer, the district assumed the indebtedness and liability incurred by the City of Auburn and the Auburn Water Commissioners. Section 3 continues

> "As further consideration for the transfer and conveyance of the property and rights described in the foregoing section, the amount which the city of Auburn shall be required to pay to said Auburn Water District for water for all municipal purposes is hereby limited and fixed at the sum of three thousand dollars per year."

Other pertinent provisions of the charter are as follows:

> "Every issue of bonds shall be payable within a term of thirty years." (§ 13.)
>
> "**Sec. 14. Bonds, how payable; sinking fund may be created.** Bonds issued by said Auburn Water District under authority of this act shall be payable in such annual installments as will extinguish each issue in thirty years from its date; and the amount of such annual installment in any year shall not be less than the amount of the principal of said issue payable in any subsequent year; or in lieu of such provision for serial payments, said Auburn Water District shall create a sinking fund by setting aside annually from its income such amount as shall be sufficient with interest accumulations to extinguish and pay at maturity any issue of bonds which contain no provision for serial payment as aforesaid. The money so set aside shall be devoted to the purchase or retirement of the obligations of said district, or invested in se-

curities legal for savings banks in the state of Maine.

"**Sec. 15. Property exempt from taxation.** The property, rights and franchises of said district shall be forever exempt from taxation.

"**Sec. 16. Rates, how established and paid.** All individuals, firms and corporations, other than the city of Auburn, shall pay to the district the rates established by the board of trustees for the service and water used by them. Said rates shall be uniform within the territory supplied by the district and subject to the approval of the public utilities commission."

The Commission, in finding that the $3,000 water rate paid by the City of Auburn was not just and reasonable, said:

"Obviously, a 1923 charge relating to conditions as existed at that time cannot be considered adequate or equitable at the present time."

It is not necessary, as we have seen, to consider the factual situation. The issue is not whether the charge to the city in itself is just and reasonable. In discussion of this issue of law, it is sufficient to note that the Commission has declined to act upon the request of the District because of the inclusion of the city water rate fixed by the 1923 Legislature. The question then arises whether the Commission is bound to accept the charge or rate so fixed and then to proceed to determine whether the rates established by the trustees of the District should be approved.

It is well understood that the regulation of public utilities is a function of the Legislature. The regulation of public utilities lies with the Legislature and not with the Executive or Judiciary. The Public Utilities Commission, established under Laws 1913, c. 129, was given jurisdiction of all public utilities unless the Legislature plainly indicated otherwise. The Legislature thus placed in the hands of its

agents, namely, the Commission, broad powers of regulation and control of public utilities. The power of the Legislature was not, however, surrendered, but delegated. The Commission has no life except as life is given by the Legislature.

The Commission in refusing to act relies heavily upon the leading cases of *Guilford Water Company,* 118 Me. 367, 108 A. 446; *Searsport Water Co. & Lincoln Water Co.,* 118 Me. 382, 108 A. 452. In these cases the court held that contracts between a water company and a municipality made prior to the 1913 Act must give way to rates established in the exercise of the usual principles of utility regulation by the Commission. In short, as the court said in *Guilford,* at page 374, ". . . the contract is subject to state restriction, and to regulation in the interest of the general public. . ."

In *Searsport* it was again held that contracts between utilities and towns did not preclude regulation by the Commission. The court said, on page 393: "All contracts relating to the public service are entered into in contemplation of the exercise of the right of the State's regulatory powers whenever the public interests may require." Further, the court said, speaking with particular reference to the contracts made prior to the establishment of the Public Utilities Commission, at page 394:

> "The main purpose of such legislation, viz: to secure adequate service to the public at just and reasonable rates, might, in a large measure, be defeated by the exemption from the operation of such laws of all rates fixed by contract entered into prior to their taking effect. No rates, however fixed, should, we think, be regarded as exempted from such general regulatory powers as are contained in Chapter 55 (now R. S. c. 44), *unless excepted in express terms or by necessary implication.*"

The court clearly recognized in the words we have underscored that the Legislature had the power to exempt from the general regulatory power.

The Auburn Water District charter was enacted in 1923, ten years after the establishment of the Public Utilities Commission, and four years after the *Guilford* and *Searsport* decisions. We may properly assume that the Legislature had in mind not only the 1913 Public Utilities Act, but also the decisions construing the Act, in fixing a water rate for Auburn and a limitation upon the life of bond issues.

The argument of the Commission is that the regulation of water districts was placed in its hands by the 1913 Act, now R. S., c. 44. Without question, this is in general terms a fair statement. The Commission, however, fails to take into consideration that the Legislature may limit the power of its agent, the Commission, if it so pleases. In what plainer words could the Legislature have established the amount required to be paid annually for water services by the city? The amount is fixed at $3,000. (§ 3.) Under Section 16 the trustees establish the rates except for the city and such rates (i.e. the rates so established) are subject to approval of the Commission.

The usual principles governing the regulation of rates of privately owned utilities do not operate in the instant case. We have here no problem involving a proper rate of return on the property of the utility. See for example *New England Tel. & Tel. Co.* v. *Public Utilities Commission,* 148 Me. 374, 94 A. (2nd) 801; *CMPCo.* v. *Public Utilities Commission,* 150 Me. 257, 109 A. (2nd) 512; *CMPCo. Re Contract Rate,* 152 Me. 32, 122 A. (2nd) 541.

The Auburn Water District, like other districts, is not entitled to and it does not seek any given rate of return on its property. In general, what it requires is sufficient in-

come to meet current expenses of operation and maintenance with provision for necessary extensions and renewals, and payment of interest and indebtedness. The Auburn Water District charter unlike many such charters does not state the specific purposes including bond retirement for which rates may be charged. Such charters usually require that the rates provide each year a sum equal to a stated percentage of the bonded indebtedness. A typical example is South Berwick Water District, P. & S. L., 1959, c. 61, § 13, "**Water rates; application of revenue; sinking fund. III** . . . not less than 1% nor more than 5% of the entire indebtedness" for a sinking fund, or retirement of not less than 1% of the bonds each year. For the history of provisions relating to income of water districts see *Waterville* v. *Kennebec Water District, et al.*, 138 Me. 307, 316, 318, 25 A. (2nd) 475.

It is plain therefore that the rates of the Auburn Water District will be sufficient for the purposes of the district if they provide for the items indicated including the retirement of the bonds within the authorized life.

Let us assume the city under its fixed rate is not paying its fair share of the expenses of the district and that the burden is thus shifted to the other rate payer. What authority, we may ask, has the Commission to correct the imbalance?

The Commission must act in accordance with the authority given by the Legislature. It must accept the city water rate fixed by the Legislature, and must direct its attention to the approval or disapproval of the rates established by the trustees in light of the needs of the District.

The Commission in our view falls into a like error in refusing to approve rates designed to pay bonds within their limited life. The Legislature in its judgment has said "every issue of bonds shall be payable within a term of 30

years" with certain provisions for serial payments or sinking fund. The Commission takes the position that it is unfair to the present users to require them to pay within 30 years indebtedness incurred to pay for extensions or other property with a much longer useful life. Here again the Commission fails to note the difference between the publicly owned water district and the privately owned utility. It might be an intolerable burden upon the customer of a private utility to force, for example, too rapid retirement of debt from income. The yardstick of rate regulation designed for the private utility is not a suitable measure for use with the quasi municipal water district.

There is a further and compelling reason why the Commission cannot be said to control this issue. It is well understood that the property of the inhabitants of a water district is liable for its debts. The Legislature very properly may have considered it was wise to require that the load of debt weighing against the inhabitants should be lifted within a period of 30 years.

Restrictions upon the issuance of bonds by water districts are repeatedly found in our legislative history. The acceptance of such regulation by the Legislature for nearly half a century since the adoption of the Public Utilities Act in 1913 is shown in charter after charter. Without question, the Legislature could have placed the regulation of bonds including their life and income to meet their payment in the hands of the Commission. In this instance the Legislature plainly did not do so.

We express no view upon what action the Legislature may or may not take to alter or change the provisions relating to the city water rates, or the issuance of bonds. It will be time enough to consider these matters when and if the Legislature acts. Our inquiry has been directed to ascertain the intention of the Legislature and then to determine whether the intention can be carried out by the Commission.

We conclude that it is the duty of the Commission in passing upon the rate structure of the Auburn Water District to take into account: first, that the city water rate is fixed by charter at $3,000, and second, that bonds must be extinguished within 30 years.

The petition in equity must be sustained. The order of the Commission is hereby annulled to the extent of the unlawfulness thereof as set forth in this opinion. The cause is remanded to the Public Utilities Commission (1) for the consideration of the rates of the Auburn Water District under the principles herein set forth upon the present record or such further evidence as the Commission may receive in its discretion, and (2) for entry of an order of which a copy shall be filed by the Public Utilities Commission with the Clerk of the Law Court in the County of Kennebec within 10 days after the date of said order. The petition in equity is retained on this docket until final disposition thereof.

So ordered.

STATE OF MAINE
vs.
REYNALD A. COUTURE, APPELLANT

York. Opinion, July 20, 1960.

Criminal Rule 15. New Trial. Error. Escape. Detention. Pleading. Speedy Trial. Waiver.

Where manifest errors of law exist and injustice will result, such errors may be examined upon motion for a new trial.

An indictment which recites that the "escape occurred while the respondent was *lawfully detained* in the county jail at said Alfred" is but a statement of a legal conclusion, and such allegation is inadequate unless sufficient facts are alleged to show the lawfulness of the detention.

One who has been convicted and sentenced to imprisonment should not be unreasonably detained. The reasonableness of detention prior to delivering the prisoner depends upon circumstances. The issue of the reasonableness of the detention is a matter of law for the court—not a jury question.

One charged with crime is guaranteed a speedy trial by the Constitution. The issue of speedy trial may be raised by motion. Motion to quash or plea in abatement. This right may be waived.

Whether respondent waived his constitutional rights to speedy trial are questions of law to be decided by the court within its discretion—not questions of fact for a jury.

ON MOTION FOR NEW TRIAL.

This is a criminal action before the Law Court upon motion for new trial. Appeal sustained. New trial granted.

Donald P. Allen, for Applt.

Marcel J. Viger, County Attorney, for the State.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. This case, argued at our May 1960 Term, is before us upon an appeal from the denial of a motion for a new trial filed by Reynald A. Couture, after a conviction in the Superior Court within and for the County of York for his alleged escape from the County Jail in violation of Section 28, Chapter 135, R. S., 1954.

Under the provisions of Rule 8 of the Rules of Court, relating to Appellate Procedure For Indigent Defendants In Criminal Cases (now Rule 15 of Maine Criminal Rules), an abbreviated record was prepared for the use of this court and in the record is contained a stipulation of facts signed by counsel for the State and for the respondent. The chronology of events appears to be as follows:

Reynald A. Couture having pleaded guilty in the Superior Court of York County to the crime of breaking, entering and larceny in the nighttime, was ordered committed to the Reformatory for Men at Windham, in the County of Cumberland. A mittimus directed to the Sheriff of the County of York, or any of his deputies, dated March 1, 1957 was handed to the Sheriff and the prisoner immediately taken into custody and placed in the County Jail for the County of York, pending his transfer to the Reformatory for Men at Windham. In the mittimus is included this clause: "We therefore command you, the said Sheriff or any of his deputies, *forthwith* (emphasis supplied) to convey the said Reynald A. Couture to the State Reformatory for Men aforesaid, and him deliver to the Superintendent thereof." No emergency existed at the time such as sickness, quarantine or impassability of roads. The Reformatory is located about 20 miles from the County Jail in Alfred, Maine. The prisoner was not transported immediately to the Reformatory, but was held in the County Jail from March 1, 1957 to March 6, 1957. The reason given by the Sheriff for failure to take him to the Reformatory earlier was that he and his deputies were busy investigating other

criminal matters throughout the county. It is stipulated that there were 38 or 40 deputies on the Sheriff's staff.

On March 6, 1957, while the turnkey was held by a prisoner, the doorway to the cell block was opened and several prisoners left the jail. Couture was seen leaving the side door to the jail with other prisoners. He was captured and returned to the jail within a few hours. On March 8, 1957, he was transferred to the Reformatory and delivered to the Superintendent.

At the May 1957 Term of the Superior Court within and for the County of York, the grand jury returned an indictment against Couture charging him with escape in violation of Section 28, Chapter 135, R. S., 1954. It is stipulated that no copy of the indictment was sent to Couture while he was in the Reformatory, and that he had no knowledge of the existence of the indictment until December 31, 1957, when he was arrested on a capias issued on the indictment by the Superior Court of York County. It is also stipulated that at no time between the May 1957 Term of the Superior Court and the January 1958 Term was any counsel appointed by the court to represent the respondent.

At the January 1958 Term, counsel was appointed by the court to represent the respondent and a copy of the indictment was furnished to him.

Prior to his arraignment, counsel for the respondent filed a motion to quash the indictment. This motion alleged in substance that the indictment was inadequate because of insufficient allegations and that the respondent had been denied his constitutional right to a speedy trial. The motion to quash was denied and exceptions noted and allowed. These exceptions were not prosecuted.

Counsel for the respondent then filed a plea in abatement, praying that the indictment be dismissed for the reason that the constitutional rights of the respondent had

been violated in that he had not been furnished with a copy of the indictment, and that he was denied his right to a speedy trial. The plea was dismissed. To this ruling the respondent excepted. These exceptions were allowed, but were not prosecuted.

The respondent then entered a plea of not guilty and before trial, counsel made a statement for the record to the effect that the constitutional rights of the respondent were being reserved and not waived. Upon trial, the respondent was found guilty and sentenced to serve not less than two and one-half years nor more than five years in the State Prison, and committed in execution thereof.

The respondent then filed a motion for a new trial and upon denial of the motion, he took an appeal, which is now before us.

The reasons alleged by the respondent in support of his appeal are substantially as follows:

(1) The verdict is against the law because the respondent was not informed of the nature of the charge against him by the furnishing of a copy of the indictment, and that he was denied a speedy trial, all in violation of his constitutional rights.

(2) Because the verdict is against the evidence in that he was not being lawfully detained as specified in Section 28, Chapter 135, and thus could not be guilty of the crime charged.

(3) That the verdict was against the weight of the evidence in that the respondent did not escape as alleged, and

(4) The charge of the presiding justice does not include a definition of what constitutes a waiver by the respondent of his constitutional rights.

It has frequently been held by this court that on appeal, in a criminal case, the issue is whether, in view of all the

evidence, the jury was warranted in believing beyond a reasonable doubt the guilt of the respondent. This rule has so often been repeated that citation of authority appears to be unnecessary.

A study of the stipulated facts relating to the issue of the alleged escape convinces us that the evidence was such that the jury, in the light of instructions given them by the presiding justice, was warranted in believing, beyond a reasonable doubt, the guilt of the respondent. If that were all there is to the case, we might well stop at this point. In an ordinary criminal case, when this court is satisfied that the evidence supports a verdict of guilt, there is no reason to invoke the doctrine previously propounded that errors of law, improperly presented, may be considered upon an appeal, when injustice may result, if counsel has not seen fit to attack an inadequate indictment in accordance with the regular rules of criminal pleading. However, a careful study of the record convinces us that manifest errors exist and injustice will result unless these errors are examined upon this appeal. Authority for such procedure on the part of this court is abundant.

> "In our practice, in civil cases, errors of law are not as a general rule open to review on a motion for a new trial directed to this court. The same general rule applies to statutory appeals in criminal cases. The appropriate practice is to present such errors to this court in a Bill of Exceptions, and a departure from this practice is not to be encouraged.
>
> "In civil cases, however, an exception to this general rule has been recognized, and where, and only where, manifest error in law has occurred in the trial of cases and injustice would otherwise inevitably result, the law of the case may be examined upon a motion for a new trial on the ground that the verdict is against the law, and the verdict, if clearly wrong, set aside.

> "The same exception must be recognized in the review of criminal appeals. In this state the principles applicable to the review of civil trials on a general motion govern appeals in criminal cases." *State* v. *Wright,* 128 Me. 404, 406; 148 A. 146; *State* v. *Hudon,* 142 Me. 337, 52 A. (2nd) 520.

The proper procedure to test the adequacy of an indictment is, of course, by filing a demurrer before trial. If the demurrer is overruled, a respondent may take exceptions and prosecute those exceptions in this court; or he may wait until after a finding of guilt and file a motion in arrest of judgment, and if overruled, the same method of relief, by way of exceptions, is afforded to the respondent.

In the instant case, counsel for the respondent filed a motion to quash the indictment. Such a motion is addressed to the discretion of the court and is not exceptionable, unless abuse of authority is shown. *State* v. *Mallett,* 123 Me. 220, 122 A. 570.

While it has been generally held, as previously pointed out, that no exceptions lie to the refusal of the court to quash an indictment, it would seem that perhaps there is an exception to this rule where a motion to quash is filed in cases where the respondent contends that his constitutional rights were violated. See *State* v. *Slorah,* 118 Me. 203, 106 A. 768. In any event, the exceptions were not prosecuted.

Counsel for the respondent, in his motion for a new trial alleges as grounds for a new trial reasons which cannot ordinarily be considered under such procedure. In his motion, among other grounds not ordinarily heard under a motion for a new trial, counsel attacks the charge of the justice, in relation to what constitutes a waiver of constitutional rights by one charged with crime.

If counsel for a respondent objects to any portion of the charge of the justice, correct practice is to have his exceptions noted to designated portions of the charge and prose-

cute his exceptions in this court. Likewise, if counsel for a respondent is of the opinion that the charge of the justice is insufficient, it is his duty to request that the court charge the jury in accordance with his conceptions of the applicable law, and if these instructions are refused, the respondent may protect his rights by taking exceptions and prosecuting the same. This procedure was not followed by counsel for the respondent.

Nevertheless, as we have previously stated, because of the fact that grave injustice may result unless these different questions are examined, we have concluded to make such an examination.

There are the following points for consideration:

(1) The sufficiency or insufficiency of the indictment.

(2) The lawfulness of the detention of the respondent at the time of his alleged escape.

(3) The question of whether or not the constitutional rights of the respondent were violated, and if so, whether or not he waived such violation; and

(4) Whether or not certain portions of the charge of the justice were erroneous and prejudicial to the respondent.

Section 6, Article I of the Constitution of Maine provides that in all criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation and have a copy thereof; and to have a speedy, public and impartial trial.

We first give consideration to the issue of the sufficiency or insufficiency of the indictment.

The statute which the State contends the respondent violated is Section 28, Chapter 135, R. S., 1954, and reads as follows:

"Whoever, being lawfully detained in any jail or other place of confinement, except the state prison, breaks or escapes therefrom, or attempts to do so, shall be punished, etc."

"The very foundation of the crime of escape is the lawful confinement of the prisoner; and therefore, it is a well-established rule that when the imprisonment is unlawful the reason which makes flight from prison an offense does not exist." 19 Am. Jur., Escape, § 10.

See also 30 C. J. S., Escape, § 5.

"The indictment or information must charge every necessary ingredient of the offense with reasonable certainty." 30 C. J. S., Escape, § 25 (b) (1).

"An indictment or information for escape should aver facts from which the lawfulness of the custody of the prisoner may appear." 30 C. J. S., Escape, § 25 (b) (2a).

"One of the essentials of a lawful detention in a jail is that the commitment thereto be made by lawful authority. That is an essential traversable fact which must be established by the state to make out a prima facie case. * * * * * The indictment fails to show upon its face any facts from which the lawfulness of the commitment may be determined. It does not show by whom or by what authority the commitment was made. There is not even a direct allegation that he was *'lawfully'* committed. Although the indictment follows the language of the statute and alleges the escape 'while being then and there lawfully detained in the Cumberland County Jail,' this allegation is not sufficient. It sets forth no facts from which the lawfulness of the detention may be determined. Nor is it aided by the allegation with respect to the commitment. That allegation neither alleges its lawfulness nor sets forth any facts from which its lawfulness may be determined. In passing it may be noted that the indictment does

> not even allege that the detention was by virtue of and under the commitment." *Smith, Petr.*, v. *State of Maine,* 145 Me. 313, 318; 75 A. (2nd) 538.
>
> "An indictment or information against a prisoner for effecting his escape should show the original cause of imprisonment, and by what authority he was delivered into custody—so that the lawfulness of the custody will appear—and that the prisoner did escape and go at large." 7 Ency. Pl. & Prac. 914. See also 2 Chitty's Crim. Law (5th Am. Ed.) 159. 1 Russell on Crimes, 430.
>
> "The Indictment (for escape) will in detail vary with the form of the offence; and, if statutory, the particular terms of the statute; and with the special facts. But it must contain such a setting out that the custody under which the defendant was held and its lawfulness will appear, on its face showing the escaping or breaking away to be a crime. It may then charge that then and there the defendant, so being in the lawful custody of etc, 'out of, etc, unlawfully did escape'." 2 Bishop New Crim. Procedure, Sec. 943.

Studied in the light of the law applicable to indictments for escape and particularly the principles laid down by our own court in *Smith, Petr.* v. *State of Maine, supra,* the indictment upon which this respondent was sentenced is woefully inadequate. True, the indictment recites that the "escape occurred while the respondent was lawfully detained in the County Jail at said Alfred." However, as pointed out in the case of *Smith, Petr.* v. *State of Maine, supra,* unless sufficient facts are alleged to show the lawfulness of the detention, an allegation that the escapee was "lawfully detained" is but the statement of a legal conclusion so far as the lawfulness of the detention is concerned. The indictment goes on to recite in detail that the respondent had been sentenced to a term in the Reformatory for Men; that he had been ordered by the presiding justice to be com-

mitted in execution of said sentence, and that said respondent, pending commitment to the Reformatory for Men was being held in the County Jail in Alfred. There is no allegation to the effect that a mittimus had been issued to authorize the detention of the respondent. In the charge of the justice it is noted that he instructed the jury that it could be considered as an established fact, that the respondent was delivered to the Sheriff pursuant to a mittimus, but the indictment does not say so.

While the statute in existence at the time of the rendition of the opinion in the *Smith Case* has been since repealed and superseded by a differently worded statute, the principles of pleading set forth are applicable to the amended statute.

Based upon the rules relating to pleadings in cases of escape, expounded by this court, the indictment is faulty and should have been quashed by the presiding justice. A demurrer to the indictment, if filed, should have been sustained, and judgment should have been arrested on proper motion filed therefor.

Was the detention of the respondent at the time of the alleged escape lawful? He had been committed to the Sheriff under a mittimus which commanded that he be *forthwith* delivered to the Superintendent of the Reformatory for Men at Windham.

> "It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully and precisely." *State* v. *Guthrie,* 90 Me. 448, 450, 38 A. 368; *Hefler* v. *Hunt,* 120 Me. 10, 14, 112 A. 675.
>
> "One who has been convicted and sentenced to imprisonment in the penitentiary should not be detained unreasonably in the county jail or else-

> where by the sheriff; but he should deliver the convict to the proper authority as soon as he can do so. What is a reasonable or an unreasonable time to detain the prisoner before delivering him to those who are his custodians during the term of his imprisonment depends on the circumstances of each particular case. If the prisoner is too sick to be removed, or if he has been exposed to a contagious disease, his detention until he can be removed thereto safely is not unreasonable." 24 C. J. S., Criminal Law, § 1621.

Section 32, Chapter 27, R. S., 1954, provides for the method of delivery of male persons convicted and sentenced to the State Prison. There does not seem to be any statutory provision relating to the transportation and delivery of prisoners sentenced to the Reformatory for Men.

In giving consideration to the issue of the reasonableness of the time in which Couture was detained in the County Jail, the question of when his sentence to the Reformatory for Men was to begin is of importance. The law seems to be that the term of a sentence begins with the first day of actual incarceration after delivery of the prisoner to the Warden or Superintendent of the penal institution to which a prisoner has been sentenced.

> "The time when the term begins will depend on the circumstances of the case as considered in the light of local practice and applicable statutes, but it is ordinarily deemed to begin with the first day of actual incarceration." 24 C. J. S., Criminal Law, § 1995 (b).

That it is recognized in this State that a sentence begins when a prisoner is received in the institution to which he has been sentenced is indicated by Section 47, Chapter 27, R. S., 1954, relating to sentences in the State Prison. There seems to be no similar statute relating to sentences in other penal institutions.

This court in a very recent opinion of *State* v. *Blanchard,* 156 Me. 30; 159 A. (2nd) 304, 317, recognized the principle that a sentence does not begin until commitment of the prisoner to the institution wherein the sentence will be served.

> "In the case of Oxman v. United States, 8 Cir., 148 F. 2d. 750, 159 A.L.R. 155, after the defendant had been convicted, he was sentenced to imprisonment, and was placed temporarily in a room in the marshal's office close by the courtroom, awaiting action on certain co-defendants. Before being removed to the place at which his sentence was to be served, he was called back into court. The original sentence was revoked and a new sentence imposed. It was the contention of the defendant that when he was placed in this room, he had already begun to serve his sentence and, therefore, the court was without power to alter it. It was held that such temporary detention was not a beginning of the execution of his sentence."
>
> "In holding that the period during which the probationer was in the custody of the probation officer could not be counted as time during which he was undergoing punishment imposed upon him, the Supreme Court of Vermont said In re Hall, 100 Vt. 197, 136 A. 24:
>
> " 'The execution of his sentence did not come into operation until his commitment, after the finding by the court that the terms and conditions of his probation had been violated.' " *State* v. *Blanchard, supra.*

It is stipulated that no emergency existed, such as sickness, quarantine or impassibility of roads. The Reformatory was only twenty miles away. The State advances as a reason for failure of the sheriff to remove the prisoner to the Reformatory earlier that his staff of 38 or 40 deputies were busy investigating crime throughout the county. We are not impressed with this reason.

It is not the function of this court at this time, to determine the reasonableness of the delay. This was a matter within the discretion of the court which should have been exercised at the time, and this discretion is subject to reversal on appeal only in the event of its abuse.

See *State* v. *Guthrie, supra,* where the court said:

> "What is a reasonable time within which the service of such a warrant can lawfully be made is also a question of law for the court."

In his charge, the presiding justice properly instructed the jury that when a prisoner is delivered to a sheriff with the mittimus commanding that he be removed forthwith to the penal institution to which he has been sentenced, that the sheriff may place such person within a county jail or other appropriate place and keep such person for a reasonable time thereafter. He further instructed them correctly that if such prisoner is kept by the sheriff for a reasonable time that the detention is lawful, but that if the detention extends beyond a reasonable time, such detention then becomes unlawful.

He then instructed the jury that the question of the reasonableness of the detention was one of fact for their determination. We quote the following excerpt from his charge upon this point:

> "I instruct you that you may properly consider in determining the reasonableness of the detention the exigencies of the situation as they relate to the traveling conditions, distance the respondent is to be conveyed, the accessibility of transportation, that there was or was not a plague existing in the area of the Reformatory or in the Reformatory itself, and further you may properly consider that the officer or officers to whom the mittimus was directed were or were not occupied with duties so that conveyance of the respondent in accordance with the directive contained in the

> mittimus at a time prior to that time at which the respondent was actually conveyed could not be accomplished without an unreasonable interference with duties which were then and there being performed by the officer to whom the mittimus was directed, or the officers to whom the mittimus was directed.
>
> "If you find as a fact that the detention in the County Jail was reasonable under all the circumstances, then I instruct you as law that escape from such detention would constitute an escape from a lawful detention."

When the case was submitted, the jury was asked to answer this question: "Was such detention reasonable under the circumstances?"

In view of the fact that the issue of the reasonableness of the detention is a matter of law for the court, this instruction was erroneous. As a result of the procedure adopted, authority was actually given to the jury to determine when the sentence of this prisoner to the Reformatory was to start. This is a prerogative not vested in a jury. We are of the opinion that the propounding of this question was prejudicial to the respondent.

Were the constitutional rights of the respondent violated, and if so, did he waive such violation?

The respondent says his rights were violated in that he was not given a speedy trial and that the presiding justice did not properly instruct the jury upon the question of waiver.

It is fundamental law that a person charged with crime is guaranteed a speedy trial by the Constitution. This constitutional guaranty extends to all persons accused of crime; and a person accused of crime is entitled to a discharge or dismissal, if his right to a speedy trial is violated.

> "No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; it is consistent with delays, and whether such a trial is afforded must be determined in the light of the circumstances of each particular case as a matter of judicial discretion. It is generally said that a speedy trial is one had as soon after indictment as the prosecution can with reasonable diligence prepare for it, regard being had to the terms of court." 22 C. J. S., Criminal Law, § 467 (b) (3).
>
> "Constitutional guaranties of the right of accused to a speedy trial are, as is stated in Constitutional Law § 59, self-executing, and if his right is violated accused is entitled to be discharged or to have the proceedings dismissed." 22 C. J. S., Criminal Law, § 468.
>
> "While there is some authority to the contrary, the general rule is that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to entitle him to a discharge on the ground of delay." 22 C. J. S., Criminal Law, § 469.

It seems that the proper method for raising the question of violation of the right to a speedy trial is by motion addressed to the court at which the indictment is pending.

> "Accused must show that there has been a delay; that the delay was caused by the state and not by him; and that the trial has not been postponed on his application, or with his consent; * * * * . When accused has made this proof, the burden is then on the state to prove that good cause existed for delay, * * * ." 22 C. J. S., Criminal Law, § 470 (b).

The motion to quash and the plea in abatement filed by the respondent in this case may well be considered adequate to reach the violations of constitutional rights claimed.

> "The right of the accused to a discharge for the failure of the prosecution to put him on trial within the required time may be waived by his own conduct, even in capital cases. He must claim his right if he wishes its protection. Silence on his part cannot be construed as a demand for trial." 14 Am. Jur., Criminal Law, § 138.
>
> "But the right of the accused to have a speedy trial may be waived by his own conduct. He must claim his right if he wishes for its protection. If he does not make a demand for trial, he will not be in a position to demand a discharge because of delay in prosecution." *State* v. *Kopelow,* 126 Me. 384, 386; 138 A. 625.

Section 11, Chapter 148, R. S., 1954 provides that "The clerk shall, without charge, furnish to any person indicted for a crime punishable by imprisonment in the state prison, a copy of the indictment."

Section 9, Chapter 148, R. S., 1954 provides that "Any person in prison under indictment shall be tried or bailed at the next term after the finding thereof, if he demands it, unless the court is satisfied that some of the witnesses on the part of the state have been enticed away or detained from court by some cause beyond their control; and all persons under indictment for felony, if they have been arrested thereon, shall be tried or bailed at the 2nd term after the finding thereof. Any person indicted, although he has not been arrested, is entitled to a speedy trial, if he demands it in person in open court."

Presumably the foregoing provisions are designed to implement the general provisions of the Constitution guaranteeing a speedy trial. See *State* v. *Slorah, supra.*

A study of Section 9, Chapter 148, indicates that its provisions are not specifically applicable to the instant case. For example, the first sentence reads: "Any person in prison under indictment shall be tried or bailed at the next

term after the finding thereof if he demands it, etc." The respondent in this case was not in prison by virtue of the indictment against which he now complains, but was serving a sentence for another offense. Manifestly, he could not demand a trial because he did not know he was under indictment.

Then we find the following sentence: "and, all persons under indictment for felony, if they have been arrested thereon shall be tried at the 2nd term after the filing thereof." The respondent had not been arrested under the indictment and was not arrested until nearly eight months after the indictment was returned and it is stipulated that during all that time he had no knowledge of the existence of the indictment. The last sentence of Section 9, Chapter 148 reads: "Any person indicted, although he has not been arrested is entitled to a speedy trial, if he demands it, in person, in open court." Not only was the respondent unaware that an indictment had been returned against him, but he could not appear in court to demand trial, because he was serving a sentence for another offense in the Reformatory.

> "One serving a sentence in the penitentiary is entitled to a speedy trial of other crimes with which he is charged." 22 C. J. S., Criminal Law, § 467 (b) (1).

While there is no provision of law which says that the Clerk is under a duty of furnishing one charged with crime with a copy of the indictment, where no request therefor has been made, we are of the opinion that under the facts existing in this case, there was a duty on the part of the officials to inform the respondent that an indictment was pending against him, so as to give him an opportunity, if he desired to do so, of requesting a copy of the indictment and demanding an immediate trial. It can readily be seen that long delay, such as existed in this case, might well be prejudicial to a person charged with crime, because during

the interval existing between the time of the return of the indictment and the time when such person learns of its existence, witnesses essential to his defense might have died or become otherwise unavailable. We feel that the constitutional rights of this respondent were violated.

Now, what of a waiver thereof?

Upon the question of violation of constitutional rights and waiver thereon, the presiding justice instructed the jury as follows:

> "Whether or not there was a violation of the rules of fair play as I have described them to you, whether or not, in other words, there was a violation of the due process provisions of the Constitution is a question of fact which I submit to you for your determination. Whether or not there was a waiver of the rights which were accorded this and all respondents is a question of fact which I submit to you for your determination under these instructions which I have given you."

Pursuant to these instructions, the following question was propounded to the jury. "Did the respondent waive his right to a speedy trial?"

These instructions of the learned justice below were erroneous and the question improperly propounded, because the issue of violation of constitutional rights and waiver thereof are questions of law to be decided by the court within its discretion.

Moreover, if the question of whether or not the respondent had waived his rights to a speedy trial, was properly asked, then the jury was wrong in giving an affirmative answer, because according to the stipulated facts, the respondent was not aware that there was an indictment pending against him and manifestly could not waive any rights, either by silence or otherwise. These instructions were prejudicial to the respondent.

We give no further consideration to the fourth issue raised by the respondent relating to certain portions of the charge of the justice, because we have already elaborated upon this matter in reference to the other issues, the answers to which we have resolved.

We are satisfied that the respondent was convicted and has been serving a sentence under a defective indictment; that the question of the reasonableness of the delay in delivering the respondent to the Superintendent of the Reformatory for Men was not an issue for the determination of the jury; that the constitutional rights of the respondent were violated; and that the question of waiver, was not an issue to be decided by the jury, and, in any event, the affirmative answer given by the jury was erroneous.

The respondent is entitled to a new trial.

The entry will be:

Appeal sustained.

New trial granted.

CARLTON D. MCGARY ET AL.
vs.
CLYDE I. BARROWS ET AL.

Franklin. Opinion, July 20, 1960.

Sinclair Act. *Constitutional Law.*
Delegation of Power. *Impairment of Contracts.*
Due Process. *Property Rights.*

Article VIII of the Maine Constitution that "the Legislature is authorized, and it shall be their duty to require the several towns to make suitable provisions, at their own expense, for the support . . . of public schools; . . ." is mandatory not prohibitory and is not a limitation on Legislative power in the field of education.

Section 111-G of the Sinclair Act does not contain an improper delegation of legislative power. The School District Commission does not make law; it administers established law.

To inspect returns and declare the result of an election is a task administrative and not judicial in nature.

There is no constitutional obligation to submitting the question of the formation of a School Administrative District to popular vote of the municipalities involved; and it follows that there can be no valid objection to the act of the Legislature in providing that the determination of the outcome of the referendum be made by the Commission finally and without appeal.

Where there is no objection to the sufficiency of criteria or standards for the establishment of School Administrative Districts, the empowering of the Commission to find "that all other steps in the formation of the proposed School Administrative District are in order and in conformity with law," is not objectionable.

There is no valid constitutional objection either State or Federal to the action of the Legislature in making a certificate of the Commission conclusive evidence of the fact of incorporation (U. S. Const. 14th Amendment).

The interest of taxpaying inhabitants in the creation and establishment of a school district is not a property interest.

Sec. 111-H of the Sinclair Act is not objectionable as impairing the obligations on contract, where no given situation is presented for the court's consideration. The court cannot, however, anticipate issues, constitutional or otherwise, which might arise in the application of Sec. 111-H.

ON REPORT.

This is a petition for Declaratory Judgment before the Law Court upon report and agreed statement. Cause remanded for entry of a judgment in accordance with this opinion without costs.

Arthur A. Peabody, for plaintiffs.

George A. Wathen, Asst. Atty. Gen.,
Joseph F. Holman, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WILLIAMSON, C. J. On report on agreed statement. This is an action for a declaratory judgment by ten taxpayers and residents of Farmington designed to test the constitutionality of the statutes under which School Administrative District No. 9, comprising the Towns of Farmington, Chesterville, and Industry, was organized. R. S., c. 107, §§ 38-50 (Uniform Declaratory Judgments Act) ; R. S., c. 41, §§ 111-A through 111-U (statutes relating to School Administrative District, sometimes hereinafter called the "Sinclair Act").

The defendants are the School Directors and the Superintendent of Schools of School Administrative District No. 9, the Maine School District Commission, the Inhabitants of the Towns of Farmington, Chesterville, and Industry, the Attorney General, the State Treasurer, and the Commissioner of Education.

The plaintiffs seek a declaratory judgment that the Sinclair Act is unconstitutional under the State and Federal Constitutions, an injunction against the exercise by the defendants of any rights, duties, or powers pursuant thereto, and such further relief as the nature of the case may require.

The issues stated in the complaint have been narrowed in the briefs and argument of counsel. Our opinion and decision is given with respect only to the issues so presented.

The parties have stipulated and agreed as follows:

> "1. All the parties hereto are properly designated in their respective capacities;
>
> "2. This action arises upon complaint for a declaratory judgment before a Justice of the Supreme Judicial Court which has been reported by agreement of the parties and order of the single Justice;
>
> "3. The superintending school committees of the towns of Farmington, Chesterville and Industry voted to apply to the Maine School District Commission to request approval of a school administrative district composed of said towns;
>
> "4. The application from the towns of Farmington, Chesterville and Industry was received by the Maine School District Commission. At a meeting thereof on February 19, 1959, at Augusta, Maine, the Commission found that said applicant towns were eligible for approval under the provisions of Chapter 41, Revised Statutes of 1954, as amended, and issued an order to each member of the several superintending school committees and an order to each of the municipal officers in each of the said towns to meet on March 6, 1959, at 8:00 P. M., at the Farmington High School for the purpose of determining a fair and equitable number of school directors to be elected by and to represent each participating municipality, said notice and a list

of eligible participants being sent by certified mail at least ten days prior to the date of said meeting;

"5. A record of the joint meeting of March 6, 1959, was received by the Maine School District Commission showing that it had been determined that the Town of Farmington was entitled to five (5) members, and the Towns of Chesterville and Industry were entitled to two (2) members each on the board of school directors of the proposed district;

"6. The Maine School District Commission, at a meeting held at the State House in Augusta, Maine, on March 11, 1959, found the record of said joint meeting to be in order, and further the Maine School District Commission ordered the municipal officers of the said three towns to call town meetings to vote in favor of, or in opposition to, the three articles required by and in conformity with Section 111-F, Subsection IV, Chapter 41, Revised Statutes of 1954, as amended, to form a school administrative district; said findings and order being sent by certified mail;

"7. Town meetings were called pursuant to the statutes in each of the said towns for the purposes of voting on the article relating to the formation of a school administrative district and the other articles related thereto;

"8. The Maine School District Commission received a record of the action taken in each of the said three towns showing that each article in each of the warrants received a majority vote of those voters present and voting;

"9. The Maine School District Commission at a meeting on April 9, 1959, found that the questions relating to the formation of a school administrative district composed of said three towns had been submitted to the voters and that a majority of said voters had voted in the affirmative on each article or question submitted to them, and all other steps in the formation of the district were in order and

in conformity with the law; the Maine School District Commission assigned number 9 to the area comprised of the said three towns and ordered the Secretary of the Commission to issue a certificate of organization, and ordered said certificate to be delivered to the directors of the School Administrative District No. 9 on the day the directors organized and assumed their duties. The Maine School District Commission on April 9, 1959, ordered the Secretary to notify the municipal officers of the said three towns to call special town meetings within 60 days to elect the number of directors to which each municipality was entitled. Said notice was sent by certified mail. The certificate of organization was issued on April 9, 1959, without notice or hearing;

"10. Each of the said three towns called a town meeting and elected the allotted number of directors to represent said town in School Administrative District No. 9 and filed returns showing the manner and method of election and the names and addresses of each director elected thereat;

"11. At a meeting of the Maine School District Commission held at the State Office Building in Augusta, Maine, on June 10, 1959, the Commission ordered *and* elected school directors to hold their organizational meeting on July 1, 1959, said notice being given pursuant to Section 111-F, Chapter 41, Revised Statutes of 1954, as amended, for the purpose of determining the length of their terms, subscribing to their oaths of office, and assuming the management and control of the operation of all the public schools within the area of School Administrative District No. 9;

"12. A meeting of the school directors was held as ordered on July 1, 1959, and a certificate of organization of the three town district was delivered to said directors. Said directors having qualified for office on that date have exercised their duties and offices as school directors since that time;

"13. The Maine School District Commission filed a certificate of organization of School Administrative District No. 9 with the Secretary of the State of Maine pursuant to the statute;

"14. At a special session of the Ninety-Ninth Legislature held in January, 1960, Chapter 203 of the Private and Special Laws of 1959 was enacted which purported to validate and reconstitute School Administrative District No. 9. Said Act has now become effective;

"15. It is further agreed that the Supreme Judicial Court sitting as a Law Court is to make a final decision in the matter."

It is unnecessary to set forth the Sinclair Act with its detailed provisions. Broadly stated, the Legislature has provided machinery for the formation of school administrative districts comprising two or more municipalities, on vote of the municipalities, subject to approval of the School District Commission, an administrative agency operating under principles and standards set forth in the Act.

School District Commission

"**Sec. 111-A. Declaration of policy.** It is hereby declared to be the policy of the State to encourage the development of school administrative units of sufficient size to provide a more equalized educational opportunity for pupils, to establish satisfactory school programs, and achieve a greater uniformity of school tax rates among the school administrative districts and a more effective use of the public funds expended for the support of public schools."

* * * * * * * * *

"**Sec. 111-G. Organization.** When the residents of each of the municipalities have voted upon the formation of the proposed School Administrative District and all of the other questions submitted therewith, the clerks of each of the municipalities shall make a return to the School Dis-

trict Commission in such form as the commission shall determine. If the commission finds that a majority of the residents within each of the municipalities involved, voting on each of the articles or questions submitted to them, have voted in the affirmative, and have elected the necessary school directors to represent each municipality, and that all other steps in the formation of the proposed School Administrative District are in order and in conformity with law, the commission shall make a finding to that effect and record the same upon its records. The School District Commission shall further assign a number to each School Administrative District so formed in the order of their formation in the following form, 'School Administrative District No. ,' which shall be the official title of the School Administrative District.

"The Commission shall, immediately after making its findings, issue a certificate of organization in such form as the commission shall determine. The original certificate shall be delivered to the school directors on the day that they organize and a copy of said certificate, attested by the secretary of the commission, shall be filed and recorded in the office of the Secretary of State. The issuance of such certificate by the School District Commission shall be conclusive evidence of the lawful organization of the School Administrative District. The School Administrative District shall not be operative until the date set by the School District Commission under section 111-J.

"**Sec. 111-H. Transfer of property and assets.** . . . . .

"Where in the formation of a School Administrative District the School Administrative District has assumed the outstanding indebtedness of any municipality, school district or community school district, the directors of the School Administrative District shall be entitled to the use of any sinking fund or any other moneys that have been set aside by the municipality, school district or com-

munity school district for the payment of any or all of the indebtedness which has been assumed by the School Administrative District notwithstanding any other provision of any act of the Legislature or any provision of any trust agreement to the contrary, provided that the school directors shall only use the money so set aside for the purpose of retiring any or all of the assumed indebtedness for which it was previously dedicated."

* * * * * * * * *

"**Sec. 111-M. Application of general law.** All schools operated by School Administrative Districts, when established, shall be considered the official schools of the participating municipalities and all provisions of the general law relating to public education shall apply to said schools. Special courses and other bases for allocations to municipalities because of these schools shall be paid by the State directly to the treasurer of the administrative districts."

* * * * * * * * *

"**Sec. 111-R. Operational date of the School Administrative District; teachers' and superintendents' contracts.** Notwithstanding the prior issuance of a certificate of organization, a School Administrative District shall not be in operation and shall not exercise any of its powers granted until the date set by the School District Commission, as provided in section 111-J. On the date so set, the School Administrative District shall become operative and the school directors shall assume the management and control of the operation of all the public schools within the district and the municipalities, coterminous school districts or community school districts within said district on and after said date shall have no responsibility for the operation or control of the public schools within their respective jurisdictions, . . ."

This section also provides for the transfer of school funds and assignment of contracts of teachers and superintendents of schools to the School Administrative District.

In considering the constitutionality of statutes, we keep in mind the principles succinctly stated by the late Chief Justice Fellows in *Baxter* v. *Waterville Sewerage District,* 146 Me. 211, 214, 79 A. (2nd) 585:

> "In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is 'a presumption of great strength.' *State v. Pooler,* 105 Me. 224, 228; *Laughlin v. City of Portland,* 111 Me. 486; *Village Corporation v. Libby,* 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *Warren v. Norwood,* 138 Me. 180. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. *Kelley v. School District,* 134 Me. 414; *Hamilton v. District,* 120 Me. 15, 20."

Illustrative cases are *State of Maine* v. *Vahlsing, Inc.,* 147 Me. 417, 430, 88 A. (2nd) 144 (potato tax); *Nat. Bk., Boston* v. *Turnpike Authority,* 153 Me. 131, 171, 136 A. (2nd) 699 (bonds-impairment of contracts); *Martin* v. *Maine Savings Bank et al.,* 154 Me. 259, 147 A. (2nd) 131 (Maine Industrial Building Authority Act).

First issue: The plaintiffs argue that the Act violates Article VIII of the State Constitution in that towns thereby escape an obligation to support and maintain public schools and are deprived by Sec. 111-R of responsibility for the operation and control of public schools within their jurisdiction. Article VIII of the Maine Constitution reads in part:

> "A general diffusion of the advantages of education being essential to the preservation of the

> rights and liberties of the people; to promote this important object, the legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; . ."

The plaintiffs would turn Article VIII into a prohibition upon the exercise of legislative power in support of education. It has long since been established that Article VIII is "mandatory not prohibitory," and that it is not a limitation upon legislative power in the field of education. The Legislature indeed cannot be compelled to perform its duty under Article VIII. The responsibility for compliance rests with the Legislature. *Sawyer* v. *Gilmore,* 109 Me. 169, 83 A. 673; *Opinion of Justices,* 68 Me. 582; *Call* v. *Chadbourne,* 46 Me. 206, 222.

The power of the Legislature to create quasi-municipal corporations for educational purposes separate and distinct from municipalities is not questioned. *Kelley* v. *School District,* 134 Me. 414, 187 A. 703; *Knapp* v. *Swift River School District,* 152 Me. 350, 129 A. (2nd) 790; *North Yarmouth* v. *Skillings,* 45 Me. 133; 78 C. J. S., *Schools and School Districts* § 27; 47 Am. Jur., *Schools* § 12 *et seq.*

> "Municipalities providing for their public school system by the medium of School Administrative Districts will nevertheless thereby be making suitable provision for the support and maintenance of public schools, and by their proportional contributions to the expense incurred by such Districts will be in compliance with both the letter and spirit of the Constitution. The Legislature, by making provision therefor, will have satisfied the mandatory constitutional requirements imposed upon it." *Opinion of Justices,* 153 Me. 469, 474, 145 A. (2nd) 250.

There is no violation of Article VIII by the legislation here under study.

Second issue: The plaintiffs contend that under Sec. 111-G there is an unlawful delegation to the School District Commission in violation of the constitutional provisions relating to the separation of powers and the delegation of legislative power under our State Constitution. With this view we do not agree.

> "SECTION 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.
>
> "SECTION 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."
>
> Article III, Maine Constitution.
>
> "SECTION 1. The legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the Legislature of Maine, but the people reserve to themselves power. . ."
>
> Article IV, Part First, Maine Constitution.

The School District Commission is an administrative agency designed by the Legislature to administer the Sinclair Act and thus to make effective the declaration of policy in Sec. 111-A. The Commission exists "for the purpose of promoting, developing and adjusting a state plan for the creation of efficient School Administrative Districts throughout the State and for the purpose of approving applications for the organization of School Administrative Districts, . . ." (Sec. 111-B.)

The desirability and practical need of some such agency, whether it is a board, commission or officer to administer the Act is apparent. The Legislature cannot be expected to investigate each situation throughout the State relating

to the new school policy and to make the findings required to meet the standard set by the Legislature.

That the Legislature has the power to undertake this task and the right to exercise this power at any time or in any case, does not deny the authority of the Legislature to place important responsibilities in administration upon an agency such as the School District Commission. The problem presented by the second issue arises it may be noted solely because the Legislature has seen fit to establish a general law for the organization of School Administrative Districts under standards to be applied by the School District Commission for a five year period and thereafter by the State Board of Education. (Sec. 111-B.)

Under Sec. 111-G, if the Commission finds that a majority within each municipality voted upon each of the articles submitted in the affirmative and have elected the necessary school directors, and that all other steps in the formation of the proposed School Administrative District are in order and in conformity with law, then the Commission is charged with making a finding to that effect and thereupon issuing a certificate of organization. "The issuance of such certificate by the School District Commission shall be conclusive evidence of the lawful organization of the School Administrative District."

On examination of each of the steps in the formation of School Administrative Districts requiring action by the School District Commission, we conclude that there is no improper delegation of legislative power under the statute. The Commission does not make law. It administers the established law.

In determining the majority vote on returns from the clerks of the municipalities, the School District Commission is without question, as urged by the plaintiffs, performing the duties usually associated with a canvassing board. To

inspect returns and declare the result of an election is a task administrative and not judicial in nature. In *Campbell, Petr.* v. *Watts,* 71 Me. 380, it was made clear that a canvassing board was an administrative and not a judicial body, and such is the case of the School District Commission.

We need not here consider the rights, whatever they may be, of individuals to go behind the returns in testing the right to public office, as in *Campbell, Petr.* v. *Watts, supra.* This is not such an election.

The Legislature, as we have indicated, has the authority to create School Administrative Districts directly by its own act without the intervening services of an administrative body. There is no requirement under the Constitution of Maine for the submission of the question of formation of a School Administrative District to popular vote in the municipalities within the proposed District. There is no constitutional obligation to give this measure of home rule to the people of the communities involved. The same principle is clearly enunciated in *People* v. *Deatherage,* 401 Ill. 25, 81 N. E. (2nd) 581.

It follows, in our view, that there can therefore be no valid objection to the act of the Legislature in providing that the determination of the outcome of the referendum be made by the Commission finally and without appeal. Like principles are applicable to the election of the "necessary school directors." We are here concerned only with the election of school directors at the outset of the organization of the School Administrative District, that is to say, the school directors to whom, to use words of the statutes, "the original certificate shall be delivered to the school directors on the day that they organize." (Sec. 111-G.) It is to be noted that the time, place, and date of the first meeting of directors are set by the School District Commission. (Sec. 111-J.)

Turning to the phrase "and that all other steps in the formation of the proposed School Administrative District are in order and in conformity with law," we find the technique repeatedly used in the organization of various types of corporations under general laws. For example, under the business corporation law the certificate of organization must be "certified to be properly drawn and signed and to be conformable to the constitution and laws" by the attorney general. R. S., c. 53, § 10.

The plaintiffs raise no constitutional issues upon the sufficiency of the criteria or standards under the Sinclair Act for the establishment of School Administrative Districts. Stated differently, there is no objection that there are not sufficient guides in the statute to determine whether a district should be organized under the Act. See *Opinion of Justices,* 153 Me. at p. 471, in which the justices had before them the Legislative Document forming the basis of the Sinclair Act.

In short, the issue involves the constitutional authority of the School District Commission to approve the corporate organization of School Administrative Districts, and not the sufficiency of the criteria to be met for the formation of School Administrative Districts found in Sec. 111-E, or elsewhere in the Sinclair Act apart from Sec. 111-G.

The remaining objection to Sec. 111-G relates to the conclusive effect of the certificate of organization. Here again we see no objection under the constitution to the action of the Legislature in making such a certificate conclusive evidence of the fact of incorporation.

We have seen that the Legislature could have created this or any other School Administrative District by special act. Here the Legislature gives to the School District Commission (and later to the State Board of Education) the authority to speak finally for the State without right of ap-

peal on the question of the organization of each School Administrative District. It is the issuance of the certificate that completes the organization of a School Administrative District.

The purpose of such provision is plain. It is to make clear and certain to all who may deal with School Administrative Districts that there are no hidden difficulties in the organization and that all may consider that the necessary statutory steps have been duly and properly taken.

But it is said the opportunity for fraud or mistake is great. We are comforted by the thought that we may presume all officers of government will act faithfully and that under the Sinclair Act fairly administered there is no reason to believe that facts which should prevent the issuance of a certificate of organization will not come to light before final action. That there is risk in this procedure may be admitted. On balance, between the possible harm and the understandable benefits of certainty in establishing the legal organization of a School Administrative District at the outset the Legislature chose the benefits of certainty.

The practice of giving to a certificate of organization the force of conclusive evidence of the fact certified is not new. Since at least 1876 Legislatures have repeatedly made use of this technique where it would appear the public interest is advanced by certainty.

The certificate of the secretary of state is by statute conclusive evidence of the organization and existence of several kinds of corporations. Steam railroads, R. S., c. 45, § 3, first enacted in Laws 1876, c. 120, § 3; street railroads, R. S., c. 47, § 4, first enacted Laws 1893, c. 268, § 3 ("This certificate is the official evidence that the appellant is a 'corporation organized. .' " *Milbridge* v. *Cherryfield Elec. R. R. Appellant,* 96 Me. 110, 114, 51 A. 818); mutual insurance companies, R. S., c. 60, § 42, first enacted Laws 1876, c. 144,

§ 9; trust companies, R. S., c. 59, § 100, first enacted Laws 1907, c. 96, § 5; fraternal beneficiary associates, R. S., c. 60, § 173.

In the case of a bank merger resulting in a trust company (R. S., c. 59, § 149), the certificate of the bank commissioner "shall be conclusive evidence of the merger and of the correctness of all proceedings therefor in all courts and places, . . "

In the Community School District law we find the obvious source of the provision under discussion. The sentence quoted below was not in the law as first enacted in Laws 1947, c. 357, but was added by amendment in Laws 1949, c. 249.

> "If the secretary of state finds that the community school district has been organized and the trustees thereof elected or appointed, according to law, he shall issue to it a certificate of organization and such certificate shall be conclusive evidence of the lawful organization of the community school district and of the election or appointment of the trustees thereof." (R. S., c. 41, § 113.)

The intention of the Legislature is plain and certain, that the certificate of organization issued by the School District Commission shall be conclusive evidence of its lawful organization.

The question before us is whether the Legislature has exceeded its constitutional powers and this we find was not the case. We hold, therefore, there are no constitutional objections to the exercise by the School District Commission of the powers set forth in Sec. 111-G, and further, that the lawful organization of School Administrative District No. 9 is conclusively evidenced by the certificate of the School District Commission issued under Sec. 111-G.

Third issue: Sec. 111-G does not in our opinion violate "due process." ". . . nor shall any State deprive any person

of life, liberty, or property, without due process of law; . . . " Fourteenth Amendment, U. S. Constitution.

The plaintiffs contend that findings made under Sec. 111-G without notice, hearing, or right of appeal and the issuance of a certificate which is conclusive evidence of organization, deprive them of property without "due process." They fail to establish what property is lost under the procedure established by the statute.

We are not here directing our attention to determine whether School Administrative District No. 9 has properly and lawfully exercised powers given to it by the Legislature. The problem reaches only the constitutionality of the statute under which School Administrative District No. 9 was organized.

The controlling principle is stated as follows:

> "A school district, being an auxiliary of the state for purposes of education, the legislature may provide for its creation, control, and regulation, without violating the due process guaranty, with respect to the property rights of the district or of property owners therein." 16A C. J. S., *Constitutional Law*, § 604 (b).

The interest of the taxpaying inhabitants in the creation and establishment of a school district is not a property interest. Our court in *Kelley* v. *School District, supra,* at p. 420, in upholding an act creating a school district said:

> "A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The Legislature may change such agencies, and control and direct what shall be done with school property. The length of time this district may exist is, because capable of being made certain, definite from the beginning."
>
> * * * * * * * * *
>
> "School property is public property, the property of the incorporated district and not of the taxpayers residing within it."

Having no property interests at stake in the creation of the District, the plaintiffs cannot be said to have suffered a deprivation of property through the organization procedures under Sec. 111-G. See *Baxter* v. *Waterville Sewerage District, supra; North Yarmouth* v. *Skillings, supra.*

Fourth issue: The plaintiffs assert that the following paragraph of Sec. 111-H impairs the obligation of contracts in violation of Article I, Sec. 10 of the U. S. Constitution, and Article I, Sec. 11 of the Maine Constitution.

> "Where in the formation of a School Administrative District the School Administrative District has assumed the outstanding indebtedness of any municipality, school district or community school district, the directors of the School Administrative District shall be entitled to the use of any sinking fund or any other moneys that have been set aside by the municipality, school district or community school district for the payment of any or all of the indebtedness which has been assumed by the School Administrative District notwithstanding any other provision of any act of the Legislature or any provision of any trust agreement to the contrary, provided that the school directors shall only use the money so set aside for the purpose of retiring any or all of the assumed indebtedness for which it was previously dedicated."

The pertinent constitutional provisions with which we are concerned are as follows:

> "No State shall . . . pass any . . . law impairing obligations of contracts. . ." U. S. Constitution, Article I, § 10.
>
> "The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts. . ." Maine Constitution, Article I, § 11.

No attack is made upon the other provisions of Sec. 111-H, which provide for the transfer of existing school prop-

erty and buildings to the School Administrative District, the assignment of leases with the Maine School Building Authority to the School Administrative District with assumption of duties and liabilities, and for the raising, appropriation, transfer, and expenditure of moneys for capital outlay purposes.

In voting upon the question of the formation of the proposed School Administrative District, each municipality must vote "To see if the municipality will vote to authorize the district to assume full responsibility for amortizing the following listed indebtedness now outstanding in the municipalities and school districts comprising the School Administrative District under consideration." (Sec. 111-F-IV.)

The intention of the Legislature is clear, namely, that sinking funds and other moneys dedicated for payment of particular indebtedness assumed by the School Administrative District be used for such purposes and none other. We cannot, however, anticipate issues, constitutional or otherwise, which might arise in the application of this provision of the statute to a particular set of facts. No given situation is presented on the record for our consideration.

Fifth issue: It is unnecessary to consider the issue raised relating to the effect of P. & S. L., 1959, c. 203, entitled "An Act to Reconstitute School Administrative District No. 9." We have held in our discussion of the other issues that there are no constitutional prohibitions against the organization of a School Administrative District under the Sinclair Act, and that therefore School Administrative District No. 9 was lawfully organized.

Whether School Administrative District No. 9 has acted lawfully within the Sinclair Act or any other statutes subsequent to its organization does not raise problems for decision on this complaint. We express no opinion upon the effect of the 1959 statute in validating such acts.

The plaintiffs have failed in their attack upon the organization of School Administrative District No. 9. They are not entitled to the relief prayed for. Under the terms of the report the Law Court shall render such decision as the rights of the parties require. Accordingly, the entry will be

Cause remanded for entry of a judgment in accordance with this opinion without costs.

STATE OF MAINE
vs.
FREDITH J. BURBANK

Sagadahoc. Opinion, July 26, 1960.

Evidence. Criminal Procedure.
Manslaughter. Principal and Accessory.

Exception taken to the testimony of a doctor who performed a post-mortem examination that there was insufficient evidence of identity of the corpse must be overruled where there has been a sufficient description of the body to lay a foundation for the testimony.

A justice in a criminal case, after the state has rested and after respondent has asked for a directed verdict for failure to prove cause of death, may permit the state to reopen its case and prove cause of death through medical opinion. A trial judge has a wide latitude to the end that justice is not thwarted through a mistake or inadvertence.

A principal of the second degree to a felony is one who is present lending his countenance, encouragement or other mental aid while another does the act. A principal must be present actual or constructive.

A verdict of guilty of manslaughter is proper where a jury could properly find that a mother of a new born infant gave the directions to kill and the verbal aiding and abetting on her part were not the results of a cool and calculating mind but came from one influenced

by passion provoked by birth under circumstances fraught with depression.

ON EXCEPTIONS.

This is a criminal action for murder before the Law Court upon exceptions after verdict of manslaughter. Exceptions overruled. Judgment for the State.

Frank E. Hancock, Attorney General,
George M. Carlton, for State.

Harold J. Rubin, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

TAPLEY, J. On exceptions. The respondent was indicted for the crime of murder. The case was tried before a drawn jury at the October Term, 1958 of the Superior Court, within and for the County of Sagadahoc. The State, by indictment, accused the respondent of murdering her infant female child. The jury returned a verdict of manslaughter. The respondent comes to this court on the basis of three exceptions. The first exception was taken to the refusal of the presiding justice to strike from the record the testimony of Dr. Goodof who performed a post-mortem examination of the child, the respondent contending that Dr. Goodof's testimony should not stand because the State had failed to prove that the body upon which the post-mortem examination was made was the body of the child alleged to have been murdered by the respondent. The second exception involves the refusal of the presiding justice to rule upon the respondent's motion for a directed verdict of not guilty at the close of all the testimony and the subsequent denial of the respondent's motion for a directed verdict. Exception number III brings forward the question

as to whether or not the evidence produced by the State shows any participation on the part of the respondent sufficient to establish her guilty of the crime of manslaughter.

The respondent saw fit not to testify or to present any evidence. The State's evidence developed the following circumstances: At approximately three o'clock in the morning of July 14, 1958 a man identifying himself as George Burbank, father of the respondent, appeared at the Bath Police Station and after some conversation he, in company with two police officers, went to the Marston Cabins at Woolwich, Maine where Mr. Burbank and his daughter, the respondent, lived. The respondent was found lying on the bed in the bedroom apparently suffering pain. One of the police officers in an attempt to alleviate her suffering applied first aid. On a bed in the kitchen of the cabin was found a living baby almost entirely covered with a bed covering. In due time the respondent was removed from the bed, placed on a stretcher and taken by ambulance to the Bath Memorial Hospital. Mr. Burbank picked up the baby and in company with a police officer drove to the hospital where he handed the baby to Mrs. Eva F. Pinkham, a registered nurse. There is other evidence in the State's case which must be treated in detail in considering those questions which have arisen as a result of the exceptions.

EXCEPTION I

Counsel for the respondent objects to the testimony of Dr. Irving Goodof who made the post-mortem examination of the child on the basis that the State failed to prove the body was that of the baby the respondent was alleged to have murdered. The evidence discloses that the child was found on a bed in the kitchen of the Marston Cabins at Woolwich and from there taken to the Bath Memorial Hospital arriving there about three o'clock in the morning on July 14, 1958. The baby was taken directly to the iso-

lation nursery by Mrs. Pinkham, a registered nurse. The baby at this time was alive. Mrs. Pinkham in relating her physical observations of the condition of the child said "the left side of its head was soft and spongy to the touch." She remained with the child until Dr. Marion W. Westermeyer arrived, whereupon Mrs. Pinkham left the nursery and went about her duties. The time was approximately four o'clock in the morning. Dr. Westermeyer made an examination of the child, found the head bruised, pulpy to the touch, the forehead bruised and the bone that makes the prominence just over the left eye was cracked and there was a depression suggesting a fracture. The doctor was asked the question:

> "Q. - - - - - Previously in your testimony Doctor, you have indicated an area of the head which indicated a mushiness, I believe, to you, or pulpiness. Will you describe with more particularity the exact area and perhaps the size of the area that was involved?"

and he answered:

> "A. It was the most of the left half of the top of the head was pulpy, as you will find in what we call a hematoma or a collection of blood underneath the scalp — in the scalp."

The doctor pronounced the baby dead fifteen minutes after examination. Mrs. Pinkham said that the last time she saw the child's body in the isolation nursery was at six or six-fifteen in the morning. The deceased child was the only occupant of the nursery.

Mr. Robert Herbert Farnham, a mortician's assistant, went to the hospital at approximately twelve-thirty o'clock on July 14th, going directly to the isolation ward of the nursery where he was directed to the x-ray room where he obtained the body of the child and took it to the undertakers. At two o'clock in the afternoon of the same day Dr. Irving

I. Goodof, pathologist, appeared at the Mayo Funeral Home and forthwith performed a post-mortem on the child. He first made a general observation of the child as a result of which he testified:

> "A. Well, this was a dead female infant, new born, approximately twenty inches in length. The skin was generally mottled. The umbilical cord was still attached and moist. It was well tied with green string. The head showed some degree of swelling of the left side of the head, including a portion of the forehead. The left pupil was larger than the right. These, I believe, were all of the significant external findings."

In the course of his post-mortem examination he made an incision in the scalp and on reflecting the scalp he, "encountered a large amount of blood located primarily over the left side of the head, but with some extension to the right side. This blood extended forward far enough so that it produced some swelling in the region of the forehead, as I mentioned before. On clearing this material away, the skull itself could then be examined and was found to show multiple fractures, most of them concentrated in the region of the left side of the head just above the ear and possibly just behind it, but also extending across to the right side." It is to be noted that the record shows that Dr. Goodof in his opinion determined that the child was less than a day old. On July 16th George Burbank, father of the respondent, in the presence of the County Attorney, the Sheriff and investigators went to the cabin and there occurred a reenactment of Burbank's actions in the early morning hours of July 14th. He demonstrated how he took the baby from the bedroom into another room and proceeded to show how he hit the baby's head three or four times on the bedpost which obviously caused injury and damage to the head of the child. This testimony becomes significant when considering the objection of defense counsel that the

State has failed to prove that the child upon whom the post-mortem examination was made was the same child alleged to have been murdered by the respondent or that if it was the same child something could have happened to her while in the hospital that caused the injuries. A reading of the testimony demonstrates by medical proof that the State has not failed in laying a foundation for the testimony of Dr. Goodof and particularly when one compares the medical findings of head injuries by Dr. Westermeyer and what was found by Dr. Goodof in his post-mortem examination of the head.

In *People* v. *Minzer,* 193 N. E. 370 (Ill.), a similar question arose as to whether or not in a prosecution for murder the body of the deceased had been sufficiently identified as to render admissible testimony of the physician who had performed the autopsy. The testimony showed that the body of the deceased was taken to the county hospital and in turn delivered to the keeper of the morgue. The keeper of the morgue tagged the body for identification and notified the medical examiner that he was to perform an autopsy. The undertaker removed the body from the morgue after the autopsy had been performed and later a sister of the deceased identified the body at the undertaking establishment. In addition to this testimony of identification, Dr. Kearns, the Medical Examiner, described an old bruise on the deceased's right leg which corresponded with that described by a Dr. Petit who had treated the deceased after a fall a few days before her death. The court held under these circumstances that there was sufficient description of the body to lay a foundation for the testimony of the doctor.

This exception is overruled.

EXCEPTION II

The second exception consists of two parts, the first claiming error on the part of the presiding justice in not ruling

upon the respondent's motion until after a subsequent motion on the part of the State to reopen the case in order to submit further evidence was granted. The second part concerns the denial of respondent's motion for a directed verdict. This latter part of the second exception will be determined at the time we consider Exception III.

Respondent contends that the presiding justice was without right and in error in allowing the State to reopen the case and introduce further evidence after the respondent had moved for a directed verdict at the conclusion of all the evidence and before the court ruled on respondent's motion. This brings up the important question as to what authority a trial judge has in controlling trial procedure in a criminal case. Counsel for the respondent admits that the conduct of the trial is in the discretion of the presiding justice and in the absence of any abuse of discretion or where there is no infringement upon the rights of a respondent, the trial judge has wide latitude in determining trial procedure. He contends that under the particular circumstances of this case, when the court permitted the State to reopen and introduce evidence before ruling on the motion, he then prejudiced and did violence to the rights of the accused. One of the reasons urged by respondent's counsel for a directed verdict was that Dr. Goodof's testimony failed to disclose cause of death and the fact being material, she was entitled to a directed verdict on that phase of the case. Over the objections of counsel, Dr. Goodof further testified in manner following:

"Q. And with reference to your testimony of yesterday in this cause, I believe you testified to the performance of an autopsy upon a female infant child at the Mayo Funeral Home?

A. Yes, sir.

Q. And I believe your testimony recited the manner in which this was performed and the sig-

nificant findings in so far as your opinion was concerned; is that correct?

A. Yes, sir.

Q. And based on the performance of that autopsy and the findings that in your opinion were made, I ask you at this time, Doctor, whether or not you have an opinion as to the cause of death of the infant child upon which you performed the autopsy?

A. Yes, sir.

Q. Will you tell us, please, what in your opinion was the reason or the cause of death?

A. The cause of death was lacerations of the brain due to fractures of the skull due to blunt force injury to the head.

Q. And I assume your reference to fractures, Doctor — Strike that. In your reference to fractures of the head in the last statement, are these fractures the same fractures that you have referred to and testified to yesterday?

A. Yes, sir.

Q. And your testimony here today relating to your opinion also results, or does it result from your entire examination which was testified to yesterday in so far as the examination of the body and the organs and the significance or absence of significance of any findings there?

A. Yes, sir."

It is to be noted that respondent not only objected to the admission of the testimony on the ground that the State had rested its case but also that the body of the baby was not properly identified, as complained of under Exception I. Due to the fact that we have determined that Exception I is not sustained, this ground of objection is of no avail.

In *State* v. *Martin,* 89 Me. 117, the County Attorney, after the arguments for the respondent and the State had been

concluded, was allowed by the presiding justice to call a witness to testify as to the place where the intoxicating liquor was sold. This allowance was objected to by respondent's attorney and exceptions were taken. The court said on page 118:

> "This is a matter entirely within the discretion of the presiding justice. Whenever in his opinion the occasion requires it, he may vary the ordinary order of procedure and at any stage of the trial permit evidence to be offered which had been omitted through inadvertence, or which had not before come to the knowledge of counsel. Nor is the exercise of this discretion subject to revision on exceptions."

See *Benner* v. *Benner,* 120 Me. 468; *State* v. *Cassady,* 190 P. (2nd) 501 (Ariz.). In the *Cassady* case the respondent was tried for conspiracy. After the close of the State's case the respondent moved for a directed verdict on three of the counts in the indictment. The court indicated an inclination to grant the motion, whereupon the State moved for permission to reopen the case. The court granted permission over the objection of the respondent. Further testimony was introduced. The court said on page 506:

> "We believe that the court in the exercise of a sound legal discretion was authorized to permit the state to reopen the case and submit further proof."
>
> "We note that at the close of the people's case defendant made a motion for a verdict of not guilty, whereupon the trial court reopened the case and permitted a witness for the people to testify that the pills were found lying loose in the purse. It is the rule in criminal cases that the trial court in the exercise of sound discretion may reopen a case for the purpose of admitting testimony in behalf of either the prosecution or the defense." *People* v. *Baker,* 51 N. W. (2nd) 240-242 (Mich.).

We are fully aware of and recognize the rights of a respondent in a criminal prosecution. A justice presiding in a criminal case not only has the responsibility of protecting the rights of one accused of crime but also an equal responsibility to the people of the State to the end that justice is not thwarted by mistake or inadvertence. The presiding justice under the circumstances of this case was well within his rights and his discretionary powers of trial procedure in permitting the State to reopen and present further evidence after the respondent's motion for a directed verdict of not guilty had been made. This exception is overruled.

EXCEPTION III

Respondent contends that there was insufficient evidence upon which to base a jury finding of manslaughter. The respondent in her conversation with an officer said that she went to bed around ten or ten-thirty and soon after experienced pain; that her father came into the room and at that moment the baby was born; that she sat up in bed, looked at the baby, saying that the baby was blue and that it didn't look normal, and she said something would have to be done with it. The baby started to cry, and as the baby cried she said to her father, "do something with it — hit it in the head." The evidence further discloses that the father took the child into the next room, closed the door and hit the child's head against the bedpost two or three times.

There is no evidence that the respondent left her bed after the birth of the child nor does the State contend there is. The State admits that according to the evidence the door was closed between the two rooms and "that the respondent was not physically in the immediate presence of her father in the kitchen" at the time he committed violence upon the child. The State contends that even though she had not left the bed nor was she physically present in the room

where the act occurred she was, nevertheless, guilty of manslaughter on the basis (1) that she was constructively present; and (2) that she commanded, incited and encouraged her father to commit the act.

Under these circumstances, is the respondent guilty of the crime of manslaughter? If she is guilty of manslaughter, it must be because the evidence is such that she is placed in the category of a principal to the commission of a felony as there is no proof of her physical engagement in the act which caused the injuries resulting in death.

> "A principal of the second degree is one who is present lending his countenance, encouragement or other mental aid while another does the act." *Bishop's Criminal Law,* Vol. 1, Sec. 648 (3).

In order for one to be a principal, it is necessary for him to be present, either actually or constructively.

Constructive presence is sufficient to satisfy the element of "presence" in a charge of aiding and abetting in constituting one a principal. *English* v. *Matowitz,* 72 N. E. (2nd) 898 (Ohio).

> "It is settled law that all who are present (either actually or constructively) at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty." *State* v. *Holland,* 67 S. E. (2nd) 272-274 (N. C.).

> "To constitute one an aider and abettor in the commission of a crime, he must be actually or constructively present at the time of its commission and render assistance or encouragement to the perpetrator." *Howard* v. *Commonwealth,* 200 S. W. (2nd) 148-150 (Ky.).

In *State* v. *Rodosta,* 138 So. 124 (La.), one Peter Rodosta and his wife were charged with the crime of murdering

their infant child seven days old. Peter Rodosta was tried separately and convicted of the crime of murder. He was not the perpetrator of the crime but was charged as principal. The evidence in the case supported his contention that he was not present actually or constructively when the child was killed. The court on page 126 said:

> "According to all law writers, and as settled by our own jurisprudence and that of other states, one who is not the actual perpetrator of a felonious act, but who aids, abets, counsels, or procures its commission, is not a principal, unless actually or constructively present at the commission of the crime."

This court said in *State* v. *Saba, et al.,* 139 Me. 153, at page 156:

> "The proper rule of law is that to constitute one as a principal in the commission of a felony, he must be proved to be present either actually or constructively at the time and place it was committed. The issue of actual presence is necessarily simple."

See also *State* v. *Rainey,* 149 Me. 92.

> "The advice or encouragement that will make one a principal in a felony may be given by words, acts, or signs. Therefore, one who inflames the minds of others and induces them by violent means to do an illegal act is guilty of such act, although he takes no other part therein. If he contemplates the result, he is answerable, although it is produced in a manner different from that contemplated by him. If he awakes into action an indiscriminate power, he is responsible." 14 Am. Jur. Criminal Law, Sec. 90.

> "Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in second degree, as to any crime committed in execution of the plan."

Regarding participation and presence, reference is made to 40 C. J. S. — Homicide — page 839, Sec. 9 (c).

Counsel for the respondent strenuously argues that the elements constituting manslaughter are such that she cannot be a principal to the crime as aiding, abetting, counseling, inciting and directing are all inconsistent with the commission of a crime resulting from heat of passion or sudden provocation. He says the very nature of circumstances here present precludes this respondent from being a principal.

In *State* v. *Coleman,* 5 Porter 32 (Ala.) (1837), the respondent Coleman was found guilty of manslaughter on an indictment charging him and another with murder. The indictment charged Kennedy with the shooting and Coleman as being present, aiding and abetting. On a motion in arrest of judgment counsel for Coleman, among other grounds, contended (1) "The indictment showed that Coleman, if he did anything, only aided and abetted Kennedy, and under that charge, he could not be found guilty of manslaughter; because the very nature of the offence, with which Coleman was charged, implied premeditation, and would make it murder, if it were any offence at all." (2) "No one could commit man-slaughter, except the one who actually kills; because man-slaughter is an unlawful killing without malice." The court on page 41 said:

> "The man who, without any predetermined purpose, but under the influence of a momentary excitement, aids and abets his friend in an affray, in which the friend kills his adversary, is not guilty of murder, because malice, an essential constituent of the crime, is wanting; yet, he is not wholly dispunishable, for aiding and abetting an unlawful homicide.
>
> "Upon authority, it seems unquestionable that there may be aiders and abettors in manslaughter; and Russell, (1. vol. 456.) lays it down, that 'in

order to make an abettor to a manslaughter a principal in the felony, he must be present, aiding and abetting the fact committed.' This learned author is sustained by Hale."

"One may be held guilty as a principal in the second degree, or as an aider and abettor, to the crime of manslaughter, including, according to the weight of authority, involuntary manslaughter, although as to the latter proposition there is some authority to the contrary." 40 C. J. S. — Homicide — page 839, Sec. 9 (b).

"While the characteristic element of the crime of manslaughter is that although a homicide, it is committed in sudden heat and passion and without malice aforethought and will not therefore admit of accessories before the fact, yet this does not necessarily limit the offense to the persons who actually did the deed when several were present and engaged in a common quarrel. The provocation given may extend to others as well as to the principal actor. Although the crime is said to be sudden and unpremeditated, it need not be on the instant the provocation is received. In its regard for the weakness of human nature, the law allows a certain time — reasonable time — for the transport of passion to continue before 'cooling,' and during that time it is possible for others present, affected by the same provocation and passion, to stimulate and incite the principal actor to the perpetration of the deed, thereby becoming aiders and abettors." 14 Am. Jur.— Criminal Law — Sec. 84.

The respondent in the case at bar, an unmarried female, gave birth to a child. During the period of pregnancy she and her father had discussed what action should be taken as to the child after its birth. It was determined that if the child was born a normal child it would be left at a foundling home but if not normal something would have to be done with it. The mother had a feeling, as she said, "that the baby would not be normal due to the way it was

conceived." Thus the child came into the world unwanted and, according to the mother, its life depended upon a decision as to whether the child was normal or not. The child was born under abnormal circumstances in so far as the relationship of the parents was concerned. At the time of birth the mental processes of the mother must have been, according to the evidence, in a confused state. The child was born without benefit to the mother of medical attention. She was in the throes of pain and bleeding profusely. There was no opportunity for her to exercise a normal and reasonable power of decision. On the evidence the jury could properly determine that the direction to kill and the verbal aiding and abetting on her part were not the results of a cool and calculating mind but came from one influenced by passion provoked by the birth of the child under circumstances fraught with desperation. It is true that she contributed no physical effort to bring about the injuries to the child which eventually resulted in death. Nevertheless she participated to an extent which the law recognizes as sufficient to bring her within the category of a principal to the crime of manslaughter.

Exception III is overruled.

Exceptions overruled.

Judgment for the State.

MAINE CENTRAL RAILROAD COMPANY
vs.
PUBLIC UTILITIES COMMISSION

Kennebec. Opinion, August 3, 1960.

P. U. C. Public Service. Discontinuance.
Public Necessity. Need.

The statutory authority of the P. U. C. to act in connection with a request for discontinuance of passenger service is R. S., 1954, Chap. 44, Sec. 48. The test is the "*public interest*" (i.e. the interest and necessities of the whole public).

Where the evidence permits only the conclusion that *actual need* for railroad passenger service is so small as to be almost non-existent, the railroad is entitled to cast off *now* the intolerable burden of passenger service; and no further delay based on illusory hopes of a reversal of trends in the field of transportation can be justified.

ON EXCEPTIONS.

This is a petition to the P. U. C. to discontinue passenger service. The case is before the Law Court upon exceptions. Exceptions sustained. Remanded to the P. U. C. for a decree forthwith authorizing discontinuance in accordance with this opinion.

Leonard A. Pierce,
John E. Harrington, Jr.,
Archibald Knowles,
Vincent L. McKusick, for plaintiff.

Richard B. Sanborn, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. On exceptions. On July 8, 1959 the Maine Central Railroad Company, hereinafter referred to as the

"Railroad," filed with the Public Utilities Commission a petition for authority to discontinue as of October 25, 1959 its remaining scheduled passenger train service. Involved were eight trains furnishing three round trips daily between Portland and Bangor and one round trip between Portland and Vanceboro. After extended hearings, the Commission on January 14, 1960 granted the discontinuance of service via Lewiston-Auburn, but ordered the Railroad to continue operating for a period of not less than one year four trains furnishing service via Augusta. The Railroad in effect asserts that the Commission has made findings of fact unsupported by substantial evidence, has failed to make material findings of fact based on undisputed evidence, and has erroneously applied the applicable law to the established facts. There is no real dispute as to the factual situation and the issue presented is one of law. Since our disposition of the first exception is decisive of this case, it will be unnecessary to consider the other exceptions raised which are essentially subsidiary thereto.

In view of the revolution which has occurred in methods of transportation, it should come as a surprise to no one that a railroad may regard the carriage of passengers as an intolerable and oppressive financial burden. The obvious preference of most of the traveling public for the automobile and the airplane has produced an astonishingly rapid increase in their use with a correspondingly sharp decline in the use of passenger trains. Interest in and concern for the preferred methods of travel have been evidenced by large and ever increasing expenditures of public funds for the extension and improvement of the highway system and airport facilities. The railroads have been afforded the doubtful privilege of aiding the development of such effective competition by the payment of very substantial taxes. In short, times have changed and railroads no longer have any practical monopoly of transportation. As was stated in

Illinois Central R. R. v. *Illinois Commerce Commission* (1951), 410 Ill. 77, 101 N. E. (2nd) 588, 593: "In the light of such changed conditions it is a duty of the carrier (railroad) to seek, and of the regulatory agency to permit, elimination of uneconomic services no longer needed or used by the public *to any substantial extent.* The reasons which originally may have provided justification for compulsory facilities maintained at substantial losses have largely disappeared today, rendering local train service in many cases an obsolete form of transportation." (Emphasis ours.) See also *Application of Chicago, B. & Q. R. Co.* (1950), 152 Neb. 352, 41 N. W. (2nd) 157.

The statutory authority of the Commission to act in such a case as this is afforded by R. S., 1954, Chap. 44, Sec. 48, the pertinent portions of which state:

> "No public utility * * * shall * * * discontinue the service which it is rendering to the public by the use of such facilities, without first securing the approval of the commission. In granting its approval, the commission may impose such terms, conditions or requirements as in its judgment are necessary *to protect the public interest.*" (Emphasis ours.)

The test is therefore the protection of the "public interest." In so saying we are not merely concerned with that segment of the public which may actually use the trains for passenger travel. It is the interest and the necessities of the *whole* public which must control the ultimate decision. In our view, the legislature by its wording of the quoted statute intended the recognition of the same broad standard announced by the courts of a number of states in passenger train discontinuance cases. *Application of Chicago and North Western Ry. Co.* (1958), 167 Neb. 61, 91 N. W. (2nd) 312 (public necessity and not local convenience); *Western Maryland Ry. Co.* v. *Public Service Com'n.* (1959), 106 S. E. (2nd) (W. Va.) 923 (interest of whole public); *Susque-*

hanna Transit Com. Ass'n. v. *Bd. of P. U. Com'rs.* (1959), 55 N. J. Super. (App. Div.) 377, 151 A. (2nd) 9 (interest of the public generally).

The Railroad has been faced with a trend which is national rather than merely local. In 1949, 83.6% of the passenger travel in this country was by private automobile. By 1957 that figure had increased to 88.7%. In the same period railroad passenger traffic dropped from 8% to 3.7%. Meanwhile air travel increased from 1.9% to 3.9%. In Maine substantially less than 1½% of passenger travel in the area served by the Railroad was by rail in 1959. All the rest moved by air and by busses and automobiles, the latter traveling over the Maine Turnpike and the main public highways between the communities served by the Railroad. By 1957 there was a passenger automobile for every 3.4 persons. In 1959 less than ½ of 1% of the population of those communities made any use of the passenger service offered by the Railroad. Here also railroad passenger travel has been steadily declining. From 1949 to 1958 the number of passengers showed a drop of 65.5% and estimates of 1959 business indicated that the percentage of reduction in passenger use would reach 83%, this in a decade which produced a 60% *increase* in travel by all means of transportation.

Who are the people who still make some use of the passenger service offered by the Railroad? They are not commuters as the Railroad offers no commuter service whatever. Many are non-residents who merely pass through the state without stopping or transacting any business in Maine. Such passengers must be disregarded in assessing any need which the public of this state may have for the service. For the most part, if we may judge by the evidence adduced at the several public hearings conducted by the Commission in various parts of the state, those who urge the retention of passenger service do so either out of senti-

mental nostalgia for an era of railroading now past, or out of a sense of community pride, or because they desire the security of knowing that the trains are there, standing by for the day when the weather is inclement or other preferred means of transportation fail. As the court said in *Western Maryland Ry. Co.* v. *Public Service Com'n., supra* at page 925: "Though such system formerly afforded an extensive and excellent passenger service to the public, that service is now at the last 'mile post.' But common carriers are not required to furnish such service for sentimental reasons. They are entitled to reasonable profits." The uniform aspect of these hearings lay in their failure to produce witnesses who demonstrated any real need of the service on a week by week or even a month by month basis. The Railroad is thus required at great expense to serve customers who will buy its product only when they can procure that product nowhere else. Moreover, under ordinary circumstances the product is readily available elsewhere. We are satisfied that the evidence permits only one conclusion, that the *actual need* for this service is so small as to be almost non-existent.

The Railroad has been criticized for not making its service more attractive to passengers. It has been charged with faulty housekeeping and unsatisfactory schedules, and has even been accused by some witnesses of deliberately attempting to discourage passenger use of its facilities. Any present lack of interest in attempting to increase the patronage of its passenger trains may well be attributed to the frustrating experiences of recent years. For the Railroad has made determined attempts to please and attract passenger business. It is significant that such efforts, the purchase of new and most modern equipment, the employment of all advertising media, the use of reduced fares for multiple rides and group travel, all completely failed to halt or even retard the steady reduction in passenger travel. The

train cannot transport a passenger from his home to his destination on a schedule of his own making as can the private automobile, nor can it carry him with the speed of an airplane — and these appear to be the over-riding considerations which dictate the choice of the traveling public and create the trend which must be recognized as one of the realities of our day. In the face of a similar criticism of promotional methods, the Texas court in *Texas & New Orleans R. Co.* v. *Railroad Commission* (1949), 220 S. W. (2nd) 273, 275, noted: "Few of those who so travel know or care if the train operates over the route they intend going; they neither know nor care whether the train coach is modern or not; they are not interested in when the train leaves or when it returns. Most people never even inquire as to such matters. They use their own cars." We could only add, "or board a plane."

What is the cost of furnishing this service to a tiny segment of the traveling public? An accountant who made some studies at the request of the Commission placed the minimum avoidable losses from the conduct of passenger service at $744,480 a year. Admittedly, in addition to this potential saving, there are some costs common to both freight and passenger service which would be reduced by elimination of the latter entirely, and there is the further opportunity for increasing profits from freight service by management decision made possible by relief from the burden of passenger service. Since opinions were quite divergent as to the extent of these additional savings, it is enough to say that the Commission could properly find no less upon the evidence than that the avoidable losses would substantially exceed three-quarters of a million dollars annually. This amount assumes even more serious proportions when we examine the somewhat dubious financial position of the Railroad. Although the Railroad has remained solvent thus far, its net earnings are entirely inadequate

to provide necessary funds for proper replacement and improvement of equipment. It is in arrears as to payments of dividends on preferred stock and has paid no dividends on its common stock since 1931. Even more disturbing is the fact that the trend of earnings has been downward in the past few years. The Railroad is the sole guarantor of first mortgage bonds of its wholly owned subsidiary Portland Terminal Company in the amount of $9,350,000 which fall due July 1, 1961. The ability of the Railroad to refund these bonds on any reasonable basis is quite understandably a matter of genuine concern and even alarm on the part both of management and investment counsel charged with the responsibility of maintaining credit. The margin of safety, the amount by which gross revenues could decline before the Railroad lost coverage of its fixed charges has declined from 9% in 1956 to about 4.97% in 1959. The adverse trend is further demonstrated by the drop in rate of return on investment which moved from an inadequate 4% in 1956 to a confiscatory level of 2.84% in 1958. As the late Chief Justice Vanderbilt succinctly stated in the landmark case of *Pennsylvania-Reading Sea. Lines* v. *Board of Pub. U.* (1950), 5 N. J. 114, 74 A. (2nd) 265, 270:

> "There can be no doubt of the power of a state functioning through an administrative body to regulate the services and facilities of common carriers so that the public necessity and convenience will be accommodated, but that power is not unlimited; it is circumscribed by the provisions of the United States Constitution. Under the guise of regulation the property of a railroad may not be taken by requiring it to furnish services or facilities not reasonably necessary to serve the public. * * * The obligation is dependent upon the need; without the need, the obligation does not exist."

It may be noted that the United States Supreme Court denied certiorari in this case. 340 U. S. 876, 71 S. Ct. 122,

95 L. Ed. 637. See also *Chicago & N. W. Ry. Co.* v. *Michigan Public Service Com'n.* (1951), 329 Mich. 432, 45 N. W. (2nd) 520.

The Railroad necessarily looks to its freight carriage for well over 90% of its gross revenue. Continuation of some passenger service losses might perhaps be justifiable if profits from freight business were steady, dependable and adequate to keep the entire operation on a sound financial basis. Unfortunately, however, here again storm warnings are out. Freight business has also been declining year by year. Competition with the trucking industry operating over tax-supported highways has become more vigorous with each passing year. In 1958, 57.09% of the freight profit was required to subsidize the passenger service and absorb the passenger deficit. In our view, this is an unreasonably high subsidy level and effectively prevents the Railroad from modernizing its freight carrying methods and equipment so as to remain truly competitive.

There can be no question as to the very real need which the whole public of Maine has for an efficient freight service by rail. There are many raw materials and products of great weight and bulk which can only be carried efficiently in and out of Maine in freight cars. This state is somewhat remote from the principal markets and thus dependent on fast and economical transportation of goods. We are engaged in spirited competition with our sister states for new industry which will add to payrolls and taxes and assure the economic health of Maine. Moreover, existing established industry must be encouraged and preserved and agriculture must not be deprived of indispensable freight service. Here we are dealing with the *public interest* in its broad sense for every citizen of Maine has a stake in the industrial and economic vitality of his state. Representatives of business and industry, and there were many, who gave evidence before the Commission were unanimous in

their conviction that the need for continued passenger service is negligible whereas the maintenance of good freight service by rail is absolutely essential to the economic future of Maine.

The Commission saw fit to discontinue half of the passenger service operated by the Railroad but ordered it to continue four of its trains for a trial period of one year. We are satisfied that the somewhat precarious financial position of the Railroad sets limits to the risks which may be taken with its ability to furnish proper freight service. This is especially true when past experience and present trends make it possible to foretell with relative certainty the disappointing and unsatisfactory result of the experiment. The evidence makes it abundantly clear that there is some urgency in this matter and any further impairment of the capacity of the Railroad to perform its essential function as a freight carrier is not in the public interest. In our view, the convenience and preferences of some and the needs of a very few must yield to the interests of all. We think that the Railroad has shown by strong and undisputed evidence that it is justly entitled to cast off *now* this intolerable burden and that no further delay based on illusory hopes of a reversal of trends in the field of transportation can be justified.

In summation, counsel for the Railroad have suggested for our consideration six factors which commend themselves to reason and find support in respectable authority and which should be considered as proper criteria in determining what is in the "public interest." 1. What use is the public making of passenger service? The evidence discloses a nominal and ever diminishing use by the traveling public of Maine, based primarily on mere convenience or preference rather than need. 2. What is the financial position of the carrier? The evidence permits no other conclusion than that present trends, if continued without check,

will impair the credit of the Railroad and eventually undermine its actual solvency. 3. What is the relation of the passenger deficit to the capacity of the Railroad to absorb losses? As has been noted, the avoidable losses from passenger service are high and ever increasing and are absorbing a dangerously large percentage of freight profit. 4. What are the necessities of Maine industry and agriculture? Here again the evidence is clear that the need is for a fast, efficient and economical freight service by rail, the importance of which can hardly be overstated. 5. Are the alternative means of passenger transportation adequate to the needs of the traveling public? The evidence shows that upon discontinuance of train service, the communities involved will be served by air at terminals in the principal cities, by automobile over public highways and the Maine Turnpike, and by bus service available throughout the area now served by the Railroad and offering comparable transit times and somewhat cheaper fares. These alternative services are in fact the very ones for which the public has increasingly shown a marked preference. All of these services are being constantly improved by the expenditure of large sums of public funds for airports and highways. The Railroad has assured continued service to campers and charter groups by special trains. As competition has developed between the railroad and trucking industries, it has been increasingly difficult for the Railroad to reconcile schedules required by the U. S. postal authorities with those which might be most attractive to passengers. The Railroad proposes to continue the carriage of mail and express on schedules and by non-passenger carrying trains suited to the needs and requirements of these services. Since mail and express have provided the principal revenue from passenger trains heretofore, it is desirable that the Railroad should seek to retain these revenues and that the general public should not lose any advantages, where they exist, from continued mail and express carriage by rail. 6. What are the

interests of the Railroad's investors in passenger train discontinuance? The evidence makes the answer to this question quite obvious. The securities of the Railroad are widely held by private and corporate investors in Maine. Every depositor has an interest in the investment portfolio in his bank. Those who have an interest as investors in the Railroad, therefore, form a not inconsiderable segment of the public of this state. They may not be ignored in a proceeding of this nature. Whatever hope the common stockholders have of ever receiving a dividend, or the preferred stockholders of being paid both their arrearage and future dividends as they accrue, or the bondholders of ultimately being paid in full, lies in the elimination of passenger train losses and the development and improvement of a profitable freight service. The Railroad is entitled to earn a fair return on its investment and is currently earning only 2.84%. This fact alone should furnish a deterrent to withholding the most obvious remedy. When the arm is hopelessly gangrenous and amputation is indicated, further delay may cause the whole body to be beset and the patient to die. The time for remedial action is now and not many months from now.

The Railroad has made out its case for immediate discontinuance of all passenger service involved in its petition by substantial and virtually undisputed evidence. It cannot be required to do more in order to obtain necessary relief and protection of the law. As was said in *Application of Chicago & N. W. R. R., supra,* at page 315:

> "The purpose of commission control of railroads is to secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the investments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated. But where,

as the evidence in this case demonstrates, passenger trains are operated at great loss due to a large decrease in passenger traffic, and no real public need exists for their continuance, the railway company *is entitled to an order discontinuing such trains.*"

The entry will be

Exceptions sustained.

Remanded to the Public Utilities Commission for a decree forthwith authorizing discontinuance in accordance with this opinion.

CENTRAL MAINE POWER CO.
RE: INCREASE IN RATES

CENTRAL MAINE POWER CO.
vs.
PUBLIC UTILITIES COMMISSION
OF THE STATE OF MAINE ET AL.

Kennebec. Opinion, August 16, 1960.

P. U. C. Scope of Review. Equity. Constitutional Law. Confiscation. Rates.

The Legislature must be deemed to have understood and intended by R. S., 1954, Chap. 44, Secs. 69, 71, and 72 that the court may nonetheless exercise "independent judgment" as to facts and yet in that very process be "informed and aided" by the findings of the Public Utilities Commission (14th Amend. U. S. Const.) (Const. of Me. Art. 1, Secs. 1, 6, 19, 21).

In the rate making controversy the company bears the burden of proof and there is a strong presumption in favor of the P. U. C.

conclusions. And in the confiscation controversy, the court will not interfere with the rate making power unless confiscation is clearly established.

Exceptions to the Commission's findings of rate of return cannot prevail where the findings are supported by substantial evidence.

In determining rates the Commission has the duty to fix a reasonable value upon company property used or required to be used in service.

A formalistic value judgment by the P. U. C. which excludes from "reasonable value" a 45 year old "write up" by predecessor companies concerning which the C. M. P. was a stranger and concerning which the Commission later assented is not fair compliance with the P. U. C. Law (Androscoggin Electric Co.).

It is error for the Commission to dispense with prudent acquisition costs of utility property purchased as authoritatively prudent pursuant to a merger under the Public Utility Holding Company Act as being at reasonable value and in the public interest, 15 U. S. C. A. 79 a (b) (1). (Cumberland County Power and Light.)

The P. U. C. may reject an item of property value where the company, after fair and timely notice, has failed to clarify either original cost or reasonable value (Robinson Land Co.).

The rejection by the P. U. C. of an item of property value for the acquisition by C. M. P. of 12 miles of riparian lands on the Kennebec River in connection with its upstream power plant is legal error. The company would have been less than prudent if it had not preempted down stream rights because of the state of the common law and the Mill act. (Harris Station.)

Materials and supply items of the working capital account are allowable as part of the base rate if "used or required to be used" in the public service; and where such items for repairs and minor replacements are commingled with construction inventory the commission has the duty and the correlative right to study such property to determine the average needs of the company (working capital).

The use by the Commission of the "average" rather than the "minimum balance" deduction of accrual for Federal Income Tax purposes is justified.

If there is some over-all calculable annual average of extraordinary repairs, the company has the burden of proving such pattern to the Commission for test year normalization.

Where, according to company acccounting practice a small percentage of General Administration expenses is allocated to construction thus reducing the general operating expense account during periods of increased construction, it is error for the Commission to regulate for a delayed futurity rather than for a test year actuality when construction was low. The increase, therefore, of the company's *pro forma* net operating income is error.

There is no legal error where the Commission is supported by evidence and statutory principle in normalizing the test year net income because of the economic recession in 1957-58.

ON EXCEPTIONS AND PETITION IN EQUITY.

This is a petition for rate increase before the P. U. C. The case is before the Law Court upon exceptions and upon petition to the Law Court alleging confiscation. Petition sustained. Exceptions allowed. Cause remanded.

Frederick T. Taintor,
Joseph P. Gorham,
Vincent L. McKusick,
Leonard A. Pierce,
William H. Dunham, for plaintiff.

Peter Kyros, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SULLIVAN, J. This case comprises two review proceedings instituted by the Company following the refusal by the Commission to allow to the Company rates which would have increased the latter's gross income some $2,794,000 and after the fixing of rates by the Commission granting a partial increase of $898,000.

The Company has filed both exceptions asserting errors in fact and in law and a petition in equity alleging confiscation of property. R. S., 1954, c. 44, §§ 67, 69. This

court has overruled the Commission's demurrer to the petition and has ordered that both causes be entertained concurrently. A general denial in equity has been interposed by the Commission and the parties have stipulated that both controversies shall be heard upon the evidence presented before the Commission.

As for the exceptions, alleged errors of law must be adjudged exclusively by this court. Averred errors of fact are to be conceded or rejected in accordance with the presence or absence of any substantial evidence to sustain the factual findings.

Rioux v. *Assurance Co.,* 134 Me. 459, 465.

Wade & Dunton, Inc. v. *Gordon,* 144 Me. 49, 51.

Picken v. *Richardson,* 146 Me. 29, 32.

D'Aoust Appellant, 146 Me. 443, 444.

Cent. Me. Pr. Co. v. *P. U. C.,* 153 Me. 228, 231.

> "If a factual finding, basic of an order of the Commission, is supported by any substantial evidence, that is, by such evidence as, taken alone, would justify the inference of the fact, the finding is final."
>
> *Hamilton* v. *Caribou, etc., Company,* 121 Me. 422, 424.
>
> *Gilman* v. *Telephone Co.,* 129 Me. 243, 248.

The Massachusetts Legislature has succinctly defined substantial evidence:

> " 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion."
>
> *Annotated Laws of Massachusetts,* C 30 A, § 1 (6).

As for the petition in equity, this court has not hitherto had occasion to construe formally R. S., c. 44, § 69. That

statute characterizes the equity petition as an "appeal." The power of this court under the act "to review, modify, amend or annul" is reminiscent of the language of the former equity appeal law which was R. S., c. 107, § 21 (Repealed, P. L., 1959, c. 317, § 86) and which authorized this court to "affirm, reverse or modify."

R. S., c. 44, § 69 prescribes the review in ratemaking legislative cases in which the applicant utility alleges that confiscation of property has resulted to it from an order or decree of the Commission. The act is thus calculated to afford the indispensable court hearing to satisfy the constitutional property rights of the utility. By legislative mandate this court is required to supply such a hearing and

> "- - - exercise its own independent judgment as to both law and facts."

The equity cause contains the Commission record of both oral testimony and printed evidence. Rulings of law by the Commission to be reviewed must be considered independently by this court.

The burden of proof at the rate hearing had rested upon the Company and it continues to lie there in the instant proceeding. R. S., c. 44, §§ 71, 35.

The legislative direction that this court "exercise its own independent judgment as to - - - facts" places the court at no noteworthy disadvantage so far as the printed exhibits are concerned save for the specialized knowledge and superior familiarity of a Commission in utility technology and economy. But in respect to the oral testimony this court has enjoyed no opportunity to hear or observe the witnesses, particularly the experts in attenuated disagreement.

Independent judgment as to facts as a judicial technique or function in an equity review such as that obtaining here had been authoritatively evolved and been given reduced and abridged connotations by the Supreme Court of the

United States long prior to the enactment by our Legislature in 1953 of R. S., c. 44, § 69 (P. L., 1953, c. 377 § 3). We are to assume, then, that the Legislature was quite aware of such precedents in the highest court in the land when the Legislature expressly invoked a judicial process which had been scrutinized many times by the Supreme Court of the United States.

The constitutional rights to equitable review by a court utilizing independent judgment as to both law and facts in the instance of rate cases heard before an administrative tribunal had been implied by the United States Supreme Court years before the remedy was more extensively elaborated.

Knoxville v. *Water Co.* (1909), 212 U. S. 1, was an appeal from an equity decree of a Circuit Court of Appeals restraining the enforcement of a city ordinance fixing the maximum rates chargeable by a utility. The grievance was that the ordinance had denied a reasonable return and was confiscatory. The matter had been referred to a Master whose report had been confirmed by the Circuit Court which had found the ordinance confiscatory. The U. S. Supreme Court said at Page 8:

> "- - - In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. *It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question sometimes be regarded as conclusive.* All that is intended to be said is, that in cases of this character this court will not fetter its discretion or

> judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit." (Emphasis supplied.)

In 1920 came the decision of the widely known case of *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287. At Page 289 the court said:

> "- - - In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 347; Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 660, 661; Missouri v. Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533, 538; Oklahoma Operating Co. v. Love, 252 U. S. 331."

The case of *Los Angeles Gas Co.* v. *R. R. Comm'n.* (1953), 289 U. S. 287 was an appeal from a decree of a District Court, constituted of three judges, which dismissed a bill in a suit by the appellant gas company praying that the defendant state commission and its officers be enjoined from enforcing new gas rates attacked as confiscatory. We quote from page 304:

> "4. We approach the decision of the particular question thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in

> reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached; but the judicial function does not go beyond the decision of the constitutional question. *That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established.*" (Emphasis supplied.)

In *Lindheimer* v. *Illinois Tel. Co.* (1934), 292 U. S. 151, Chief Justice Hughes for the court held:

> Page 164. "- - - The question is whether the Company has established, with the *clarity and definiteness befitting the cause,* that this reduction would bring about confiscation. Los Angeles Gas Co. v. Railroad Comm'n., 289 U. S. 287, 304, 305. - - - - Page 169. *"Confiscation being the issue, the Company has the burden of making a convincing showing* that the amounts it has charged to operating expenses for depreciation have not been excessive. That burden is not sustained by proof that its general accounting system has been correct. The calculations are mathematical but the predictions underlying them are essentially matters of opinion. They proceed from studies of the 'behavior of large groups' of items. - - -" (Emphasis supplied.)

In *Dayton P. & L. Co.* v. *Comm'n.* (1934), 292 U. S. 290, Justice Cardozo on behalf of the court held:

> Page 295. " - - - we turn to the objections in the effort to determine whether separately or collectively they support the claim of confiscation.
>
> "They fall into three classes: (1) objections to the computation of operating expenses; (2) objections to the valuation of the property making up the rate base; and (3) objections to the rate itself.

"First. Objections to the computation of operating expenses.

Page 298. "As to that issue *the burden of proof rests heavily on the appellant.* Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S. 287, 304, 305 - - - -" (Emphasis supplied.)

A noted decision is that of *St. Joseph's Stock Yards Co.* v. *U. S.* (1936), 298 U. S. 38. (Hughes, C. J.)

Page 53. "But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. *Judicial judgment may be none the less appropriately independent because informed and aided by the shifting procedure of an expert legislative agency.* Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that 'in a question of ratemaking there is a *strong presumption* in favor of the conclusions reached by an experienced administrative body after a full hearing.' Dartnell v. Edwards, 244 U. S. 564, 569. *The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established.* Los Angeles Gas Corp. v. Railroad Commission, 289 U. S. 287, 305; Lindheimer v. Illinois Telephone Co., 292 U. S. 151, 169; Dayton Power &

> Light Co. v. Public Utilities Comm'n., 292 U. S. 290, 298." (Emphasis supplied.)

What satisfies the exacting demands of the Fourteenth Amendment to the Federal Constitution in the equity petition before us is necessarily and coextensively adequate to meet the imperatives here of Article 1, Sections 1, 6, 19 and 21 of our Maine Constitution. R. S., c. 44, § 71 as to the burden of proof in rate cases existed prior to R. S., c. 44, § 69 and persists contemporaneously with R. S., c. 44, § 69 without incongruity. Those truths and the hereinbefore quoted disquisitions through the years before 1953 of the United States Supreme Court are revealing of legislative understanding and intent as to the exercise of independent judgment of fact by this court in the equity petition and as to both the burden and degree of proof incumbent upon a petitioning utility.

A primary and not just a cumulative factor in the safeguarding withal of the constitutional rights of a utility in this jurisdiction derives from R. S., c. 44, § 72 which guarantees to a utility a hearing before the legislative Public Utilities Commission in accordance with judicial practice and governed by the same rules of evidence which control our trial court.

Unmistakably what our Legislature must be deemed to have understood and intended is that the court may none the less exercise the prescribed "independent judgment" as to the facts and yet in that very process be "informed and aided" by findings of the Public Utilities Commission.

Massachusetts through its court and legislature gave considerable attention to constitutional exigencies and incorporated in its statute remedying confiscatory rate making an express direction that:

> "- - - The court shall give due weight to the experience, technical competence, and specialized

> knowledge of the agency, as well as to the discretionary authority conferred upon it. - - -"
>
> Annotated Laws of Massachusetts, c. 30A § 14 (8).

In resumé, then, the Company bears the burden of proof in this ratemaking controversy and there is "a strong presumption" in favor of the conclusion reached by the Public Utilities Commission, "an experienced administrative body, after a full hearing." *Darnell* v. *Edwards,* 244 U. S. 564, 569. There is for the guidance of this court "in the exercise of its judgment on the entire case" "the established principle" "that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established." *St. Joseph's Stock Yards Co.* v. *U. S.,* 298 U. S. 38, 53.

In the instant case in both causes which the Company is prosecuting the same subject matter constitutes the issues. We shall resolve each contention in its order in accordance with the recognized norms decisive of both procedures involved. The Company has precisely reduced its protests presented upon exceptions and in equity to nine in number.

The Company petitioned the Commission for a ratio of increase to its base revenue of some 7½% or an augmentation of $2,794,000 in gross revenue annually to be realized from a normalized volume of business for 1958. The return thus sought for 1958 from the full effect of the requested rates would have totaled $11,748,000. The Commission by its decree granted the Company upon a considerably pared rate base an annual rate of return of 5.75% or an additional gross annual revenue of $898,000. The Company protests error and insists that the fair return to which it is by law entitled is no less than the return which would result from the rate increase of some 7½% requested by the Company.

> " - - - In determining just and reasonable rates, the Commission shall provide such revenues to the

> utility as may be required to perform its public service and to attract necessary capital on just and reasonable terms - - -"
>
> R. S., c. 44, § 17, as amended.
>
> "In determining reasonable and just rates, tolls and charges the commission shall fix a reasonable value upon all the property of any public utility used or required to be used in its service to the public within the state and a fair return thereon - - -"
>
> R. S., c. 44, § 18, as amended.

At the hearing both State and Company presented expert testimony to demonstrate within the dictates of the foregoing statutes the proper rate of a fair return to the Company. Such testimony concerned itself principally with the calculation of the cost of capital of the Company. The Company has outstanding notes, bonds, preferred stock and common stock, all evidencing loans and rights of investors. The Company must provide for the marketing of more bonds, the conversion of preferred stock, the flotation of further stock, the payment of interest and dividends, the cost of financing and of embedded costs therefor and such other costs of capital as are requisite to conserve financial integrity and to attract necessary capital on reasonable terms, *Bluefield* v. *Pub. Serv. Comm.*, 262 U. S. 679, 673, 693. The witnesses agreed that the cost of capital is the gauge of what the investor exacts.

Our statutes and the decisions rendered thereunder prescribe and define a rate base of just and reasonable value and a fair return upon it. Such a rate base multiplied by a fair rate of return results in a fair return. R. S., c. 44, §§ 17, 19; *Central Maine Power Co.* v. *P. U. C.*, 153 Me. 228, 229. Determination of the "fair value" of the rate base "for rate-making purposes upon which the Company is entitled to earn a fair rate of return" is the statutory author-

ity and responsibility of the Commission to be exercised upon the evidence and within a sound discretion. *Central Maine Power Co.* v. *P. U. C.*, 150 Me. 259, 261.

For professional assistance in the complex task of fixing a fair return for the Company here each litigant supplied to the Commission the testimony of an accredited expert, one an investment banking authority, the other a public utility consultant specialist. Each testified as to capital cost. Capital cost when competently computed is essentially and practically the equivalent of fair rate of return.

> " - - - the fair return, generally speaking, is such an amount as would at the time of the inquiry induce the investment of money in such a utility." *Indiana Bell Teleph. Co.* v. *P. U. C.*, 300 Fed. 190, 201.
>
> " - - - Where the financing has been proper, the cost of the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn."
>
> *Missouri Ex Rel. Southern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 306.

The utility consultant in his testimony explained the parity between cost of debt and rate of return as follows:

> "To summarize the fair rate of return is essentially equal to the cost of capital. The cost of capital is determined in the investment markets, and reflects the extent of uncertainty involved in the particular investment, in the light of alternative investment opportunities available. Thus the competitive money markets, in their determination of the cost of capital, regulate the reasonableness of utility earnings.
>
> " - - - While price competition in the sale of utility services cannot be relied upon to set stable utility rates or reasonable utility earnings, competition

in the investment market (the market in which the utility must obtain its capital) steps in, via regulation, to do the job, that is, set reasonably stable rates, and reasonable utility earnings.

"On the other hand, if all or most reasonable doubts, or questions, are resolved in the direction of a higher cost rate, then the end result will be at or near the upper end of the range of a fair rate of return.

"Perhaps then the question can best be answered in terms of regulatory rather than strictly economic terms; the bare - bones cost of capital is at or near the bottom of the zone of reasonableness of fair rate of return.

"The cost of capital, as I use the term, is above the bare - bones cost, and provides, in my opinion, a sufficient margin of safety, so as to constitute a fair rate of return.

" - - - if reasonable doubts are resolved in favor of a higher rather than a lower cost of capital, the result does become equal to, and in fact may well be in the upper range of a fair rate of return.

"The cost rates I have used were, if anything, on the high side. The cost rates of debt and preferred reflect not only the full costs of each type of capital, but the cost of future capital.

"The cost rate of equity I used contains a single margin above the computed cost rate.

"The capital structure I have used is a strong capital structure, stronger than the actual one.

"Consequently, the cost rates shown - - - reasonably reflect the full fair rate of return."

The Company's investment banking expert was in agreement with the State's utility consultant as to the cost of debt and of preferred stock. The former was at variance with the latter as to the cost of equity and the investment banker's figure was the higher.

The Commission did not lack for very fulsome testimony for its findings of cost of capital or rate of return.

The Company protests that a rate of return is of itself an *a priori* figure and that no application of such percentage to any rate base was effected by the utility consultant to test the fairness of the return produced thereby. The investment banker did turn his rate of return to account but against a rate base figure provided by the Company. Neither witness had studied the Company's rate base, however, or professed to have any cultivated talent for so doing. From the very necessity of a precedent finding of a rate base by the Commission to make possible the mathematical determination of the actual rate return through the employment of the rate of return, neither witness was in a position to translate his costs of capital-rate of return percentage into any derivative money total.

Each expert in his pains credibly to realize for the Commission the interchangeable cost of capital and rate of return plied a like technique. Each was applying a practical science dependent upon a skilled judgment where by the nature of the problem precision was often not to be had. Each resorted to a comparison of the Company with other utilities esteemed to be comparable with it for the obtaining of pragmatic standards and applicable data. Earnings-price ratios, financing costs, market pressure, capital structures and competition for capital as well as the attraction of it were analyzed studiously by both witnesses. They both sought the same objectives. They heeded much the same elements. Variables had to be entertained with the constants. They differed in some respects in the importance they attributed to such factors as dividend payment, in their choice of similar utilities, in the span of time adequate for certain tests and in their appraisal of the cost of financing and of market pressure, etc.

Yet in spite of a want of absolutes both experts by independent efforts reached quite the same conclusions as to the cost of debt at 3.88% and the cost of preferred stock at 4.57% vs. 4.62%. Their results in the fixing of the cost of equity differed as 9.19% vs. 8.75%. As to the cost of financing and market pressure their reckonings were 10.6% vs. 7.5%. The Commission in the abundance of evidence submitted accepted the 7.5 percentage rather than the 10.6% as the better reasoned and defended quantity and arrived at an equity cost of 8.93% which placed the two experts in closer disagreement, such as 5.76% vs. 5.75% for the cost of capital-fair rate of return. In the intricacies of the considerations the Commission adopted 5.75% as fair.

The Company complains that against a multi-million dollar rate base a small discrepancy in percentage nevertheless entails a very tangible sum of money. Viewing the subject detachedly the criticism contains truth. Considering on the other hand the inherent possibilities of conflict of judgments in the problem of the experts the final disparity can be deemed to be quite insignificant.

We have examined the record. Upon its exception the Company can not prevail as ample evidence supports the Commission's finding of rate of return. In equity the Company has failed to sustain its onus of demonstrating confiscation or violation of a constitutional right. On the contrary the court is of the opinion that a multifold problem has been comprehensively tried and fairly resolved.

From the rate base of $206,034,000 proposed by the Company the Commission disallowed or suspended sundry items of a valuation exceeding $10,000,000 and set a rate base of $195,853,671. The Company charges that such action of the Commission was exceptionable and unconstitutional.

The directive statute is as follows:

> "In determining reasonable and just rates, tolls and charges, the Commission shall fix a reasonable

> value upon all the property of any public utility used or required to be used in its service to the public within the state and a fair return thereon. In fixing such reasonable value, the Commission shall give due consideration to evidence of the cost of the property when first devoted to public use, prudent acquisition cost to the utility, less depreciation on each, and any other factors or evidence material and relevant thereto but such other factors shall not include current value. - - - -"
>
> R. S., c. 44, § 18; P. L., 1957, c. 400, § 2.

An inspection of the foregoing law will reveal that the Commission has a duty to fix *a reasonable value* upon the property of the Company *used or required to be used in service* and that reasonable value derives from due consideration of evidence of the *cost of the property when first devoted to public use, of prudent acquisition cost* to the Company and, with the exception of current value, of any other factors material and relevant. The terminal persisting, however, as the statutory objective is reasonable value.

A fair estimation of cost of utility property when first devoted to public use or of the prudent acquisition cost of such property to a successor utility may be a rather perfunctory task or it may occasion a considerable weighing of evidence. Such costs must be original, realistic, bona fide, legitimate and within rational and sensible limitations.

The interests of the investing public and of consumers must be consulted and safeguarded. Problems can evolve. That is especially so when there are a first cost and a successive acquisition cost involved. A first cost may or may not be of aid in resolving the prudency of a subsequent acquisition cost. A successive acquisition cost can be lower than the cost to the first public utility, when, e.g., the purchase of the property by the successor utility was made at a distress sale. Capitalization of good will, of franchise value and of other intangibles demands full scrutiny. Nor is it

unthinkable that a property be given to a utility. In fine, satisfaction of the foregoing statute in all cases necessitates "due consideration to evidence of the cost" and that is no less than the exercise of a sound discretion by the Commission.

Justice Brandeis might well have been speaking of prudent acquisition cost when in commenting upon "prudent investment" he said:

> "- - - The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures - - -"
>
> *State of Missouri Ex Rel. Southwestern Bell Telephone Company* v. *Pub. Ser. Comm.*, 262 U. S. 276, 289, Note 1.

This court in commenting upon prudent acquisition cost has said:

> "*Prudent acquisition cost less depreciation.* As has been stated, this factor is intended to reflect the difference, most often an excess, between the original cost when first devoted to public service and the amount invested upon acquisition. This factor brings into focus what the Company *prudently* invested in the property and takes into account that property which is part of an established business often demands a higher price than its original cost. The Company has the burden of proving its prudence in acquiring property, for the consumer cannot be compelled to provide the utility with an income on its unjustifiable and imprudent acquisitions. - - - -"
>
> *Central Maine Power Co.* v. *P. U. C.*, 150 Me. 257, 266.

ANDROSCOGGIN ELECTRIC COMPANY

The Commission has found that the Company has failed to prove the prudency of the acquisition cost in excess of

the original cost of the quondam Androscoggin Electric Company properties and consequently has suspended from the rate base valuation in this case the amount of $1,095,194.09.

Androscoggin Electric Company was organized in 1914 and purchased the assets of the antecedent Lewiston-Auburn Electric Company. At the time the cost of property in the electric plant account of Lewiston-Auburn Electric Company was $1,645,641.95. Such property was forthwith entered upon the books of the purchasing Androscoggin Electric Company at a cost of $3,840,000. The magnification in cost is not explained and must be deemed a "write-up," an over capitalization having the semblance of a purchase by a security issue and a speculation.

In 1920 by contract and through its instrumentality, the Androscoggin Corporation, the Central Maine Power Company purchased the securities of the Androscoggin Electric Company. The total contract price of the property involved in the transaction, for the purposes of the instant case, was the augmented cost which had been posted upon the Androscoggin Electric Company's books.

In 1920 the Public Utilities Commission approved the above transaction of sale and purchase of securities. The Commission in its findings was commendatory. It stated that it had not been able to make a careful valuation of the several properties affected and therefore felt:

> "- - - compelled to look about and see if the record contains sufficient information upon which we may reach a reasonably accurate conclusion - - -"

The Commission opined:

> "Feeling that we have before us all of the evidence which can be reasonably required - - -"

The Commission was mindful of the "vital" interest of the

> "- - - public, the security holders of the several companies, and this Commission as a regulatory body - - -"

The Commission concluded that the transaction of purchase bode well for service to the public, for the protection of contemporary and future security holders of the Central Maine Power Company and for the welfare of the customers of Central Maine Power Company and its allied companies.

The Commission decided:

> "- - - We, therefore, conclude and find that the value of the property to be obtained furnishes an adequate consideration for the money to be paid and the guaranties which are to be undertaken."

In 1920 and ever since the statute (P. L., 1919, c. 128) regulating the approval by the Public Utilities Commission of the issue of securities by public utilities contained as now (R. S., 1954, c. 44, § 43) the provision:

> "- - - No order of the commission authorizing the issue of any stocks, bonds, notes or other evidences of indebtedness shall limit or restrict the powers of the commission in determining and fixing any rate, fare, toll, charge, classification, schedule or joint rate as provided in this chapter; - - -"

In 1920 the law directed that a rate base be laid upon the reasonable value of the properties composing it. R. S., 1916, c. 55, § 36.

In 1935 Androscoggin Electric Company was merged into Androscoggin Electric Corporation by order of the Public Utilities Commission to effect economies and simplification and to permit the issue of additional common stock. Again the costs of the property affected was the same carried upon the books of Androscoggin Electric Company with

additions and retirements not of moment here. No issuance of securities was involved in this process, R. S., 1930, c. 62, § 44; R. S., 1954, c. 44, § 47. The Public Utilities Commission in its findings circumspectly noted:

> "- - - since the application concerns neither the issuing of securities nor the fixing of rates, we do not determine at this time what portion of the properties, franchises and permits, if any, which are the subject of consolidation, may be capitalized or may be used by the new corporation as a basis for rate making purposes."

Later in 1935 the Androscoggin Electric Corporation of which the Central Maine Power Company owned all the common stock was merged into the latter upon P. U. C. order to effect economies and simplification. The P. U. C. repeated in its findings the same admonition quoted just above and added:

> "- - - but we do reserve the right to make such determination when and as the occasion may arise."

From 1920 (R. S., 1916, c. 55, § 36) until 1953 valuation of property made for rate fixing continued to be gauged at reasonable value. But in 1953 (P. L., 1953, c. 377, § 2) the P. U. C. was instructed to consider evidence of the cost of the property when first devoted to public use, prudent acquisition cost to the public utility, current value and any other factors material and relevant. Since 1957 current value consideration estimated by many to be impracticable as a factor has been deleted by the Legislature. P. L., 1957, c. 400, § 2. 70 Har. L. Rev. @ 982.

Thus 45 years prior to the hearing before the Commission in this case a "write-up" of properties had been introduced upon the records of Androscoggin Electric Company with Central Maine Power Company having no part in the incident.

In 1920 the Public Utilities Commission was almost laudatory in approving the Central Maine Power Company's intermediate purchase of the Androscoggin Electric Company securities. True the curb of P. L., 1919, c. 128 as to rate-making, mentioned above, was in effect always and no doubt made a legal implied condition for security purchasers and others to heed. *Sullivan* v. *Insurance Co.*, 131 Me. 228, 230. Yet the language employed by the Public Utilities Commission objectively to express its thought voices plain accord to the 1920 transaction, its prudency and economy.

In 1935 twice the Public Utilities Commission gave approbation to the progression of advancing the Androscoggin Electric Company's electric plant into the immediate ownership of Central Maine Power Company. In both latter instances the P. U. C. affirmatively adverted to the statutory reservation as to ratemaking. The caveat seems somewhat ritualistic, however, following upon the assenting orders of the Commission.

Since 1953 the Legislature has required a consideration of cost of rate base properties when first devoted to public use, prudent acquisition cost and any other considerable factors in deciding the reasonable value of those properties.

From the time of the establishment of the Public Utilities Commission pursuant to P. L., 1913, c. 129, the Legislature has adhered to the reasonable value formulary. P. L., 1913, c. 129, § 34. But neither cost of the property when first devoted to public use nor prudent acquisition cost is made synonymous with reasonable value by the statute. Nor is either of those 2 costs forced upon the P. U. C. as a substitute for reasonable value. Reasonable value as the objective of the Legislative act is not susceptive of such simple attainment. Permissively and to render reasonable value the more accessible of resolution the Legislature has prescribed attention to first cost and acquisition cost but along with

and not disregardful of the solution of a practicable, yet just, reasonable value. Given both an original and acquisition cost their comparison is often revealing in the settlement of reasonable value. These legislative determinants were not directed in lieu of but as conducive with the exercise of a sound discretion.

In this case an implacable concentration upon the write up of 45 years before can produce a drastic finding. In the quest for just rates based upon reasonable values, R. S., c. 44, § 18, the deliberation must be as careful and comprehensive as the data permit. There is no finality here but a critical inquiry into the relative equities of a host of people. Central Maine Power Company paid the total enlarged cost. There is no evidence negating an arm's-length dealing. No speculative securities were issued by Central Maine Power Company which was a stranger to the 1914 enlargement entered upon the books of the predecessor utility 6 years before the Central Maine Power Company became related with the subject matter. The property is operating and must be accepted as necessary to the public service. The Commission gave its assent as beneficial for all classes. Depreciation and amortization have accrued to reduce the cost account. Inflation must surely have become very efficacious as a neutralizer for the factor of the 45 year old "write-up." The fictitious and unsound asset value is now of dubious survival. The customers as to rates of service, the investors in respect to security and the public have a clear interest in the sound prosperity and compatible expansion of the utility. Just rates ultimately affect service and costs. The consumers' interest can be fairly harmonzed with the investors' here. A formalistic judgment upon the segregated write-up is not a fair compliance with the letter or spirit of the Legislative act. It is a kind of censure in its application here and could now serve little purpose save as a dooming for remote acts committed by outside parties before

Central Maine Power Company secured leave to purchase the controversial properties. We believe that the Company is entitled to the inclusion of the excess acquisition cost of $1,095,194.09 with any proper adjustments in the rate base and that the suspension of that amount under the circumstances must be considered exceptionable and unlawful.

NORTH GORHAM, WEST BUXTON and BONNY EAGLE HYDRO STATIONS

The Commission suspended from the items composing the Company's proposed rate base an inclusion of three properties which formerly were owned by Cumberland County Power and Light Company (C. C. P. & L. Co.) and which the Central Maine Power Company acquired when it assimilated by merger the assets of C. C. P. & L. Co. in 1942. Those properties are the North Gorham Hydro Station, the West Buxton Hydro Station and the Bonny Eagle Hydro Station and collectively are listed at the cost of $2,239,918.04.

The merger of 1942 was consummated by the Securities and Exchange Commission (S. E. C.) functioning under the authority of the Public Utility Holding Company Act of 1935 (U. S. C. A., Title 15, § 79) and the commerce clause of the U. S. Constitution. The Company and C. C. P. & L. Co. were in 1942 subsidiaries of New England Public Service Company (N. E. P. S. Co.) of which S. E. C. had jurisdiction. S. E. C. was then in the process of reorganizing and simplifying the N. E. P. S. Co. system. An application had been presented to S. E. C. for the merger of C. C. P. & L. Co. into the Central Maine Power Company. The S. E. C. granted the application and by its order fixed and recited the consideration whereby the Company should purchase and C. C. P. & L. Co. should sell to the Company the assets, subject to the liabilities, of C. C. P. & L. Co. The North Gorham, West Buxton and Bonny Eagle prop-

erties were among those assets of C. C. P. & L. Co. The price to the C. C. P. & L. Co. was an aggregate one. Some intangible and inflationary items had been eliminated by the S. E. C. The S. E. C. approved the kind and amount of securities which the Company should issue to finance the merger. The S. E. C. required the approbation of the merger by the Maine Public Utilities Commission in compliance with Maine law. A consolidated actual and *pro forma* statement of both the assets of C. C. P. & L. Co. and of the Company as of July 1, 1942 is appended to the findings and opinion of the S. E. C. in the merger record.

The Maine P. U. C. in approving the merger of C. C. P. & L. Co. into the Company in 1942 ordered that pursuant to the merger the Company

> "- - - shall enter the accounts of Cumberland County Power and Light Company upon its books at the amount shown by the books of Cumberland County Power and Light Company as of July 31, 1942. - -"

The wherefore of the Public Utility Holding Company Act which created the S. E. C. is told in Title 1, Section 1 of the Act. U. S. C. A. Tit. 15, § 79 a (b) (1). In reciting the old law, the mischief and the remedy the statute relates some evils to be alleviated by the S. E. C.

> "(b) ---it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy - - - are or may be affected,
>
> ---
>
> "(1) when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from inter-company transactions."

The S. E. C. found that the merger of the two subsidiary utilities, C. C. P. & L. Co. into Central Maine Power Company:

> " - - - will make certain operating economies possible" and "will serve the public interest by tending towards the economical and efficient development of an integrated public utility system."

The S. E. C. in its exercise of jurisdiction over the merger was *without authority to act* wherever it found that:

> "(b)
>
> "(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or
>
> "(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system."
>
> Public Utility Holding Act, 10 (b) (2) (3); U. S. C. A., Tit. 15, § 79 j, (b) (2) (3).

The S. E. C. possessed the following powers:

> "(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers."
>
> Public Utility Holding Act, 10 (e); U. S. C. A., Tit. 15, § 79 j (e).

This court in *Woodsum* v. *Portland R. R. Co.*, 144 Me. 74 commented upon the nature and scope of the Public Utility Holding Act and its administration by the S. E. C., as follows:

> P. 79 "- - - an overriding federal law. - - - It is therefore apparent that this court is being invited to take action which may well be in disregard of that delicate balance between state and federal power on which our system of government rests. P. 91 - 92." There can be no question of the right of Congress under the commerce clause of the constitution to bar any action by the state inconsistent with the full and plenary exercise of the authority given to the federal government in a particular field. This is made clear in the case of Schwabacher v. United States, supra. (334 U. S. 182) Both the majority and minority opinions agree that Congress has such power. In matters within its scope, a federal law is supreme.
>
> *Harvey* v. *Rackliffe,* 141 Me. 169, 41 A. (2nd) 455, 161 A. L. R. 296.
>
> "It was the avowed purpose of the Public Utility Holding Company Act to compel the simplification of the structures of holding company systems throughout the United States. To effectuate this purpose, the S. E. C. was given wide powers which it could exercise in carrying out the policy of the Act without regard to the wishes of stockholders and in spite of charter provisions. The so-called death sentence clause meant that the Commission could compel the dissolution of a company whenever necessary to carry out the congressional mandate, and could take complete control of all of its assets.
>
> P. 97. " - - - When the Commission assumed jurisdiction, the power of the state court to take any incompatible action was gone - - -"

When S. E. C. in 1942 ordered that the Company acquire by merger the assets, encumbered by the liabilities, of C. C. P. & L. Co. at a specific consideration, compliance with

that decree was an officially commissioned purchase at an acquisition cost authoritatively prudent. That deduction is unassailable and incontrovertible because of the jurisdiction in the subject matter and proceeding and the broad control enjoyed by the Federal agency which prescribed the price paid. The very action of the S. E. C. presupposes that the price it fixed was adjudged prudent by it. The Company gave the consideration in full and it is operating the Bonny Eagle, West Buxton and North Gorham hydro stations which are necessary to the public service of that utility.

It may be observed cumulatively that in the record of this case is contained evidence that two experts acting independently and contemporaneously with the merger, for a trustee bank appraised the value of the C. C. P. & L. Co. properties. Their judgment is commensurate with the price finding of S. E. C.

Upon the record the cost of the hydro station properties when first devoted to public use appears to be a fact lost beyond evidential recall. But, as we have seen, there is conclusive proof of the prudency of the entire and composite acquisition cost of the C. C. P. & L. Co. assets when purchased in 1942 by the Company. There is evidence available of the costs allocable in the merger of 1942 to the three properties in question.

The Commission therefore erred in dispensing with such evidence of the prudency of the acquisition cost which was paid. There is no evidence of private speculation on the part of the Company here. Fictitious value is eliminated. The legality of the acquisition is beyond question. The properties are in public use. The customers, we must assume, were adequately considered by the S. E. C. They are being served by the properties. The investors have advanced their funds with authoritative sanction. To deny a return on these

properties at their acquisition cost under the circumstances would constitute confiscation. The action of the Commission was exceptionable and unlawful. The prudent acquisition cost of the three properties less depreciation must be added to the Company rate base with any proper adjustments.

ROBINSON LAND COMPANY

Robinson Land Company was created in 1909 and throughout its existence, until 1923 was controlled by Central Maine Power Company. 600 shares of the Land Company stock were issued for no revealed consideration to Central Maine Power Company and the balance of 400 shares to "the Robinsons." We are informed that "the Robinsons owned the key land and water rights at the site of the Wyman project." One Kelleher was related to the Robinsons and he seems to have received the 400 shares of $100 par value stock. All the while, from 1909 until 1923, the 4 directors of Robinson Land Company were also directors of Central Maine Power Company. In 1910 Kelleher became a director of Central Maine Power Company and in 1921 was a director of both the Land Company and of Central Maine Power Company.

C. M. P. Co. advanced moneys to the Land Company which purchased property. Prior to 1921 C. M. P. Co. had paid $126,355.61 to the Land Company. In 1921 C. M. P. Co. disbursed to the Land Company $80,000 which the latter in turn gave to Kelleher for his minority stock holding of 400 shares in the Land Company. When we subtract $15 representing an account receivable of the Land Company collected by C. M. P. Co., C. M. P. Co. appears to have spent $206,340.61.

On hearsay it is said that Kelleher in 1909 had supplied to Robinson Land Company options on "the Robinson Farm which was at the key site of the Wyman Dam" in exchange for the 400 shares of stock.

It appears in an exhibit prepared by C. M. P. Co. and entered here by the State that by deed of Hadassah S. Robinson dated October 30, 1909 real estate of the Wyman Hydro Development was conveyed to Robinson Land Company at the purchase price of $15,000.

It is not comprehensible from the evidence how much Robinson Land Company real estate is in the rate base presented by C. M. P. Co., how much of it has been released, where the presently operating portion of it lies or when such land was first devoted to public service. C. M. P. Co. carries the real estate in its application at $190,898.18 of the $206,340.61 spent.

C. M. P. Co. has possession of the Robinson Land Company records. Any options exchanged by Kelleher for his stock are not in the record of this case. The payment by the Land Company of $80,000 to Kelleher appears in the exhibit here only as a cash outlay for capital stock and as an acquisition cost to C. M. P. Co.

On July 14, A. D. 1921 the Public Utilities Commission granted the petition of C. M. P. Co. to issue bonds against capitalized properties. A plant account in support of the petition was:

> "Cost of property and power of Robinson Land Company, that part not previously owned and now purchased *$206,355.61.*"

The P. U. C. order did not limit the powers of the P. U. C. for rate fixing. P. L. 1913, c. 216.

This particular issue and business must be distinguished from the problems of the Androscoggin Electric Company and Cumberland County Power & Light Company properties in that the Robinson Land Company additions were controlled and governed by the Central Maine Power Company throughout. In the Androscoggin and Cumberland

matters Central Maine Power Company's role was confined to the aftermath of the alleged transgressions.

The Company upon this topic had been extended fair and timely notice by the Commission that the Robinson Land Company transactions must be clarified. The Company had assumed the onus of proof. The Commission is justified in its finding that the Company has not demonstrated the original cost or the reasonable value of the Robinson Land Company's properties used or required to be used in public service by the Company. The suspension of the item of $190,818.18 from the rate base is neither exceptionable nor unlawful.

HARRIS STATION, RIPARIAN LANDS

In the time span from 1919 to 1951 the Company acquired from top of bank to stream on both sides of the Kennebec River all the riparian lands with their appurtenant easement water rights through a distance of 12 miles from Indian Pond to The Forks. The Company thereafter built the Harris Station at Indian Pond with an outlay of some $20,000,000. That station is operated as a peak plant which is one designed to function whenever the demand upon the utility system for electric energy is abnormally acute and must be for limited periods of time compensated by some emergency facility. The station was performing in public service during the test year.

In its requested rate base the Company included those riparian lands and water easements at their cost of $543,338.66. The Commission found that such property was not "used or required to be used" in the Company's service to the public and suspended such cost from the rate base conceded. R. S., c. 44, § 18, as amended.

The recorded testimony in support of the Company's premises was invited and elicited by the State's counsel

through the calculated venture of cross examining the Company witness. Such evidence is now disparaged in the Commission decree and in its brief. The testimony is refuted as inconsiderable in that the witness had not qualified as an hydraulic engineer competent to attest to the requirement of the riparian lands and easements for utility operation. The witness had narrated his personal history as Chief Accounting Officer of the Company from 1935 to 1945 and as Controller of the Company since 1945. Obviously he was a man of superior talent, of achieved status and by his significant office in a large utility inferentially a person of extensive information concerning Company affairs. His testimony was unchallenged, unrebutted, plausible and relevant.

> "---- Evidence, even though legally inadmissible, received without objection, is regarded as in the case by consent, and, if relevant, must be considered by the trier of the facts. Moore v. Protection Insurance Co., 29 Me., 97; Brown v. Moran, 42 Me., 44; Tomlinson v. Clement Bros., Inc., 130 Me. 189."
>
> *Watkins Co.* v. *Brown,* 134 Me. 473, 474.

The witness related that the worth to the Company of Harris Station is attributable to its character as a peak plant. As a run-of-the-river station its potency would be restricted to 10,000 kilowatts instead of the 75,000 kilowatts ability it now possesses and it would not be commercially gainful because of its capital cost. It has merited well for the Company but its very advantages were attained only after the resolution of serious problems encountered.

As the need for added power manifests itself upon the lines of the Company an automatic apparatus within 10 seconds releases dam water and spins the generators at Harris Station. The occasioned hydro flow will vary with the hour, the season, the level of the river and the wanted

electric energy. The alternation of storage and discharge of water affects the river flowage in a volume range from 140 to 8000 cubic feet per second. The release of water raises the level of the river to a maximum of 10 feet. The channel of the river from the station to The Forks is not of uniform width and "there is quite a substantial fall in the river." Before the station was constructed legal counsel advised the Company to purchase the controversial riparian lands and water rights and that was done "at the minimum price necessary."

The Kennebec River from Indian Pond to The Forks is non-tidal and floatable.

Riparian ownership extends to the thread of the stream and includes a right to the natural flow of the river with the reasonable and private use and benefit of it subject only to the public right of passage for fish and for boats and logs when the stream is naturally of sufficient size to float boats or logs. The riparian proprietor may use the power for manufacturing and industrial purposes if the water is not thereby unreasonably detained or essentially diminished. He may build dams on his land subject to the provisions of the Mill Act and to the payment of damages for all flowage caused. The proprietor may not unlawfully or unreasonably divert the water. Opinions of the Justices (1920), 118 Me. 503, 506.

As to the relation of riparian owners and downstream proprietors we quote from precedents of this court:

> "The defendants caused an unnatural accumulation of water in a reservoir above the mill of the plaintiff. *If accumulated rightfully as to this plaintiff, they must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels over the plaintiff's property.* (Emphasis added.) If accumulated wrongfully and without any right or authority as against this

plaintiff, if he lets it into its ordinary, and accustomed channels, he does so at his peril, and he must be held responsible for the consequences of his *wrongful* act."

Frye v. *Moor* (1866), 53 Me. 583, 584.

"- - - For only he can recover damages under the mill-act 'whose lands are damaged by being flowed by a *mill-dam*', R. S. c. 92, § 4. This language, especially when considered in connection with other provisions of the chapter, evidently refers to lands flowed by water raised by the dam, and situated *above* the dam - - - Damages caused by water let out of the dam is nowhere hinted at in the statute. If the dam is rightfully built, the statute provides the remedy for persons injured in their lands by flowing caused thereby; *but the water thus rightfully accumulated must be let out with ordinary care, or the party will be liable at common law for negligence.* Frye v. Moor, 53 Me. 583."

Wilson v. *Campbell* (1884), 76 Me. 94, 95. (Emphasis supplied.)

"It must be remembered the case at bar is not a complaint for flowage under the statute. The mill act of this State, unlike that of Massachusetts, does not authorize a complaint for flowing lands below the dam. Wilson v. Campbell, 76 Maine, 94. *The case at bar is an action at common law to recover damages for wrongfully increasing the volume of the stream so as to overflow its banks and the plaintiff's meadow.* Whether or not there was an unreasonable exercise of the defendant's rights under all the circumstances of the case, was a question of fact for the determination of the jury under proper instructions - - -" (Emphasis added.)

Barker v. *French* (1907), 102 Me. 407, 413.

"- - - He (the riparian proprietor) may use it for hydraulic purposes, but may not unreasonably retard its natural flow, *nor injuriously accelerate its*

> *motion, by discharging it from his works in an unreasonable manner, nor suddenly and in excessive quantities,* nor divert it from its accustomed channel without returning it to the same before it passes from his own premises to those of others - - -" (Emphasis added.)
>
> *Davis* v. *Getchell* (1862), 50 Me. 602, 604.

The above authorities would seem to afford sound apprehension to upstream riparian proprietors against the common law hazards of operating a peak plant which liberates water downstream suddenly and sporadically in large volume.

In 1714 the Province of Massachusetts Bay enacted a mill act. (Province Laws, Chapter 111.) In 1821 Maine adopted one, Laws of Maine, 1821, Chapter XLV. (c. 74, Mass. Laws of 1796.) In R. S., 1841, c. 126, §§ 1 and 2 will be found the substance of our present statutory provisions pertinent here. *Bean* v. *Cent. Me. Pr. Co.* (1934), 133 Me. 9, 13, 14; *Brown* v. *DeNormandie* (1924), 123 Me. 535, 539.

> "Sec. 1. Any man may on his own land erect and maintain a watermill and dams to raise water for working it, upon and across any stream *not navigable;* - - - (emphasis added).
>
> "Sec. 3. No such dam shall be erected or canal constructed to the injury of any mill or canal lawfully existing on the same stream; nor to the injury of any mill site, on which a mill or milldam has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or defeated."
>
> R. S., c. 180, §§ 1, 3.

The Mill Act applies to reservoir dams as well as working dams, *Brown* v. *DeNormandie,* 123 Me. @ 542, but regulates only non-navigable, non-tidal streams such as the Kennebec River between Indian Pond and The Forks.

This court said in *Bean* v. *Central Me. Pr. Co.* (1934), 133 Me. 9, 26:

> "In Maine, litigation over rights in water powers began soon after the establishment of the state, and the principle was announced by our court in 1832 that the right of the owner of an undeveloped mill site is not complete. *As against the owner of a lower site, the right to develop and use the upper is suspended, if the lower is first developed and flows the upper site, suspended so long as by the use of the lower site the other is submerged.* 'A mill privilege, not yet occupied is valuable for the purposes to which it may be applied. It is property, which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream, *although it may be impaired by the exercise of certain lawful rights, originating in prior occupancy.*'
>
> Blanchard v. Baker, 8 Me. 253, 268." (Emphasis added.)

Applying the Mill Act in 1850 the court ruled:

> "- - - The plaintiff's mill was lawfully existing upon the river, and the erection of the dam by the defendant, some ten rods above it, caused an injury to the mill, by directing the water, in violation of this statute."
>
> *Thomas* v. *Hill,* 31 Me. 252, 254.

In *Wentworth* v. *Poor* (1854), 38 Me. 243 this court held that the owner of a mill erected two rods upstream subsequently to one lawfully existing upon the same stream was liable in damages if by his mode of using the water, the first mill was rendered less beneficial and profitable than it had been before and that such liability was not lessened because the damages were occasioned from the use of improved machinery by the owner of the new mill.

In *Bean* v. *Cent. Me. Pr. Co., supra,* our court chose a felicitous adjective when it qualified the riparian right to

an upstream and undeveloped mill site as "defeasible." 133 Me. @ 21. Purposing as it was to invest vast sums in an upstream peak plant the Company would have been much less than ordinarily prudent in view of the venerable Mill Act and the state of the common law if it had not preempted intervening downstream rights as its counsel had advised. The Company could have been flowed out of its site before it got its station erected. It could continuously worry about law suits and injunctions. Nor in the light of the testimony can we fairly say that the Company has not established that it was justified in the extent of its purchase of land and rights or in the cost "at the minimum price necessary to accomplish the results we sought to accomplish."

It is our conclusion, therefore, that the action of the Commission was exceptionable and unlawful. The riparian lands and water easements at the cost of $543,338.66 subject to any proper adjustments should have been admitted to the rate base as property "used or required to be used" in the public service.

WORKING CAPITAL

In its rate base the Company solicited an allowance of $4,630,000 for working capital. The Commission approved only $1,000,000. The variance of $3,630,000 consists almost entirely of two particulars, materials and supplies and income tax accruals.

The Company computed its normal average of materials and supplies at $3,246,000. By election it has been the practice of the Company in its official reports to the Commission to post initially all materials and supplies in one account which contains both such chattels as are used for repairs and minor maintenance and also those which are for construction. The parties here stipulate:

> "Except for a special case of a special job, all materials pass through the M. & S. account."

As materials and supplies are consumed in construction interest is accredited to the Company upon their cost which is thereafter imbedded in the capital construction account. Such materials and supplies as are expended for repair and minor maintenance are traditionally classified as part of the operating charges to be defrayed from working capital in the rate base. The kind and amount of materials and supplies for repairs occasioned by attrition or emergency are to be ascertained from the reasonable and prudent requirements of operation.

We quote from the record a part of the cross-examination of the Company President:

> "Q. Now, one thing that is possible in this material is that some of it may at times be required for minor replacements and repairs, is that correct?
> "A. Yes.
>
> "Q. Now is it possible that some of this material may also be used for extensions, that is, for capital additions or construction?
> "A. Yes.
>
> "Q. Now, could you tell us approximately how much of the materials here are used for maintenance and operation of the Company, that is, normally, and what portion would be used for construction purposes?
> "A. Well, I believe from the working papers supplied, if that is the nature of your question, it was stated that 10% of the issues were charged to operation and maintenance. Does that answer the question?
>
> "Q. I think it does if it answers it, does that mean 90% approximately would be for construction, new construction or otherwise?
> "A. Well, that is what that division would show, that 90% of it is charged to construction. But going back to the purpose of the inventory and the

need for it, that is an entirely different and separate thing.

"Q. Why is that?

"A. Because the fact that this is a common pool with construction does not necessarily mean that your need for that working capital to sustain and maintain your service is in that ratio. We have to be in a position to maintain our plant, and that is no measure of the materials and supplies necessary to maintain our plant. It can't be done on a pro rata basis.

"Q. It is not possible to break it down exactly, is that right?

"A. Oh, no, it doesn't lend itself to that kind of treatment at all. It must be obvious that if we have a severe storm, with service to maintain, that we couldn't get along with 10% of that inventory, for example.

"Q. Well, you might not be able to get along with it, but you can break down what portion goes to routine operation and maintenance and what portion would go to construction, is that right?

"A. Well, under normal conditions I think the 10% indicates all that common pool actually uses. But that is no measure of the working capital that we have to tie up irrespective of the capital construction."

The same witness in redirect examination stated:

"A. Well, regardless of what use is made of this common pool, the fact remains that this amount of materials and supplies is necessary to insure the maintenance of service. While it remains in M. & S. it is not being carried by construction as subject to interest during construction and is definitely a money lock-up or true working capital as far as Central Maine Power Company is concerned.

"Now, the question has been directed as to what part comes into consideration and what part is

> used for maintenance. I repeat that that is a common practice with practically all utilities to run the requirements out of a common pool, but the actual use made of it is insignificant as relating to the main point of a capital tie-up working cash requirement to maintain service, and that is what we are obliged to do and, I am sure that is what the Commission should support us in. And the fact that whether it comes into a capital job, which easily is maintenance in another form, makes no essential difference. It is a tie-up of cash for which we are receiving no recognition whatsoever either through interest during construction, it is simply a tie-up of cash and thereby working capital.
>
> "I know that most utilities operate in this manner, using the common pool. - - -"

Abridged, the deduction of the Company is that its funds have been disbursed for materials and supplies, that it has a right to demand an uninterrupted return on such moneys although the most by far of the materials and supplies are destined for construction and that therefore the entire inventory must be placed in the rate base. The *non sequitur* here is obvious.

The fair, expressed meaning of the quoted testimony is that an average 10% of the materials and supplies may be expected to become diverted to repairs and minor replacements, that 90% will ultimately be issued from the inventory for construction but that the vicissitudes of weather further require that a large stock of articles be constantly stocked against emergencies. This last element is indefinite without the benefit of any commitment or estimate. The Company serves a great area with extensive properties and a far reaching mileage of fixtures. The exposure is wide. The materials and supplies must be distributed and stored.

The Company brief has devoted extended argument to the necessity of an abidingly large inventory contained in the rate base to the amount requested of $3,246,000. But

the Company which bears the burden of proof has afforded no substantial evidence of past average needs, of empirical history or of foreseeable requirements to permit demonstrable fact finding. Improvisation or conjecture is improper and illicit. The Company request is clearly unreasonable but by how much? The Commission availed itself of the concrete figure of 10% and then supplemented its final working capital finding by an addition of $80,900 to yield a round $1,000,000 after disallowing $2,921,400 of the materials and supplies inventoried.

The Company by commingling all materials and supplies in one account compounded the problem. It defended itself upon the grounds of economy and efficiency and pleaded its inability to clarify the situation further. The magnitude of the discrepancy between the amount asked and the $1,000,000 allowed together with the smallness of the percentage of the working capital fixed with relation to the whole rate base is arresting and has given the court much concern for want of tangible and satisfying data.

The Company holds that the amount of materials and supplies for insuring maintenance of the Company's service to the public is a matter of managerial discretion. But for rate-making purposes the Commission has the duty and the correlative right to study such property, to judge if it is *"used or required to be used"* in the public service (R. S., c. 44, § 18), and to determine if the amount approximates the average needs of the Company. *Diamond State Telephone Company* (1954), 48 Del. 317, 103 A. (2nd) 304.

> "Working capital is allowed as a part of the rate base, upon which a reasonable rate of return must be allowed, when it is demonstrated by *substantial* evidence that the utility must provide cash from its own funds to meet necessary operating expenses- - - -" (Emphasis added.)
>
> *Re Transcontinental Gas Pipe Line Corp.* (1952), 94 P. U. R. N. S. 333, 341.

For necessary working capital there is no fixed or conventional percentage or formulary applicable generally to utilities. Fixation depends upon the factual circumstances in each case. *City of Pittsburgh* v. *Penn. P. U. C.* (1952), 370 Pa. 305, 88 A. (2nd) 59, 62.

Because of our conclusions as to the propriety of the incorporation of certain disallowed properties in the rate base and the added necessity for their maintenance and because of the gravity and inadequate status of the materials and supplies issue here it is our opinion that the subject be remanded to the Commission for further hearing and determination in the light of further evidence to be supplied by the Company.

The Company suggested a deduction of $1,995,000 in its working capital computation as a concession and allowance for the minimum balance of accrual for Federal income taxes in the test year. The exhibit prepared by the Company and introduced by the State lists the actual amounts of the 12 monthly balances of accrual for such taxes during the year 1958. The Commission ordered a deduction of $2,773,090 as the 12 months' average rather than the minimum balance deduction proposed by the Company. The Commission's figure is greater by $778,000 than the Company's. The differential is substantial but justified. We find no error there.

WESTON STATION

At Weston Station in Skowhegan the Company in 1958 stabilized the power house whose foundation structure had moved or slipped. The cost was $271,425. The Company contends that such an amount should be allowed to it as the hydro maintenance expense of Weston Station for the test year, 1958. The Commission, however, granted for Weston Station in the test year formalizing only the average

amount spent for maintenance of Weston during the 5 years (1953-1957), prior to 1958 or $32,343. The result is a subtraction of $239,082 from the Company's requisition.

The theory of the Company is that the work performed at Weston was a maintenance repair rather than construction or replacement. The Company relates the number and kinds of its large and multiplied properties which are imposing and argues that by the rule of probabilities somewhere at least, each year a major repair or stabilization may be expected to supervene and that the expense will be fairly comparable with that at Weston.

The Commission rejoins that the restoration at Weston was abnormal, non recurrent and of a replacement nature without significance in maintenance expense for rate making. It says that through the years from 1949 through 1958 the Weston, 1958 outlay is the largest for maintenance at any plant of the Company, regardless of age or size.

Through the span from 1949 through 1958 it is true that at irregular and desultory times several stations individually required large and acute maintenance or rehabilitation expenditures but the peak maintenance expense of none of these stations except that at Weston is charged to the particular station upon the 1958 test year maintenance roll. As for Weston Station it is not foreseeable that a comparative disbursement for structural correction will be occasioned in the imminent future.

The Company protests that the Commission is here unjustifiedly normalizing a particular station rather than all stations collectively, for a test year.

The restoration expense in 1958 at Weston is egregious. A 5 year (1953 - 1957) average allowance for 1958 test year maintenance of that station seems rational and rightful. Assuming without deciding that the project at Weston

was a maintenance repair and not a capital replacement, inclusion of that cost in the test year maintenance for that particular station is not tenable.

> "During the year under consideration there were charged into operating expenses of the Railway & Light Company $3,444, of expenses connected with dismantling certain primary lines of the Georgia Public Service Corporation and transferring the current distribution to the primary lines of the Railway & Light Company. If a proper charge to operating expenses, this was an extraordinary expense which will not again be incurred, and this year's operating expenses will be saved that sum"
>
> *In Re Macon Railway & Light Company* (1915), P. U. R., 1915 E. 648, 658.

The Company has the burden of proof. If from its past experience of erratic exposure to major repairs at scattered times there is afforded some over-all calculable annual average of extraordinary repairs it is the responsibility of the Company to supply any such additional data and pattern to the Commission in its test year normalization.

There was no error or inequity in the Commission ruling.

HYDRO MAINTENANCE EXPENSE

The Company from a record exhibit supplied by it lists the annual hydro maintenance costs experienced by it through the period from 1953 through 1957, which yield an annual, average figure of $543,215. The Company cites the amount of $742,820 as its 1958 actual hydro maintenance expense and subtracts from it the $239,082 disallowed from the Weston Station 1958 expenditure. The difference of $503,738, the Company complains, is its allowance from the Commission for 1958 hydro maintenance expense and is $39,477 less than its average hydro maintenance allowance for the 5 years, 1953 - 1957.

The Commission, however, has allowed to the Company an overall maintenance expense for 1958 of $3,056,000 as requested by the Company less the $239,082 Weston Station disallowance or a net $2,816,918 which exceeds the overall maintenance expense for 1957 by $328,918, is greater than that overall expense for any year from 1951 through 1957 and exceeds the average of those years by $437,318.

GENERAL and ADMINISTRATIVE EXPENSES

Many of the personnel of the Company are appointed as the need occurs to the furtherance of some of the multiple aspects, engineering and clerical, of construction projects. Prior to 1958 it was the accounting practice of the Company to allocate to construction expense an additional 3% which was thus capitalized to include the overhead for such personnel. Since the test year 1958 that percentage has been lessened from 3% to 2% to compensate for the reduction in construction activity. During the years 1954 through 1957 construction expenditures were high and reached their zenith in 1957. Since the completion of the new and immense steam generating plant at Cousins Island there has been an apparent respite.

	Construction Expenditures	General Administration Allocated to Construction
1948	13,682,821.50	183,843.28
1949	9,423,982.59	193,857.63
1950	7,892,446.64	158,713.94
1951	14,929,361.47	248,848.13
1952	14,298,733.47	296,439.38
1953	14,858,892.54	291,379.86
1954	17,233,539.41	320,692.10
1955	17,889,302.04	361,262.86
1956	16,281,284.09	272,346.56
1957	20,689,395.18	413,872.46

10 year average	14,717,975.89	274,125.62
5 year average	17,390,482.65	331,910.77
3 year average	18,286,660.43	349,160.63
1958 Test Year	11,912,386.40	95,122.50

The testimony of the Company is that for 1959 it purposed and planned to spend only an actual $10,775,000 "mainly substation, transmission, distribution items made up of that nature, plus possibly some preliminaries on generation." "We do not propose to add to our generating capacity in 1959 or 1960." "- - - according to growth trends the Company should be able to take care of its requirements without the need of further generating capacity up to 1962."

The following colloquy between the Company President and the Commission counsel is in the record:

> "Q. Now, as I understand it, Mr. Wyman in your testimony heretofore, you stated that the Company is going to require more capacity of growth in 1961 and '62, is that correct, 1961 and '62?
> "A. Capacity, I believe, we are already on record of requiring capacity in the year 1962.
>
> "Q. And I think you have already stated that your construction that is required to meet that capacity will be incurred at least a couple of years before that time?
> "A. Oh, there is some lead time to final completion, that is right."

The Commission and the Company have disagreed as to the amount of construction to be postulated during the period for which rates are being defined here and derivatively as to the amount of general and administrative expense to be charged upon construction to the reduction of allowable net operating expense. Sums transferred from general and administrative expense to overhead for construction become a fixed part of operating property cost in the rate base upon which the Company earns a return. Such a transfer to the

property account reduces expenses for a particular year and increases net operating income. When construction is decreased less of the general and administrative expenses are allocated to construction and a lower net operating income results.

The presentment of the Company is that following a period of exceptional expansion ending with 1957 it could have no requirement of additional generating capacity until 1962. Therefore, it testified that for 1958 and at least for a few years to ensue it contemplated and purposed a greatly reduced building program and for the test year 1958 as well as for 1959 estimated the monetary costs. The Company contends with force that the extent of a construction prospectus is a decision for managerial authority in sound discretion. The Company insists as well that it is entitled to credit and benefit for all money legitimately and in good faith spent whether for operating expenses or overhead construction.

The Commission, nevertheless, found the following statistics most persuasive.

	Construction Expenditures	General Administration Expenses Allocated to Construction	Net General Administration Expense
1953-57 average	$17,390,482.65	$331,910.77	$1,381,147.37
1958 actual	11,912,386.40	95,122.50	2,197,937.39

The Commission concluded:

> "- - - We are of the opinion that this exhibit indicates that the year 1958 does not constitute a normal year for testing these expenses.
>
> "- - - We disagree however with the Company's contention that this is a *normal* expense for rate making. It is evident that the major cause of the difference between the year 1958 and prior years as far as this item is concerned, is that the Com-

pany's construction program for the year 1958 was considerably less than the program of prior years. For this reason, we cannot consider the 1958 actual figures for this item as being a proper measure for test year purposes."

The Commission consequently ordered the following adjustment:

Actual Gen. Adm. Expense transferred to construction (1958)	$ 95,122.50
Adjustment in 1958 of difference between 2% and 3%	77,938.00
1958 Actual Adjusted to 3% basis	$173,060.50
Gen. Adm. Expense transferred to Construction—5 year average	$331,910.77
1958 Adjusted Above	173,060.50
1958 *Less* than 5 year average	$158,850.27

The Commission thus increased the Company's *pro forma* 1958 Test Year Net Operating Income by the addition of $158,860.

The volume of actual construction in a Test Year and the planned and projected construction for the immediate and few years to follow upon that time are matters within the rationing and will of the Company management. Those elections are not so amenable to external forces as are some economic quantities in a test year. We have upon record the testimony of the Company executive. The Commission was not distrustful or incredulous but was decided rather argumentatively by the content of the cross examination of the Company President who had conceded that at some "lead time" prior to 1962 construction is indicated and operating expenses must then be reduced by transfer to construction from general and administrative expenses. Acknowledging that such an eventuality is very foreseeable, the occasion of it is in suspension and deferred by a real interim for the span from 1957 to 1960-'61. The action of the Commission

has regulated for a delayed futurity rather than for a Test Year actuality. The Company, we must assume, will report future substantial modifications in its construction program. There are sufficient sanctions written in R. S., c. 44, § 60.

It is our opinion that the adjustment of $158,850.27 increasing the Company's *pro forma* Net Operating Income is exceptionable and inequitable.

TEST YEAR RECESSION

The last quarter of 1957 was a season of economic recession which faltered on until the fall of 1958 when it terminated. The parties in this case are in accord with such facts and the court is cognizant of them. *Melanson* v. *Reed Bros.*, 146 Me. 16, 22. The Company filed its general rate revision in September, A. D., 1958. Hearings were had until June, A. D., 1959 when the Commission entered its decree.

1958 was adopted by the Company as its test year, i.e. as a recent past period reasonably dependable for affording actual and known operating results to serve with all proper adjustments as controls to assure fair returns to the Company for a future period extending until such time as there should occur severe but unforeseeable disturbances.

A test year draws a draft upon the future. It is an excursion into probabilities. Humanly for want of foreknowledge it is the extent of our capabilities. It is useful if prepared with provident caution.

This court observed in *Central Maine Power Co.* v. *P. U. C.* (1957), 153 Me. 229, 239:

> "- - - First, the experience of the test year should not be cast aside except upon a strong showing of its weakness as a measure for the future - - -"

In the same decision we commented upon judicious adjustments, @ 153:

> "- - - To ignore this probability is to defeat the very idea of fixing rates for the future upon intelligent and informed estimates. Why should a probability such as this be set aside in favor of the experience of the test year, which we know with certainty will not be repeated in the future? The experience of the test year is at best a 'guess' for the future. If we can make the 'guess' more in line with the probability, in the long run we will have benefited both public and Company. Much obviously must be left to the sound judgment and experience of the Commission."

From 1930 through 1956 the Company enjoyed an annual increase in total sales of kilowatt hours despite the depression years, two war periods and a variety of economic phases such as a hurricane and a recession. Such growth and trend persisted in 1957 and 1958 but to an abnormally depressed degree. Recovery becomes discernible in late 1958 and endures through the first five months of 1959 when the record in this case stops.

The Company made no adjustment in its test year formulary for the exceptional drop in sales of 1958. As we stated in our decision of 1957, *supra,* this has the indicia of "a strong showing of its weakness as a measure for the future."

The Company President upon cross-examination represented:

> "Q. In your pro forma income statement you pro formed water, fuel costs and wage costs, that is correct isn't it?
> "A. That is correct.
>
> "Q. You haven't, however, pro formed your 1958 income statement for the recession effect that we see in 1958, is that correct?

"A. That is correct.

"Q. Now, Mr. Wyman, isn't it reasonable to assume that 1959 sales will exceed those of 1958?
"A. Yes.

"Q. Due partly to normal growth of the Company?
"A. Yes.

"Q. Due also to the recovery from the 1957 - 1958 recession?
"A. To a point, yes."

Since the time of the Commission decree we, of course, now enjoy the advantage of the *ex post facto* and historical reality that the recession really ended in the autumn of 1958. Substantially improved business conditions have since obtained.

The public utility consultant specialist by at least 3 tests reached a conclusion that because of the recession and its passage the test year 1958 must be normalized by an addition of some 42,000,000 (plant to sales ratio) to 58,000,000 (straight trend) kilowatt hour sales and $238,000 to $341,000 in net income or $497,000 to $710,000 in gross revenue. The witness calculated and detailed the past annual growth in overall kilowatt hour sales and the net income per kilowatt hour both of which quantities, save for the 1957 - 1958 recession period, were quite constant. To estimate an adjustment he computed the subnormality in typical growth of the test year 1958 and multiplied such an amount by 0.568¢, the conservative net operating income per kilowatt hour accepted by the witness from the Company's own reckoning. He justified his computations by demonstrating that they were reconcilable with what could reasonably be foreseen for 1959.

The issue we now resolve is supremely technical, entails a mass of mathematical tabulations and much close testimony.

It has been extensively and sharply debated by parties and counsel. The State's expert was subjected to a prolonged and encompassing cross-examination. He acquitted himself very proficiently. Multiple variant factors are active in any analysis of the problem, such as rate increases, net and gross operating income, plant investment differential, water conditions, power exchanges, customer categories. The subject matter demands for its comprehension and exposition expert and experienced attention.

> " ---- The so-called fact in the rate cases —'confiscation'— is one of the end products of an intricate web of calculation and rationalization requiring expertness."
>
> 70 Harvard Law Review, 952, 980.

After a tedious review of this controversy we are unable to say that the Commission is not amply supported by the evidence and by statutory principle in its normalization of the Company's test year in the nedial and conservative net amount of $300,000. The Commission with its technical competence and specialized knowledge has considered the issue and rendered its decision which we believe is correct and just. Sound judgment was exercised in a complicated problem. There was no error or inequity.

We consider *Public Service Co. of N. H.* v. *State* (1959), 153 A. (2nd) 801, distinguishable.

DEPRECIATION and AMORTIZATION

Such depreciation and amortization expenses as are affected or occasioned by the conclusions and provisions of this opinion are to be suitably adjusted by the Commission.

The exceptions hereinbefore specifically allowed, viz. in the matters pertaining to Androscoggin Electric Company properties, North Gorham, West Buxton and Bonny Eagle Hydro Stations, Harris Station Riparian Lands (Working

Capital) — Material and Supplies, and (General and Administrative Expenses) — Net Operating Income Addition are sustained.

The petition in equity is sustained. The order of the Commission is hereby modified, amended and annulled to the extent of the inequity and unlawfulness thereof as more particularly detailed in this opinion. The cause is remanded to the Public Utilities Commission:

(1) for inclusion in the rate base of the adjusted acquisition cost of the Androscoggin Electric Company properties so-called,

(2) for like inclusion after allocation, of such cost of the North Gorham, West Buxton and Bonny Eagle Hydro Station properties so-called,

(3) for like inclusion of such cost of the Harris Station Riparian Lands so-called,

(4) for further hearing and determination of the Working Capital issue,

(5) for decreasing the Company's adjusted net operating income by the amount of $158,860,

(6) for whatever adjustments are resultingly necessitated and proper for depreciation and amortization,

(7) for entry of any interim orders which may be fitting and compatible herewith,

(8) for entry of a conclusive order.

Copies of all such orders shall be filed by the Public Utilities Commission with the Clerk of the Law Court in the County of Kennebec within 10 days after the date of the respective order.

The petition in equity is retained upon this docket until final disposition hereof.

So ordered

STATE OF MAINE
vs.
RICHARD W. ROWE

York. Opinion, May 27, 1960.

Released for publication August 25, 1960.

Criminal Law. Embezzlement. Trusts. Attorney's Fees. Mistrial.

Evidence that an attorney received monies upon an express trust to use it to compromise a claim, that it was not so used or returned, that it was retained and converted to the attorney's own use, is sufficient to sustain a charge of embezzlement.

Where the contents of an Internal Revenue file are denied to respondent and his exceptions fail to inform the Law Court of the file's contents, or how respondent was prejudiced by being denied them, no issue of law is raised and the exceptions cannot stand.

An attorney cannot retain trust funds under the guise of attorney's fees.

The refusal to grant a mistrial is proper where the claim of privilege by an official of the Internal Revenue (concerning contents of Internal Revenue files) in no way hampered respondent in making his defense.

ON EXCEPTIONS AND APPEAL.

This is a criminal action for embezzlement. The case is before the Law Court upon exceptions and appeal from a denial of a motion for a new trial. Appeal denied. Exceptions 1 and 2 dismissed. Exceptions 3 and 4 overruled. Judgment for the State.

Marcel J. Viger, County Attorney, for State.

Casper Tevanian,
Richard H. Broderick,
David K. Marshall, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. SIDDALL, J., did not sit.

WEBBER, J. On appeal and exceptions. The respondent, a practicing attorney, was employed by one Martel, the complainant, in connection with alleged income tax deficiencies. At the outset, the respondent received from his client $100 as a "retainer." On the same day, Martel gave him a further sum of $350 which, by the terms of the receipt therefor, was "In re compromise settlement proposed w/U. S. Treasury." At this time the claim of the Government for unpaid taxes, penalties and interest, as stipulated by the State's attorney, exceeded $4,000, and both lawyer and client entertained the hope that a satisfactory compromise adjustment might be effected. About nine months later the respondent received a further sum of $1150 from Martel and furnished a receipt indicating that the payment comprised "Monies held re: tax settlement U. S. v. Martel." No settlement having been consummated, the matter was set for hearing in the U. S. Tax Court and to defray the anticipated cost of travel to Boston, the respondent drew upon his client for an additional $50. On February 25, 1956 the respondent expressed the need for more funds to compromise and satisfy the claims of the Government. Thereupon the complainant gave the respondent the sum of $1250 "to pay the income tax in Boston." The final decision of the Tax Court, after hearing, produced an award of $199.52, which Martel later paid to the Government out of his own funds.

The jury could properly conclude that the complainant is obviously uneducated, handicapped by an inadequate understanding of the English language, and unable to fully comprehend the nature of the negotiations and proceedings involving alleged tax deficiencies. The jury could find that he relied entirely upon the representations and good faith of his attorney-trustee.

The respondent elected not to offer himself as a witness. The evidence presented by the State was never seriously disputed. It fully justified a finding that the respondent received from the complainant the sum of $1250 (the only sum here in issue) upon an express trust to use that money to compromise the claim of the Government; that no money whatever was ever paid by the respondent to the Government or returned by him to the complainant, but said sum was retained and converted to his own use. Thus the evidence fully supported a conviction for embezzlement of these trust funds. There is therefore no merit either to the respondent's appeal or to his exception to the denial of a directed verdict. (Exception #4.)

The respondent's first and second exceptions raise no issue of law and cannot be considered. The rule has been so often stated as to require no citation of authority that a bill of exceptions must in clear and understandable form set forth the alleged error of the court and indicate in what manner the party is prejudiced thereby. The District Director of Internal Revenue was presented by the State to prove that the respondent had not at any time turned over any money to the Government on behalf of the complainant. The court denied the respondent the right to have the entire confidential file of the Government bearing on the income tax matters of the complainant produced by this witness in court. The court further refused to compel the witness to testify concerning exhibits which were subsequently excluded from evidence. The bill of exceptions fails to inform us as to what the contents of the file or the exhibits might have tended to prove or how the respondent was prejudiced by the rulings of the court. The exhibits are not reproduced in the record and were not included in any offer of proof. The exceptions cannot stand alone and furnish no vehicle for an intelligent review.

We are satisfied, however, that the respondent has lost no rights through the inadequacy of these exceptions for we gather from the nature of the oral and the written argument that all that the respondent sought or hoped to prove through the excluded material was that the original demands of the Government against the complainant were substantial. The respondent seems to entertain the novel theory that if an attorney accepts funds upon the express trust that they be used to settle a claim and, as a result of his efforts, the claim is substantially reduced, he is later justified in retaining the trust funds in the guise of attorney's fees. Such is not the law. It was open to the respondent here to offer evidence that the funds came to him as fees and not in trust, or that by some later authority from, or agreement with, the complainant, he was given the right to retain the funds as fees, but no such evidence was offered in this case nor was there any evidence of the fair and reasonable value of any services the respondent rendered. One witness for the respondent touched upon the factual issue of lawful conversion of trust funds to fees. The jury may have quite justifiably doubted the credibility of this witness and disbelieved his testimony. But even if his version of an alleged conversation between the respondent and the complainant were fully accepted, still the testimony fell far short of evidencing that authority, consent or agreement by the complainant so necessary to the justification of a conversion of trust funds. The witness merely described an alleged summary announcement by the respondent to the complainant that henceforth funds already in respondent's hands would be regarded as fees. A trustee may not properly thus impose his will upon the one to whom he owes the trust obligation. Nor could the respondent unilaterally and arbitrarily convert trust funds to attorney's fees and justify his conduct by a claim that his efforts had ultimately produced a favorable result for his client.

Moreover, if the size of the original claim by the Government was in any way material, the respondent required no further proof of it in any event. The fact was never in issue and was, as already noted, stipulated by the prosecuting attorney. It was made abundantly clear to the jury by the evidence of nearly every witness, entirely uncontradicted, that the original claim was substantial and in fact exceeded $4,000. There is no suggestion that the excluded evidence would have done more than to further corroborate and establish an undisputed fact.

The third exception relates to the refusal of the presiding justice to order a mistrial. The events which prompted the motion were closely associated with those touched upon above in connection with the first and second exceptions. The direct examination of the District Director of Internal Revenue was brief and was confined to proof that the amount finally determined to be due from the taxpayer was $199.52, that no part of this sum was ever paid by the respondent, but that this sum was ultimately paid in full by an attorney (other than the respondent) acting for the taxpayer. These facts are obviously not disputed by the respondent. When upon cross-examination the respondent sought to compel the witness to divulge the contents of the Government's file relating to the taxpayer, the witness claimed privilege, respectfully declined to answer, and produced a telegram from the U. S. Commissioner of Internal Revenue as follows:

> "Letter dated April 28, 1958 from York County Attorney Marcel Viger requests testimony May 6, 1958 deadline in State v. Richard W. Rowe that Mr. Rowe never turned over $2500.00 in settlement of tax case of Octave Martel, Biddeford, which was settled in 1956 for $199.52. Permission granted you to furnish statement certifying you are custodian of records containing information statement, and, if such is the case, that no money turned over to Service—that means Internal Rev-

> enue Service—by Mr. Rowe in settlement of Martel's tax case, Tax Court Docket No. 51812, December 22, 1956. Signed, Russell C. Harrington, Commissioner."

The court, as we have seen, granted the privilege and the respondent moved for mistrial. In his supporting statement, respondent's attorney treated the court's ruling as a total and prejudicial denial of the right of cross-examination. In specifying the adverse effect of the alleged deprivation, however, he asserted only that the effect of the testimony already given by the witness would be to create in the mind of the jury the false impression that $199.52 was the most the Government ever claimed against the taxpayer. As already noted, no such misconception could possibly have existed in the light of all the evidence. Moreover, immediately *after* the denial of the motion for mistrial, the respondent's counsel was permitted to resume cross-examination of the Director who, without claiming privilege, again reaffirmed his previous testimony that the original claim before Tax Court adjudication was in excess of $4,000. As long as the approximate amount was known and was admittedly substantial, the exact amount of it was obviously immaterial upon any theory of this case.

Congress has by statute provided penalties to be imposed on any official who divulges a confidential matter in the Government files of an income tax payer. It is obvious that sound public policy makes necessary full protection of the confidential disclosures of such a tax payer. In an appropriate case we may have occasion to consider whether federal statutes have created a privilege or a prohibition, whether or to what extent the privilege, if it be one, may be waived by the Government and whether the ability of the State to prosecute a crime successfully must sometimes yield to this privilege. Such an examination is not required on the facts of this case. As stated in 58 Am. Jur. 368, Sec. 673: "However, the refusal to permit a question on

cross-examination is not ground for reversal if not prejudicial, or if prejudice does not appear, as where the information sought to be elicited is covered by further testimony of the witness." The rule has even more forceful application where, as here, the same information was elicited from nearly all the witnesses and was never in dispute. "Mistrial is ordered only in those rare cases where the trial cannot proceed further with the expectation of a fair result." *State* v. *Libby,* 153 Me. 1, 5; *State* v. *Woods,* 154 Me. 102, 105. The respondent was at no time prevented by the claim of privilege by the witness from presenting evidence either by cross-examination or otherwise in support of any of the three defenses available to him: (1) That the funds were never given and received in trust; or (2) that the trust was fully executed and the funds were transmitted to the Government or returned to the complainant; or (3) that the complainant authorized or consented to the retention of the funds as fees fairly earned by the respondent. The presiding justice in refusing to order mistrial was entirely justified in concluding that the claim of privilege had in no way hampered the respondent in making his defense and there was no occasion to halt the trial. This exception must be overruled.

The entry will be

Appeal denied. Exceptions 1 and 2 dismissed. Exceptions 3 and 4 overruled. Judgment for the State.

BLANCHE DANIEL
vs.
ERNEST MORENCY

Androscoggin. Opinion, September 9, 1960.

Negligence. Nuisance.

A cavity in the black top of a sidewalk with a submerged gasoline filler cap for the use of an adjacent gasoline filling station, constitutes a common and public nuisance.

Contributory negligence precludes recovery from injuries arising from the maintenance of a nuisance.

ON EXCEPTIONS.

This is an action for injuries resulting from a nuisance. The case is before the Law Court upon exceptions following a verdict for plaintiff. Exceptions sustained.

Marshall & Raymond, for plaintiff.

Mahoney & Desmond, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

SULLIVAN, J. This is an action on the case instituted on October 30, A. D. 1958 by the plaintiff for her bodily injuries and other special damages arising from a public nuisance, *Restatement of The Law, Torts,* Chapter 40, Page 218, Introductory Note; R. S., c. 141, §§ 6, 18; *Smith* v. *Preston,* 104 Me. 156, 162.

Defendant was a garage proprietor. In the public sidewalk in front of his place of business he maintained a gasoline pump. To the south, in the sidewalk but in front of the adjacent premises defendant had a metal filler pipe which

covered the inlet pipe serving to fill the tank below defendant's gasoline pump. The pump and filler cap had been at their respective locations for several years. The sidewalk top surrounding the filler cap had been concrete but a week before March 30, A. D. 1958 the city had tarred the sidewalk. Prior to such resurfacing the filler cap had rested level with the bordering sidewalk but thereafter the filler cap was left sunken 1½ inches in an encircling orifice of bituminous coating. The sidewalk was 9½ feet wide and on a flat plane. From the center of the filler cap to the curb line of the sidewalk the distance was 2 feet. The gasoline pump 16 inches square and 5 feet in height stood 8 inches from the same curb and was located some 8 feet north of the filler cap.

The filler cap was of cast iron and 6 inches in diameter. It was horizontal and had 3 holes in its diameter line, each of which was ½ inch deep. The center hole was 1 1/16 inches square. The other 2 were elliptical with their smallest diameter 1¼ inches. The square hole accommodated a wrench or tool in removing the cap for the filling of the gasoline tank or for measurement by stick of the tank's contents. The other 2 holes afforded purchase for the fingers of one lifting off the filler cap.

Just before 11 A. M., March 30, A. D. 1958 was clear, sunny, dry and somewhat cold. There was neither snow nor ice. The plaintiff stood on the sidewalk 1 foot away from and inside the curb line and south of the filler cap. She was talking to a friend and was facing the building south of and adjacent to the defendant's garage. She turned and proceeded north along the sidewalk a few steps, caught her heel in the filler cap, stumbled, fell against the gasoline pump and landed prostrate upon the sidewalk. She was seriously injured.

The plaintiff alleges that the defendant had adopted the use of the filler cap which in its dangerous condition consti-

tuted a nuisance, that he did so negligently and that his negligence was the proximate cause of the injuries and damage to the plaintiff who had exercised due care withal. Plaintiff was awarded a jury verdict. Defendant here prosecutes several exceptions properly reserved.

One exception is to the refusal of the presiding justice to grant a motion of the defendant for a directed verdict in favor of the latter because of the contributory negligence of the plaintiff.

The plaintiff was the only witness to the incipient phase and efficient cause of her unfortunate fall. Her testimony is more authentic than any paraphrase could be.

> "I turn around, took a few steps, and then I was walking and my heel went into somethings to cause to turn my foot, and when I did I lost my balance.
> - - - -
> -
> "Q. Have high heels?
> "A. Not too high, but high enough.
>
> "Q. - - - did you know there was an opening in the sidewalk? Gasoline fill pipe?
> "A. No, I didn't know.
> -
> "Q. Did you look at the sidewalk to see where you were going?
> "A. Yes.
>
> "Q. What were you doing at that time?
> "A. Just minding my own business on the way to church.
>
> "Q. And do you know what happened to your shoe with relation to that opening?
> "A. Well, as I stepped I just fell. I didn't have no change (chance?) or any — my heel there, — I fell.
>
> "Q. And, specifically, where was your heel at that time, you say you fell?

"A. Right in that filler pipe there.

- -

"A. - - - I just make a couple of steps, and into that hole I went, and then I lost my balance. - - -

- -

"A. I turned and I make a few steps, and then I feel my heel go in the hole, and then I turned my foot - - -

- -

"Q. Did you see the filler at that time?

- -

"A. I didn't see the hole, no, just see the sidewalk and start walking - - - of course, I look down. It was all black and I didn't. - - -

- -

"A. Yes, when I turned around I looked where I was going, or, started looking, and start walking.

"Q. And you didn't see the filler cap, or did you?

"A. No, I didn't.

"Q. You didn't see the filler cap at all?

"A. No.

- -

"A. Well, when I stepped in then I saw it, when I stepped in it I see it then.

- -

" Well, I stepped, I looked. But my heel down there, and, of course, I would see it.

- -

"Q. Which did you see first, the hole or the filler cap?

"A. Well, I don't really know.

"Q. Well, can you tell us what it looked like when you saw it?

"A. Yes. I can see that round thing, and it was higher than the sidewalk was. Higher than that cap. When I step, I step right in that hole, and that was the cause of my fall.

- -

"A. Well, what I stepped in it, of course, I turned around after I fell. That is the way I saw that.

After I had my fall I look around, where is it I step into.

- -

"Q. And you told us while you were on the sidewalk, after your fall, that you saw this filler cap, is that right?

"A. When I get up, somebody help me to my foot, and I look around, and I saw what I have where I fell.

- -

"Q. Do you recall it was while you were somewhere in the vicinity of those pumps you looked over and saw the filler cap?

"A. Yes, when they take me up I turn around.

"Q. - - - do you know its color?

"A. - - - I think it was kind of a yellow color, if I remember right. I don't know.

- -

"Q. - - - when you first started to fall did you look down there again?

"A. Yes.

"Q. And did you see the top of this filler pipe at that time?

"A. Yes, I did.

"Q. So, you did see it then and again, did you look when you were getting up or being helped up from the sidewalk?

"A. Yes.

"Q. So you saw it on two occasions?

"A. I saw it twice, yes, sir.

- -

"Q. Well, now, you turned around

"A. Yes.

"Q. You were looking at the ground, as I understand you

"A. Yes.

"Q. Right there at the sidewalk.

"A. Yes, sir.

"Q. And how far were you from the filler cap?
"A. Well, I don't know. Just a few — I just take a few steps - - - to start.

"Q. But you didn't see it before you reached it, did you?
"A. No.

"Q. Pardon?
"A. I don't remember.

"Q. You didn't remember whether you saw it or not before you stepped in?
"A. I guess I did, yes.

"Q. You did see it before you reached it?
"A. Yes, I would say. I don't know. I'm not sure. I saw it just when I stepped in it. I don't remember that.

- -

"A. Well, I know I saw it when I put my heel in it.

"Q. No, that is not my question. Did you see it, Mrs. Daniels, before you reached it, while you were looking at the sidewalk?
"A. I don't remember.

"Q. You don't remember?
"A. If I did see it or not."

The plaintiff was a mature woman of some fifty years in age and the mother of an oldest child of 34 years. The day was bright and clear. The sidewalk was wider than 9 feet and level. The indentation around the metal filler cap was at least 6 inches in diameter and 1½ inches in depth. The plaintiff was shod with somewhat high and narrow heels, attenuated enough to become trapped in small recesses. She did not notice the pitfall until she had stepped into it and her fall had become inevitable.

The cavity in the black top of the sidewalk and the submerged filler cap were visible and in the direct course of the

plaintiff. Nothing save the inattention of the plaintiff could have prevented her from noticing and evading the open closure which she never saw until her foot was settling into it beyond the possibility of retraction. Following her mishap the plaintiff found the crater and cap readily perceptible. Considering only the testimony most favorable to the plaintiff we must conclude that she was guilty of contributory negligence. *Bechard* v. *Railway Co.*, 122 Me. 236, 237; *Hultzen* v. *Witham,* 146 Me. 118, 122.

> "The question of contributory negligence is ordinarily for the jury. Shaw v. Butler, 122 Me., 232; but where as here on the uncontroverted testimony a want of due care by an injured person is clearly shown, it is the duty of the court to set aside a verdict in his favor. Page v. Moulton, 127 Me. 80."
>
> *McDonald* v. *Pratt,* 129 Me. 434, 439.

> "Ordinary care requires that one give attention to where he is walking, even on a city sidewalk.
>
> Witham v. Portland, 72 Me. 539; - - -
>
> "There is contributory negligence as a matter of law where that is the only inference that can reasonably be drawn from the facts shown. - - -"
>
> *Olsen* v. *Portland Water District,* 150 Me. 139, 144, 145.

The plaintiff in this jurisdiction has the burden of establishing by a preponderance of the evidence that her conduct was duly careful and did not contribute to her adversity. *Kimball* v. *Bauckman,* 131 Me. 14, 19; *Barlow* v. *Lowery,* 143 Me. 214, 217.

There can be no doubt that the faulty condition of the sidewalk constituted a common and public nuisance in a much frequented area. R. S., c. 141, §§ 6, 18.

> "Public highways afford an equal right to each citizen to their reasonable use, and any unreason-

> able obstruction that prevents or hinders such use, creates a nuisance in the judgment of the law."
>
> *Smart* v. *Lumber Co.*, 130 Me. 37, 47.

Assuming without the necessity of deciding that the defendant was chargeable with the maintenance of that nuisance, contributory negligence of the plaintiff nonetheless precludes a recovery by her.

Dickey v. *Maine Telegraph Co.*, 43 Me. 492, 496; *Palleria* v. *Farrin Bros & Smith* (1958), 153 Me. 423, 437; *McFarlane* v. *City of Niagara Falls*, 247 N. Y. 340, 160 N. E. 391; *Beckwith* v. *Town of Stratford*, 129 Conn. 506, 29 A (2nd) 775; *Harper and James, The Law of Torts*, Volume 11, § 22.8, Page 1223.

Our decision makes it unnecessary for us to consider the other exceptions.

Exception sustained.

PARKER L. SPOFFORD
vs.
MAYNARD D. GENTHNER D/B/A
THE WALDOBORO PRESS

Lincoln. Opinion, September 20, 1960.

Libel and Slander. Demurrer.

All well pleaded allegations must be treated as true upon demurrer.

Insinuations may be as defamatory as direct assertions. It is the plainly normal construction which determines the question of libel.

A real estate agent acts in fiduciary capacity.

ON EXCEPTIONS.

This is an action of libel before the Law Court upon plaintiff's exceptions to the granting of a demurrer.

Exceptions sustained.

Harold J. Rubin, for plaintiff.

Goodspeed & Goodspeed, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. Dubord, J., did not sit.

SULLIVAN, J. In March of 1959 the plaintiff commenced this action of libel against the defendant who filed a general demurrer to the plaintiff's declaration. The presiding justice sustained the demurrer. The plaintiff excepted to that ruling and prosecutes his exceptions here.

> "A demurrer is a signed statement in writing filed in a proceeding in court, to the effect that admitting the facts of the preceding pleading to be true, as stated by the adverse party, legal cause is not shown why the party demurring should be compelled to proceed further. Demurrers are gen-

> eral where no particular cause is assigned, and special where the particular defects are pointed out. - - - -"
>
> *State* v. *McNally,* 145 Me. 254, 256.

We recite the alleged facts narrated in the declaration of the plaintiff and, for the purposes of the issues here, conceded by the demurring defendant to be true.

The plaintiff was a licensed, active and successful real estate broker in good repute pursuing that vocation in Waldoboro and the surrounding towns situated in Knox, Lincoln and Sagadahoc counties. He was a town selectman and Chairman of the Board for Waldoboro. To the knowledge of several persons Gertrude B. Rash the owner listed with the plaintiff for sale Hardy Island in Medomak River in Lincoln County. Plaintiff procured for her a customer ready, able and willing to purchase that island and an agreement between such owner and buyer. Millard Creamer a lobster fisherman as tenant at will of Gertrude B. Rash was in possession of the island. Plaintiff did not solicit Creamer to buy the island but after the foregoing agreement was effected notified Creamer of that transaction and served notice upon the latter of the termination of his tenancy. The defendant was aware of all these details and

> "wickedly and maliciously intending to injure the plaintiff in his said real estate business and to bring him into insolvency, public scandal, contempt and disgrace"
>
> composed and published
>
> *"concerning the plaintiff and the business of the plaintiff"* (italics ours)

a libelous lead editorial in the newspaper called The Waldoboro Press in large and general circulation in Waldoboro and in the counties of Lincoln and Knox. Because of that libel the plaintiff complains that he has sustained damage

in his business, his good name and credit and has been subjected to contempt and disgrace.

So much for "the inducement, or statement of the alleged matter out of which the charge arose."

Judkins v. *Buckland,* 149 Me. 59, 63.

We quote, as it is contained in the record of this case, the controversial newspaper editorial together with "the colloquium, or averment that the words were used concerning the plaintiff" and "the innuendo, or meaning placed by the plaintiff upon the language of the defendant." *Judkins* v. *Buckland supra.* It will be especially noted that the words of the editorial are averred to have been used concerning the plaintiff in his real estate business and in his public office. *Barnes* v. *Trundy,* 31 Me. 321, 324; *Orr* v. *Skofield,* 56 Me. 483, 487.

> "ISLE OF HOPE" (meaning the hope of the defendant, Maynard D. Genthner, as expressed in the last sentence of the editorial hereinafter set forth)
>
> "The Press (meaning the newspaper, the Waldoboro Press) "has gathered a few details on the story concerning the little island in the Medomak River" (meaning Hardy Island, so-called). "It seems like a lady from Texas" (meaning Gertrude B. Rash) "owned it at one time and had permitted a local lobster fisherman" (meaning Millard Creamer) "its use for a number of years with the promise of the right to purchase if and when it was sold. However, a local real estate dealer" (meaning the plaintiff, Parker L. Spofford) "found a customer willing to pay a price considerably above what it was understood the island could be bought for and deciding" (meaning he, the plaintiff, Parker L. Spofford, deciding) "that the fisherman" (meaning Millard Creamer) "was a gullible fellow, came up with the idea that a fast but perhaps not wholly ethical dollar could be made" (meaning that he, the said plaintiff, Parker L.

Spofford, could make money for himself quickly by acting in an underhanded manner) "by ordering the fisherman" (meaning Millard Creamer) "off" (meaning that the plaintiff, Parker L. Spofford, conspired to further his plan of making money for himself in a short period of time by ordering the said Millard Creamer to vacate and quit his use and possession of Hardy Island, so-called) "even though no purchase rights to the island had been obtained." (meaning that the plaintiff, Parker L. Spofford, had obtained no agreement for the purchase and sale of said Hardy Island either for himself or anyone else.) "However, alas — the fisherman" (meaning Millard Creamer) "didn't turn out to be quite as dumb as the real estate man" (meaning the plaintiff, Parker L. Spofford) "figured and decided" (meaning the fisherman, Millard Creamer decided) "before moving, to contact the owner," (meaning Gertrude B. Rash) "which eventually resulted in the fisherman" (meaning Millard Creamer) "purchasing the island" (meaning Hardy Island) "which never had been purchased or owned by the real estate man" (meaning the plaintiff, Parker L. Spofford, had never acquired any rights of ownership as agent of the owner, Gertrude B. Rash) "even though a sales price and rental price had been given to the fisherman" (meaning Millard Creamer) "by the real estate dealer" (meaning the plaintiff, Parker L. Spofford, had offered to sell and rent Hardy Island, so-called, to the fisherman, Millard Creamer, at a certain price.)

"It is, of course, easy to see that one could make money much faster by these methods" (meaning that the plaintiff, Parker L. Spofford, could make money much faster by unethical conduct.) "than by really investing money first and obtaining revenue afterwards. However, the fishermen in this area seem to accumulate a certain amount of common sense along with lobsters and we" (editorial we, meaning the defendant, Maynard D. Genthner) "hope that the method" (meaning unethical meth-

od) "used in the real estate business" (meaning the plaintiff's real estate business) "doesn't creep into town business" (meaning town business as transacted by the plaintiff, Parker L. Spofford, in his capacity as Chairman of the Board of Selectmen of the Town of Waldoboro, and as a member thereof.)

All well pleaded allegations of the plaintiff we must treat as true because of the demurrer. *Inman* v. *Willinski,* 144 Me. 116, 118. Mere inspection suffices to confirm that the editorial memorializes imputed conduct of the plaintiff in his vocation as a real estate agent and purports to depict his character as such.

> " - - - 'Whatever words,' remarks Bailey, J., in Whittaker v. Bradley, 16 E. C. L., 310, 'have a tendency to hurt or are calculated to prejudice a man, who seeks a livelihood by any trade or business, are actionable' The words which constitute the plaintiff's ground of action, being spoken of here in relation to his business, are calculated to prejudice him in his business, and, as the defendant by his demurrer admits, have so prejudiced him. - - -"
>
> *Orr* v. *Skofield,* 56 Me. 483, 487.
>
> "- - - Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court - - -"
>
> *Thompson* v. *Sun Pub. Co.,* 91 Me. 203, 207.
>
> "At the outset, we recognize that the article must be read as a whole, taking into account its wording, the nature and use of headlines, and any other methods employed to give special emphasis in order to determine its natural and probable impact upon the minds of newspaper readers - - - An article is no less defamatory because it accom-

> plishes its damaging mission by the use of insinuation. - - -"
>
> *Cross* v. *Guy Gannett Pub. Co.*, 151 Me. 491, 494.

The title of the editorial is a rhetorical device called irony the intendment of which is the opposite of the literal meaning. "Hope" is a reproach and a taunt. It is the frustrated hope that is implied.

A local lobster fisherman had a promise of the first offer of the island from its owner whenever she should elect to sell it. That fisherman is cast as a type of worthy and hardy character pursuing a strenuous and hazardous trade with limited economic reward and somewhat aloof from the worldly sophistication of the business centers.

The real estate dealer hit upon the prospect of obtaining "a fast but perhaps not wholly ethical dollar" from the possibly "gullible" fisherman. "Perhaps not wholly ethical" is palliated language, an understatement in the author's literary style with an all too obvious indirection. The mischievous insinuation conjured up is that the scheme contemplated and entertained was quite dependably unethical.

"A fast - - - dollar" or more popularly "a fast - - - buck" is a concept widely appreciated in contemporary Maine and America. It is slang, a kind of rapid suggestion but, typical of most slang, it is the product of intellectual inertia. The expression like most commonplace colloquialisms is broadly inclusive. Such a dollar is attained in a fashion distinguished from the scriptural prescription of eating one's sustenance in the sweat of one's brow. It is easy money. The figure is somewhat of sleight of hand. The dollar is one taken through adroit or "fast" talking. The accent is upon nimbleness of wit rather than upon faithful service rendered or adequate consideration given. It is frequently a dollar appropriated in a selfish fashion without any equivalent *quid pro quo*. The connotation is opprobrious in varying

degrees. One who chances a reputation for exacting "fast" dollars or "bucks" is subjecting himself to being dealt with in caution if not in reluctance.

The coherent effect of the editorial is a recounting in derision of the thwarted efforts of a real estate broker who without authority from the landlord - owner and without legal justification sought to dispossess a humble tenant with the expectation of obtaining a high sale price for the island and a coveted commission for himself. The fisherman assumed by the real estate agent to be uninitiated nevertheless repelled the machinations of the latter and purchased the island directly from its mistress. The fisherman deservedly triumphed. He and his fellow fishermen in his area have evolved a homely but adequately defensive wisdom. Here is a moral discrediting sharp picture and cupidity.

There is finally projected by the editor a "hope" that such unbecoming behavior of the agent will not obtrude itself into his municipal functioning as a town officer. The implication thus generated could hardly be lost upon the normal reader.

The language of *State* v. *Norton,* 89 Me. 290, 294 is very disabusing:

> "- - - Insinuations may be as defamatory as direct assertion, and sometimes even more mischievous. The effect, the tendency of the language used, not its form, is the criterion. The libeller cannot defame and escape the consequences by any dexterity of style.
>
> "- - - It is not the ingeniously possible construction, but the plainly normal construction which determines the question of libel, or no libel, in written words which are maliciously published. In this case the natural inference from the published language is clearly defamatory."

The plaintiff plies his calling in a district of small communities where people are more intimately known to one an-

other. A good repute is, therefore, all the more essential to him. His vocation is one of reposed trust which must be available to him. This court said in *Devine* v. *Hudgins,* 131 Me. 353, 354:

> "A real estate agent with whom property is listed for sale or exchange *acts in a fiduciary capacity,* if he accepts the proffered employment." (Italics ours.)

In *Soule* v. *Deering,* 87 Me. 365, 368, this court adverted to:

> " - - - that entire good faith and loyality due from a broker to his principal - - -"

Our conclusion is that the printed words, if untrue, are undoubtedly libelous.

Exceptions sustained.

SHERYL-LOU JOHNSON, PRO AMI
vs.
KENNETH RHUDA
AND
THEODORE G. JOHNSON
vs.
KENNETH RHUDA

Cumberland. Opinion, September 28, 1960.

Negligence. School Zone. Pedestrian.
Contributory Negligence. Damages.
Husband-wife. Parent-child.

Children are under an obligation to exercise that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances (11 yr. old).

The failure of a pedestrian to see an approaching car when vision is unobstructed is not contributory negligence as a matter of law when other factual questions remain for determination.

One is entitled to assume and believe that others will obey the law until the contrary is obvious and should be apparent to a person in the exercise of due care.

A father, in a negligence action, is entitled to recover the fair and reasonable value of the nursing services rendered by his wife to his injured minor daughter.

In a marital relationship, the labor in the house belongs to the husband.

It is not for a reviewing court to interfere with a damage award merely because it is large or because the court would have awarded less.

ON EXCEPTIONS AND MOTION.

This is a negligence action before the Law Court upon defendant's exceptions. Exceptions overruled. Motion for new trial denied.

Bernstein & Bernstein, for plaintiff.

Mahoney, Desmond & Mahoney, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. These two cases, tried together by agreement, arose out of an automobile accident occurring on the highway known as Windham Hill Road in Windham, Maine, on September 27, 1957, at about 7:45 a.m.

The plaintiff, Sheryl-Lou Johnson, brought suit to recover damages for personal injuries. At the time of the accident she was 11 years and 10 months of age. The other plaintiff, Theodore G. Johnson, is her father, and his action was for the recovery of expenses incurred in the treatment of his daughter.

The jury awarded $12,500.00 to Sheryl-Lou Johnson, and $3,000.00 to Theodore G. Johnson.

The cases are before us on defendant's general motion for a new trial on the usual grounds that the verdicts are against the evidence and also because the damages are excessive; and on exceptions of the defendant to a certain portion of the charge of the presiding justice.

The Windham Hill Road is a black top road, so-called, and the traveled portion of the highway is sixteen feet in width. There are graveled shoulders on both sides about two and one-half feet wide. The road runs according to the compass about northwesterly and southeasterly, but for purposes of this opinion the road will be described as running in a general easterly and westerly direction.

It appears that on the morning in question, the defendant was operating an automobile in an easterly direction on the Windham Hill Road and traveling to his place of employment in Portland, Maine. The minor plaintiff was on her way to attend school. The car in which she was riding as a passenger had reached the point where the accident occurred by traveling in a westerly direction. On the northerly side of the highway is located the Windham High School and on the southerly side of the highway is the Field Allen Grammar School. This was the school attended by Sheryl-Lou Johnson. Some of the other passengers were students at Windham High School. The car in which Sheryl-Lou Johnson was riding was stopped at a point on the northerly side of the highway near two mail boxes and opposite the driveway leading to the Field Allen Grammar School. The car was partly, but not entirely, off the black top. She had been riding as a passenger on the right side of the back seat. After the car came to a stop, she left the car through the right rear door and walked around the rear of the car to its left rear corner. She testified that she looked to the left and then to the right and seeing no vehicles approaching started to cross the highway. When she had reached a point about the center of the highway, she

was struck by the automobile operated by the defendant and very seriously injured.

It is conceded that the conduct of the defendant at the time of the accident presented a question for the jury, but defendant now contends that the plaintiff, Sheryl-Lou Johnson, is estopped from recovery of damages by reason of her contributory negligence.

The first issue for determination, therefore, is whether or not the evidence viewed in the light most favorable to the plaintiff established negligence on the part of the plaintiff, Sheryl-Lou Johnson, which contributed to the happening of the accident, and thus precluded a verdict in her favor.

The only other issue before us is raised by exceptions taken by defendant to the following portion of the charge of the presiding justice:

> "The plaintiff, Mr. Johnson, is further entitled to nursing expenses made necessary by reason of Sheryl-Lou's injuries. Since Mr. Johnson is entitled to his wife's labor in his home, or rendered to the members of his household, if Mrs. Johnson, Sheryl-Lou's mother, and the plaintiff's wife, did actually render nursing services made necessary by Sheryl-Lou's injury, if you should so find, then Mr. Johnson, the Plaintiff, would be entitled to be reimbursed for the necessary nursing services rendered by his wife to Sheryl-Lou to the extent of fair and reasonable value of said services. You have heard testimony as to the extent of nursing services rendered, as to their necessity. It is for you to say whether these nursing services were rendered; whether they were necessary, and what a fair and reasonable value of such services were."

The evidence discloses that the child's mother, a practical nurse, rendered nursing services to her daughter and, manifestly, in the light of the foregoing charge, the verdict returned for the father undoubtedly contained an amount

awarded for these nursing services. It was stipulated that the special damages in the father's case were in the amount of $1455.00. Thus the defendant argues that the balance between that amount and the jury's award was made up substantially, if not entirely, of the value placed by the jury upon these nursing services. Defendant, consequently contends that he was aggrieved by the foregoing instruction.

In both of the plaintiffs' writs the following acts of negligence on the part of the defendant were alleged:

> "Failure to have the vehicle under proper control; operation at excessive rate of speed; violation of Chapter 22, Section 113, subsection II A, R. S. 1954, providing for a speed limit of 15 miles in a school zone; failure on the part of the defendant to observe the plaintiff crossing the road; failure to stop the vehicle in time to avoid striking the plaintiff and failure to change the course of the vehicle to avoid the accident."

As the negligence of the defendant is conceded, it is now incumbent upon us to first give consideration to the issue of contributory negligence. Was Sheryl-Lou Johnson guilty of negligence which contributed to the accident?

It has been frequently decided by this court that children are under an obligation to exercise that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. *Moran* v. *Smith,* 114 Me. 55, 95 A. 272; *Levesque* v. *Dumont,* 116 Me. 25, 99 A. 719; *Day* v. *Cunningham,* 125 Me. 328, 133 A. 855; and *Ross* v. *Russell,* 142 Me. 101, 48 A. (2nd) 403.

In *Ross* v. *Russell, supra,* this court said:

> "It is well settled that a child of tender years is not bound to exercise the same degree of care as an adult but only that degree 'of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances.'

> *Colomb v. Portland & Brunswick Street Railway,* 100 Me. 418, 420, 61 A. 898, 899; *Blanchette v. Miles,* 139 Me. 70, 27 A. 2d. 396. No hard and fast rule can be laid down as to the care required of children. It is a question of the facts of each particular case." *Farrell pro ami* v. *Hidish,* 132 Me. 57, 165 A. 903.

There is no doubt but that Sheryl-Lou Johnson was under an obligation to use that degree of care which an ordinarily prudent child of her age would use under the circumstances existing at the time of the accident. She testified that before she left her position behind the car in which she had been riding, she looked in both directions and saw no vehicles approaching; that she then proceeded across the highway on her way to the school. When she had reached a point about half way across the highway she was violently struck by the automobile operated by the defendant. That the accident occurred in the middle of the highway was corroborated by at least one other witness for the plaintiff, and the brake marks left by defendant's automobile, as indicated by the pictures taken at the scene of the accident, also substantiate the fact that the accident occurred in the middle of the highway.

The jury was, therefore, warranted in finding as a fact that the child had proceeded half way across the highway before she was struck. The force of the blow and the distance she was thrown, as well as the length of the brake marks testify to a rate of speed, on the part of the defendant, much in excess of the fifteen mile limit prescribed by applicable law.

Defendant, relying on the well known principle that a person is bound to see what in the exercise of ordinary care, he should have seen, advances the contention that Sheryl-Lou Johnson either did not look to her right as she testified, or if she did look, she should have seen defendant's ap-

proaching automobile. To counter this contention, plaintiffs argue that a dip in the highway might well have hidden defendant's car from the sight of the plaintiff, Sheryl-Lou Johnson, when she looked to her right.

Defendant introduced evidence tending to show that the dip in the highway was not of sufficient depth to prevent the plaintiff from seeing defendant's car if she had looked. Physical evidence appears to be that the deepest part of the dip in the highway was 560 feet from where the accident happened and that, at this point, the dip was only deep enough to leave unobscured a substantial part of the automobile.

If we assume that the only finding which the jury was warranted in arriving at upon this particular issue was, that if the plaintiff, Sheryl-Lou Johnson, looked to her right, she must have seen defendant's vehicle approaching, the issue of contributory negligence is not necessarily conclusively resolved. We held in *Tinker* v. *Trevett,* 155 Me. 426, 156 A. (2nd) 233, that failure of a plaintiff to see an approaching car when vision is unobstructed is not contributory negligence as a matter of law when other factual questions remain for determination. Moreover, in *Ross* v. *Russell,* 142 Me. 101, 48 A. (2nd) 403, this court held that a pedestrian in crossing the street is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car.

> "There is one other consideration. Whether or not a pedestrian in crossing a street may be guilty of negligence depends in part, at least, on the extent to which he may rely on the fact that approaching vehicles will be lawfully and carefully driven. He is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car. *Day v. Cunningham.* 125 Me. 328. For

> this reason the ordinary rule is that in such cases contributory negligence is a question for the jury." *Ross v. Russell,* 142 Me. 101, 105, 48 A. 2d. 403.

In other words, we are dealing with the rule that one is entitled to assume and believe that the other will obey the law until the contrary is obvious and should be apparent to a person in the exercise of ordinary care.

In the instant case, on the basis of the brake marks and the admission of the defendant as to speed, the jury could reasonably infer that if Sheryl-Lou Johnson had looked she would have seen defendant's car from between 250 and 400 feet away; that she would have been justified in assuming that the defendant would obey the school zone speed law and that she would have at least ten seconds to safely cross before he arrived.

The question of contributory negligence on the part of this plaintiff was one for a jury and its finding is not so clearly wrong as to require disturbance thereof.

Defendant, in support of his position, cites decisions to the effect that where physical evidence is available it must, when it contradicts that of eye witnesses and parties interested in the outcome, control and be decisive. We are in accord with this theory, but it is our conclusion that the physical evidence, particularly the location and length of the brake marks of defendant's car, sustains rather than discredits the plaintiff, Sheryl-Lou Johnson.

In a very recent decision of this court in *Bean* v. *Butler,* 155 Me. 106, 151 A. (2nd) 271, we said:

> "Much law has been written concerning the responsibilities of a motorist where children are concerned. There are many and varied circumstances and conditions under which children of tender years are injured by being struck by motor vehicles. Under some circumstances, like those ob-

taining in *Bernstein v. Carmichael,* 146 Me. 446, there is no liability on the part of the driver."

"There is a line of cases holding the driver is not responsible for injuries to a child when the child suddenly darts out from behind a parked car into the path of an oncoming automobile under circumstances where the driver is unable to see the child until he is in the path of the car or his presence in the street could not be reasonably foreseen. This type of situation has been termed the 'sudden appearance doctrine.'" Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 2A, Sec. 1498.

"Under other circumstances, conditions arise which confront the driver of a car whereby the presence of children creates a responsibility on the part of a motorist to use extreme care and to anticipate that a child might suddenly appear from behind a parked car or other object and into the path of the vehicle. A driver of a motor vehicle, upon observing the presence of a child of tender years near the highway, must alert himself to the possibility that the child may suddenly attempt a crossing of the street and the motorist has the duty to have his car under such control that he can promptly stop it should the child make the attempt to cross. *Hamlin v. N. H. Bragg & Sons,* 128 Me. 358. Where a driver of a motor vehicle is aware of the presence of a child or children near or adjacent to the highway or should reasonably be expected to know that children are in the vicinity, he must exercise reasonable and proper care for their safety. *This situation is aptly illustrated by school children going to and from school.* (Emphasis supplied.) The characteristics of young children are well known and the likelihood of them, without thought on their part, running across a highway in the path of oncoming traffic must reasonably be expected, thus requiring of the motorist a complete control of his vehicle to prevent injury to the child." *Bean* v. *Butler, supra.*

"Where a car is being driven in the immediate vicinity of a schoolhouse, particularly at a time

> when the school children are at recess, or when school is being dismissed or taken up, the driver of the car must use special caution for the protection of children in that vicinity; being under a duty to anticipate the presence of children in the street in such a vicinity, and, under these circumstances, it is his duty to bring his car under such control that it can be stopped on the shortest possible notice.
>
> "The driver must be on the lookout for children in the street near a schoolhouse, and the tendency of small children to run across streets, especially at or near schools, must not be ignored.
>
> "The question of whether a motorist was negligent in striking a child on his way to school, and while on the street near the school, is usually one for the jury, in determining which, besides the question of speed, various matters may be considered, as, for instance, the presence of other school children, the wetness or dryness of the street, the obstruction or lack of obstruction of the view, etc." Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 2A Sec. 1500.

It must be remembered that this accident occurred in a school zone where the law provides that the speed limit is fifteen miles per hour. The defendant testified that he had traveled this route many times and was familiar with the fact that it was a school zone. He testified that he saw the car in which Sheryl-Lou Johnson was riding a substantial distance before he reached it. He said that he was going as fast as thirty-five miles an hour as he approached the brow of the hill, a short distance before the point of collision. From all the facts in the case the jury was warranted in finding that perhaps he was traveling at a much greater rate of speed. He said:

"I saw the car that the little girl was in."

He further testified:

> "I saw this maroon Ford where it pulled up and it wasn't completely off the road. *I thought the doors were going to open and somebody going to get out.*" (Emphasis supplied.)

He testified that he did not see the little girl until she was on the hood of his car. The jury saw this witness, as well as all the other witnesses, and were in the best position to judge their veracity. Perhaps they were not too favorably impressed by the demeanor and testimony of the defendant, who, for example, contended that he did not have to look at a speedometer to determine the speed of his car. Moreover, although he admitted he did not measure the brake marks left by his car, and although the location and length of the marks were corroborated by photographs taken shortly after the accident, nevertheless, he disagreed, as to their length, with a state trooper who measured the marks and gave testimony thereto.

This is not a case of a child darting out from behind a car into the pathway of an oncoming vehicle. The defendant knew he was in a school zone. He was thoroughly familiar with the locality. He knew, or should have known, that school was about to open. He had seen the automobile in which the plaintiff, Sheryl-Lou Johnson, was a passenger. In fact, he said, he thought somebody was going to get out of the car. He was under a duty to foresee and anticipate the presence of children in the street, and he was under an obligation to have his car under such control that it could be stopped on the shortest possible notice. Had he been on the lookout; had he had his car under proper control; and if he had not violated the speed laws in a school zone, there probably would have been no accident. The jury was warranted in finding that the sole cause of the accident was his negligence.

All in all, we are of the opinion that the issues raised by the evidence were for the determination of the jury. Bearing in mind that a defendant prosecuting a general motion for a new trial has the burden of establishing that the verdict is manifestly wrong, we cannot say that the jury erred in its findings upon the question of liability.

We pass now to consideration of the issue raised by the defendant by his exceptions to the instruction on the part of the presiding justice that the father was entitled to recover the fair and reasonable value of the nursing services rendered by his wife to his minor daughter.

Although this court has held in *Britton* v. *Dube, et al.*, 154 Me. 319, 324; 147 A. (2nd) 452, that a husband is entitled to the fair value of his work as a nurse or in caring for his wife, the issue now before us appears to be one of novel impression. However, it has been resolved in several jurisdictions in favor of the instruction as given.

> "The majority of the relatively few cases involving the point take the view that a parent suing for injuries to his minor child may recover the value of services rendered gratuitously by the other parent or by members of the family, such services being necessitated by the injuries in question.
>
> "Thus, in Acme-Evans Co. v. Schnepf (1938) 105 Ind App 475, 15 NE (2d) 742, an action by a father 'to recover for the expenses of treatment and the loss of services of his minor son,' who was injured through the negligence of defendant's agent, the appellate court, in holding that the trial judge had properly permitted the jury to consider as an element of damages the reasonable value of services gratuitously rendered by plaintiff's wife in nursing the injured son, said: 'If [plaintiff] is fortunate enough to secure the services of his wife in treating the injuries of their minor son, rather than employing one who is not a member of the family and thus obligating himself to pay for such

services, it does not lie in the mouth of the person responsible for the injury to complain.'

"In holding that plaintiff could recover in his present action for injuries to his minor child the reasonable value of nursing services rendered by his wife in caring for the child, the court in Gorman v. New York, C. & St. L. R. Co. (1908) 128 App Div 414, 113 NYS 219, said:

" 'A husband is still entitled to the services of his wife in his household, and in the absence of any different agreement or understanding, is entitled to recover for her services rendered to a third person outside of and beyond the household duties .... He is entitled to recover the value of his own services necessarily rendered in the care of his injured infant child from the party negligently causing the injury .... There would seem to be equal reason in support of plaintiff's right to recover for like services of his wife, he being personally entitled to such services to the same extent as he is to his own.'

" ..... ; and so we find it adjudged in Selleck v. Janesville (1899) 104 Wis 570, 80 NW 944, in the case of a husband suing for loss of services of his wife caused by personal injuries to her, and where the legal right to recover is analogous to that in the case at bar, that the husband may recover the value of his own services in necessary attendance upon his wife, not, however, exceeding the amount for which he could have employed others to do that work. The same rule must apply to the case of a parent seeking to recover his damages for negligent injury to his infant child. His wife's services are his.'

"And in Martin v. Wood (1889) 23 NYSR 457, an action by a father for injuries to a minor child, the court said: 'The evidence of the value of the services of the wife of the plaintiff in the care of the injured child was properly received. The loss of the plaintiff in that regard was a part of his damage in the matter." 128 A. L. R. 702.

These decisions would appear to coincide with previous rulings of this court to the effect that under the marital relation, the labor in the house belongs to the husband. *Felker* v. *Bangor Railway and Electric Company,* 112 Me. 255, 257; 91 A. 980.

We are of the opinion that the foregoing decisions upon the point are well founded and we rule that the instruction about which the defendant now complains is sound law, and so this exception must be overruled.

The evidence discloses that the injuries suffered by the child were of a most serious nature and it does not seem to be seriously contended that the verdict rendered for the child is excessive. The mother attended the child for a period of 18 days for practically 24 hours each day. Moreover, it was necessary for her to render care to the child in the home after her discharge from the hospital. There is evidence in the case to the effect that there is a likelihood that the child may have to submit to major surgery in the future, thus creating additional expense. We cannot say that the amount awarded by the jury in excess of the stipulated special damages is excessive.

> "It is not for the reviewing court to interfere merely because the award is large, or because the court would have awarded less. Unless a verdict very clearly appears to be excessive, upon any view of the facts which the jury are authorized to adopt, it will not be disturbed." *Baston* v. *Thombs,* 127 Me. 278, 281; 143 A. 63; *Pearson* v. *Hanna,* 145 Me. 379, 70 A. (2nd) 247; *McMann* v. *Reliable Furniture Co.,* 153 Me. 383, 140 A. (2nd) 736.

The entry will be

Exceptions overruled.

Motions for new trial denied.

LEO FONTAINE, INDIVIDUALLY
AND AS NEXT FRIEND OF
BRUCE FONTAINE, A MINOR
vs.
EVELYN L. JONES, ET AL.

Oxford. Opinion, October 3, 1960.

Negligence. Children. Sudden Appearance.
Res Ipsa Loquitur.

Where the evidence shows that a child "somehow came into a street, that (the operator of an automobile) saw him lying on a sled and that she could not stop" such circumstances unexplained do not warrant the inference of negligence.

There must be negligence.

It is only if the accident is one which "commonly does not happen except in consequence of negligence" that jury may find negligence, if no explanation is offered.

Cf. Webber, J., compares *Bean* v. *Butler*, 155 Me. 106.

ON APPEAL.

This is a negligence action before the Law Court on appeal. Appeal dismissed.

Albert Beliveau,
William McCarthy, for plaintiff.

James R. Desmond,
Richard Whiting, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SULLIVAN, J. This case arises upon appeal by the plaintiffs from a judgment for the defense entered after a directed jury verdict for the defendants. The plaintiffs pro-

test that the presiding justice erred in imposing the verdict. There was other error assigned by the plaintiffs which they have abandoned by their election not to prosecute it in their briefs.

On January 10, A. D. 1958, a school day, Evelyn L. Jones drove her husband's car northerly from her residence on the easterly side of a one way street and in the direction authorized. The car inferentially struck and severely injured Bruce Fontaine, a boy of 4 years, who with his father seeks damages. The issue resolves itself into one of the sufficiency of the evidence to prove causative negligence upon the part of Mrs. Jones.

Scanty, indeed, is the record evidence. There is testimony of no eye witness to the regrettable accident save for the meager provisions of Mrs. Jones who was very responsive but who appears to have been interrogated guardedly and selectively by counsel of both parties. She had been offered and examined concerning her driving by the plaintiffs.

The boy Bruce had been warmly dressed and let out to play about his home which was on the westerly side of the street a short distance north of the Jones residence. His mother noticed him in conversation with a neighbor. Some 20 minutes later the mother heard crying and was informed by the neighbor that her son had been hurt. The mother hurried to the street. She can not remember where her boy was lying with reference to the position of the Jones automobile but recalls that when she entered the car to go to the hospital:

> " - - - the front end of the car was clear of the tree.
>
> "It was favoring the right side of the road.
>
> "And it was near the center of the street.
>
> "I would say that the sled was about a car's length behind the car."

Obviously the boy had been sliding. We may or may not have testimony of the position of the sled immediately after the accident.

Some days later Mrs. Jones told the Fontaine parents in response to their inquiry as to what happened, as follows:

> "She said she saw him (the boy) lying in the street on the sled and he was looking up at her and she couldn't stop." "About 1.15"

Mrs. Jones testified:

> "Q. Did you see a break in the snow bank in front of Fontaines'?
> "A. When Bruce came into the street I noticed a break."

Mrs. Jones had left her home in the automobile to go to market. She related that she saw no children on the banking on the westerly or Fontaine side of the street and felt safe since the children were in school and not sliding. The bank was not so high opposite her house as it was at Fontaine's home. Mrs. Jones had operated cars for years and during the winter of 1958 had driven much on her street. She had an unobstructed view of some point in front of the Fontaine dwelling as she entered her car. No attention has been called to the circumstance but upon a one way street coming traffic was of little concern. The bank might have been higher than 6 feet in front of Fontaines'. There was always the possibility, she said, that children might be sliding on the bank across the street when there was snow. She had observed them doing so but not on the day of the accident. She could not swear that she had never noticed the path in front of the Fontaine house but had noted other paths although she had never seen children sliding in the paths. She watched for children that day but saw none. She testified:

> "A. I looked both sides of the road on the bank at the left to see if there was anything and right.

"Q. But you expected there might be children sliding there as you had seen them before?

"A. Yes.

- -

"Q. You don't know how much higher the snow was than the path itself?

"A. No. Only from what I observed at the time of the accident.

"Q. Was it so high that you think you could not observe a child on that path?

"A. That's right.

"Q. You knew that when you were driving down that road?

"A. No, because I wasn't aware of a path over that particular spot at that time.

"Q. But you were aware of other paths?

"A. That's right.

"Q. So far as you were concerned there was no path?

"A. That's right.

"Q. Did you see a break in the snow bank at the road in front of Fontaines?

"A. When Bruce came into the street I noticed a break.

"Q. That is the first time?

"A. That's right.

"Q. You never noticed it before?

"A. I must have but I can't swear to that."

There is a complete dearth of detail as to snow depth or conditions, as to the state or breadth of the traveled way in the winter setting, as to distances or speeds, as to the particular nature, location or characteristics of the "bank" so-called or of the significant path. The sled is not described or classified, nor is its speed or behavior. We are at a loss to know the action or impacts of the collision.

We deduce that the boy plaintiff was struck and injured somehow by the automobile operated by Mrs. Jones. The event occurred upon the street opposite the outlet of a path the special features of which such as angle, grade, pitch and perceptibility are not recorded except for Mrs. Jones' testimony that the adjacent snow was so high as to have concealed from her view any child who might have been upon the path. We are given no information as to how little or long the path had existed.

There are no data of the car's speed or control, of the position of the car or child when the latter became noticeable, of the avoidability of the collision or of the practice of reasonable care or culpable negligence by the operator. Testimony of the advent, direction and speed of the sled could be very determinative here.

If we view the testimony in the light most favorable to the plaintiffs we are told that the boy somehow came into the street, that Mrs. Jones saw him lying on the sled and she could not stop. Do such circumstances unexplained warrant an inference of negligence on the part of the driver? Can we say without more what instrument caused rather than occasioned the damage here and that it was the automobile under the management and control of Mrs. Jones? Mrs. Jones possessed an unquestionable legal right to operate the car upon the public way compatibly with usage of the street by others. Those who drive our streets in snow time know from common experience that children upon sleds at times abruptly glide or scurry out of white cover upon careful but powerless motorists and the antics of a sled with its limited controls and young rider can be highly unpredictable.

This court has said:

> " - - - There must be negligence. The defendant is not an insurer. Edwards v. Power and Light Co., 128 Me., 207, 146 A., 700.

> "It must not be be a question of conjecture. The circumstances of the accident must indicate negligence. Nichols v. Kobratz, 139 Me., 258, 29 A., 2d, 161; Winslow v. Tibbets, 131 Me., 318, 162 A., 785. If there are several reasons why the accident may have happened, for some of which the defendant would be liable, and others for which defendant would not be liable, the jury is not at liberty to guess which reason caused the accident. Deojay v. Lyford, 139 Me., 234, 29 A. 2d, 111. Where, in a negligence case there are two or more possible causes and the true cause is conjectural, 'the Court cannot, and the jury should not, select.' McTaggart v. Railroad Co., 100 Me., 223, 60 A., 1027." *Stodder* v. *Coca Cola, Inc.*, 142 Me. 139, 143.

The instant case is distinguished from *Bean* v. *Butler*, 155 Me. 106, where the record contained testimony that upon the public street in a school zone and opposite a playground where 2 small children, one aged 2½ years and the other 5 years, as the defendant approached driving his car. He admittedly saw the children. He continued on his way striking the younger child. The obvious presence and proximity of those children under the attendant circumstances in the judgment of the court presented such a hazard as to render acute, immediately applicable and obligatory the fulfillment of a subsisting responsibility upon the driver. The conclusion was that the evidence was sufficient to present a question for jury determination as to whether the operator had satisfied the standard of reasonable care or had been remiss. A verdict directed for the defense was set aside.

The meager facts in the present case are on the other hand consistent with the "sudden appearance doctrine" discussed in *Bean* v. *Butler, supra,* 108. Mrs. Jones remains uncontradicted in her assertion that the snow was sufficiently high to conceal from view any child using the path and that the break in the snow was revealed only in the emergence of the boy from it. There is no evidence of the

prior presence about the street of any child or as to the manner or moment of the arrival of the boy plaintiff in the route of the automobile.

> " - - - the isolated fact that an accident has happened does not afford prima facie evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which 'commonly does not happen except in consequence of negligence,' then if no explanation is offered, the jury may find that it was due to the negligence of the defendant."
>
> *Cratty* v. *Aceto & Co.*, 151 Me. 126, 132.

From the record in this case the unexplained accident is one which quite understandably could have happened in spite of due care of the defendant.

Appeal dismissed.

WEBBER, J. (CONCURRING)

I concur in both the decision and the opinion save only insofar as the latter attempts to distinguish the case of *Bean* v. *Butler*, 155 Me. 106. My dissent in that case was occasioned by a concern which I expressed that the "decision of the court will have far reaching consequences with relation to the duty of motorists to children on sidewalks and in yards adjacent to streets." If we but substitute the snowbank in the instant case for the parked cars in *Bean*, we have remarkable and unusual factual and evidentiary similarities in the two cases. In each case the plaintiff relied on an alleged admission by the defendant to raise a jury question as to the defendant's negligence. In *Bean* the admission was in effect that at some unstated time before the accident the defendant saw two children start to cross the street, one of whom, never actually identified as the injured plaintiff, turned back. As to the movements of the child thereafter or where the turning back took place the evidence

was silent. In the case before us, the admission was that defendant saw the injured plaintiff lying on a sled in the street looking up at her and she could not stop. In each case, then, the defendant saw the child ahead in the street (that is, if we assume without proof in *Bean* that the plaintiff was the child who "turned back") and in each case the defendant failed to stop. In both cases and to the same extent in each, the evidence failed to disclose where the child came from or when, or where the driver was when the child appeared, or what if any opportunity the defendant had to avert an accident. In each case the jury would be left entirely to conjecture and surmise as to the distance and relationship between child and driver at any given moment.

I deem it significant that the *only* case cited by the plaintiff in his brief as bearing on the duty and negligence of the defendant is *Bean* v. *Butler*. Until the novel doctrine of that case was announced, such situations as the one now before us were fully covered by *Bernstein* v. *Carmichael,* 146 Me. 446, and the applicable law was well understood. *Bernstein* realistically permitted the orderly flow of traffic, albeit with caution and vigilance, even when children were in the vicinity who might suddenly dart into the street from a place of concealment. In my view, *Bean* requires that under these circumstances the driver must stop and may not proceed further. I would take this occasion to overrule *Bean* v. *Butler,* especially since the court does not appear disposed to follow it in a case involving almost identical facts. I still adhere strongly to the view expressed in my dissenting opinion in *Bean* that the holding of that case "makes the motorist an insurer of the safety of small children who may be near enough to the traveled portion of a street to be able, suddenly and without warning, to dart in front of his car in such proximity as to make a collision inevitable." The decision in the instant case, resting as it does firmly on the authority of *Bernstein* v. *Carmichael,* is clearly right.

JENNIE M. WENTWORTH
vs.
JOSEPH A. LaPORTE

York. Opinion, October 3, 1960.

Deeds. Conveyances. Boundaries. Monuments. Courses. Evidence.

Where the line described in a deed or charter does not correspond with that indicated by monuments, the latter must govern as the best evidence.

In construing a deed, the first inquiry is the intention of the parties as expressed. If clearly expressed the monuments mentioned must govern.

In the instant case, the location of a town line as affecting the boundaries of the properties of litigants, in the light of the descriptions in their deed and their respective chains of title is a jury question.

ON EXCEPTION AND MOTION.

This is an action of trespass before the Law Court upon exceptions and motion for new trial. Exceptions overruled. Motion denied.

Donald P. Allen, for plaintiff.

J. Armand Gendron, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, JJ. SIDDALL, J., did not sit.

TAPLEY, J. On exceptions and motion for new trial. The case is one of trespass in which the plaintiff alleges that the defendant occupied a portion of her real estate without right. The parties agreed that should the jury find for the plaintiff, damages would be assessed in the sum of $50.00. The case was tried before a jury in the Superior Court for

the County of York. The jury verdict was in the plaintiff's favor in the sum of $50.00. That portion of plaintiff's property involved in these proceedings is located on the shore of Square Pond, so-called, in the Town of Acton, County of York and State of Maine, and is contiguous to the property of the defendant. The exact location of the westerly boundary of plaintiff's property is in question. The trial of the case brings squarely in issue the location of the town line between the Town of Shapleigh and the Town of Acton, as the various conveyances which are involved in this boundary dispute had their point of beginning at the town line separating the two towns. Defendant, through counsel, argues that the town line is approximately 100 feet easterly of where plaintiff says it is and, therefore, the division line between plaintiff's and defendant's properties would be approximately 100 feet easterly from the location as claimed by the plaintiff. The defendant admits he did the various acts as alleged in the pleadings and as shown by the proof but argues that they were not in the nature of trespass as they were performed on his property.

MOTION FOR NEW TRIAL

Establishment of the line between Acton and Shapleigh was authorized by a Legislative Act in the year 1830 (Chap. 79, P. S. Laws) and is entitled "An Act to Incorporate the Town of Acton." The portion of the enactment pertinent to this issue reads as follows:

> "Be it enacted by the Senate and House of Representatives in legislature assembled, that from and after the 7th day of March in the year of our Lord one thousand eight hundred thirty so much of the Town of Shapleigh in the County of York as lies west of the following described line, namely, beginning at the point of intersection of the west line of the fifth range of lots in said Shapleigh with the northerly line of the town of Sanford; thence running north on said range line to the north check

> line of lot No. 2 in said fifth range; thence east on said check line to the east side line of said fifth range; thence north on said range line to Long Mousam Pond; thence northerly up said Pond to the mouth of Hubbard's Brook; thence up said Brook to the east line of the sixth range; thence north on said range line to Square Mousam Pond."

That part of the town line which runs from the Stiles Road (sometimes called Goose Pond Road) to Square Pond is concerned in this trespass action. The property of which plaintiff claims ownership was deeded to her husband in July of 1923. Title came to her through the last will and testament of her husband, which was proved and allowed in the Probate Court at Alfred in June of 1930, so the ownership of the property has been in the plaintiff and her husband since 1923. The defendant comes by his title through a conveyance from Goodall Brothers (a corporation) by deed dated December 29, 1922.

In June of 1850 the Selectmen of the Towns of Shapleigh and Acton perambulated the line between the Towns of Acton and Shapleigh and recorded their findings in the Acton Town Records as follows:

> "The undersigned, Selectmen of the towns of Shapleigh and Acton did on the twenty-fourth day of June A. D. 1850, meet on the line between said towns at the south west corner of Shapleigh and south east corner of Acton, being the southwest of lot No. 1 in the fifth range of lots in said town of Shapleigh, which said corner is about seventeen links southerly from *from* a scissure or division in a certain large rock lying mostly in the ground, and in the line between said towns as follows, to wit: North by the west side line of said fifth range of lots in Shapleigh to long Mousam pond, and received the spots on the ancient spoted trees, at the bridge leading over Long Mousam pond aforesaid (called Roger's bridge) we established said line at twenty two feet northerly from

> the southerly rock abutment of said bridge and twelve feet southerly from the northerly rock abutment of said bridge. We took the line at Hubbard's brook, so called, it being nine rods and three forths south from a certain white maple stump marked S. A. which said stump is about eight feet north-west from a certain dead white maple tree marked S. and run north by the ancient marked trees to square Mousam pond, at a certain white maple tree marked S.A. and the figures 1834. From the head of square Mousam pond, at six feet west of a small pitch pine tree lettered S. and A. we run north by the side line of the sixth range of lots in said Shapleigh to Little Ossipee river and on the lines aforesaid we have set up stone monuments as follows, to wit. one at the southwest corner of Shapleigh and southeast corner of Acton, one at each of the crossings of the highways, one near the western bank of Long Mousam pond, one at the angle by Hubbard's brook, one near the south bank of square Mousam pond, one near the banks on the north end of said pond and one near the bank of Little Ossipee river."

Mr. Dow, an engineer, in 1929 was employed to run the town line between the Towns of Shapleigh and Acton, from Sanford to Square Pond. Mr. Dow based his survey on the Acton record which is quoted above and ran from monument to monument, as identified in the 1850 report. The monuments referred to were one at the Stiles Road marked S-A and one near Square Pond similarly marked S-A. He testified that in making the survey for use in this case he found it to coincide with the survey of 1929. The evidence establishes that the titles of both the plaintiff and defendant sprung from a common owner and the various deeds show description-wise that the town line is involved either as a line to which other lines are parallel thereto, or in some circumstances where the point of beginning is "118 feet westerly from a stone post set in the line of Acton and Shapleigh and marked S-A." There is another deed, for

instance, that describes the point of beginning "on the Shapleigh and Acton Town Line at a point 75 feet south of a stone post marked S-A in said line." This stone post becomes material in one way or another insofar as a determination of boundaries are concerned. Mrs. Wentworth, the plaintiff, in her testimony concerning the stone marker which is a granite post marked S-A, in speaking of the time when she first noticed it, said,

"Q. Mrs. Wentworth, can you recall and tell the jury when it was the first time you ever saw the marker?

A. Well, it was in 1909 when we went up there to pick out the lot, the first time we noticed it."

Mrs. Wentworth further identifies the marker in relation to the distance between it and the dividing line between her lot and that of the defendant's, Mr. LaPorte:

"Q. Now, do you understand the situation here sufficiently to tell us how far it is in feet from this stone which is marked A-S to the line which divides your property from the property of Mr. LaPorte?

A. It is supposed to be 300 feet.

Q. So, on this sketch, your understanding is that this line here which divides your property, the westerly line of your property, from the property of Mr. LaPorte is 300 feet westerly of the stone marked A-S?

A. Yes."

(It is to be noted that the letters A-S and S-A have been used in this case interchangeably.)

Mr. Bland, witnessing for the plaintiff, when inquired of relative to the marker, testified:

"Q. Mrs. Wentworth's camp is westerly of yours?

A. Yes.

Q. Can you tell the Court whether or not there is any stone post or marker located nearby your camp or cottage building?

A. There is a stone post right between my camp and Cooper's.

Q. By 'Cooper's' camp, are you referring to a camp which is easterly of your camp?

A. Yes.

Q. Will you describe that stone post?

A. Well, it is about four feet high and it has 'S and A' marked on it.

Q. Is it a square post?

A. Yes.

Q. Is it embedded in the ground?

A. Yes, it is.

Q. And when did you acquire your camp property?

A. I think it was 1918.

Q. And from whom did your purchase?

A. Roy Downs; well, my mother bought this camp and then it passed on to me.

Q. At the time you brought this camp building in on to this lot at Square Pond, was that marker you have just described located on the lot?

A. Yes.

Q. Would you say it was located in exactly the same location as it is today?

A. Yes, right in the same place ever since I have known it.

Q. And when you say since you have known its location, how far back in time does that knowledge reach?

A. 1918.

Q. And you say of your own knowledge that that post has never been moved?

A. Not that I know of. It has been right there in the same place."

Mr. Frank W. Clark, a surveyor, identifies the marker. His knowledge of the area dates back to 1898. In 1905 he assisted in running a line, using this marker as a point. The selectmen of the Towns of Shapleigh and Acton, on the twenty-fourth day of June, 1850, in perambulating the line between the two towns, reported taking the line at Hubbard's Brook, so-called, and running it "north by the ancient marked trees to Square Mousam Pond at a certain white maple tree marked S. A. and the figures 1834." They further recorded that they set stone monuments "one at the southwest corner of Shapleigh and southeast corner of Acton, one at each of the crossings of the highways, one near the western bank of Long Mousam Pond, one at the angle by Hubbard Brook, one near the south bank of Square Mousam Pond ******." It is reasonable to deduce from this report that the white maple tree marked S-A and with the figures 1834 was replaced in 1850 by the monument which now stands and has been identified by witnesses as being that one near the Cooper place.

There were two surveyors who testified as plaintiff's witnesses, one, Mr. Frank W. Clark and the other Mr. Neil M. Dow. Mr. Clark, as a result of his survey, drafted a plan of the locus identified as Plaintiff's Exhibit 6, and Mr. Dow made a plan based on his survey which is identified as Plaintiff's Exhibit 19.

The defendant claims the engineers were in error in placing the town line as they did and further argues that the town line when originally determined was not in accordance with the direction of the Legislature.

We have noted heretofore that the Town of Acton was incorporated by the Private Laws of 1830. Sometime after the legislative enactment, and before 1850, action was taken

to define the town lines as the Selectmen's Report of 1850 refers to "Ancient marked trees" which they either replaced by monuments or they renewed spots on the ancient trees. It is obvious from the evidence that the town line in this area, at least, has stood in its present position for well over one hundred years.

In analyzing this case and the legal problems it presents, it is important to keep in mind that the line which is the focal point of the controversy is not disputed by the two towns but its location is questioned by counsel for the defendant as a defense measure. There is nothing in the evidence to indicate other than that the defendant, Mr. LaPorte, when he purchased the property in 1922, or the plaintiff's predecessor who purchased in 1923, had any question but that the boundaries of their respective properties were in accordance with the town line. This is also true as to their predecessors in title.

The stone post bearing initials S-A which replaced the ancient marker of a white maple tree marked S. A. and with the figures 1834 located near the Cooper place stands as a monument which is material in pointing the way to a determination of this controversy.

In the case of *Whitcomb* v. *Dutton,* 89 Me. 212, the question arose between individuals as to the location of a town line. Previous to the action a controversy had existed as to the location of this town line between the Towns of Morrill and Waldo. In accordance with statutory provisions, commissioners were appointed who proceeded to ascertain and determine the disputed line and place suitable monuments for the permanent establishment of the line. At the trial of the case one side argued the acceptance of the line found by the commissioners while the other urged that the original line was the correct one. Plaintiff introduced testimony of a surveyor which disputed the line as found by the commis-

sioners. The jury returned a plaintiff verdict. In speaking about the effectiveness of monuments in determining lines, the court, on page 218, said:

> "If the locations of these monuments could be established and they indicated a line varying from the one described by course, the monuments would control, the course must yield; but if the monuments cannot be found or their locations established, then resort must be had to the course as the only other description of the boundary given in the charters. The identity of these monuments, and the places where they were originally located, being in dispute, were questions of fact for the jury."

It is to be noted at this juncture that the surveyors testifying for the plaintiff in the instant case set their course from the monument at the northerly edge of Stiles Road, so-called, to the monument near the Cooper place. These monuments were set in 1850 and have stood for over one hundred years as monuments of the separation of the two towns and from one to the other was determined of course which bounded the towns on the one side and the other.

> "And from their well known experience and legal knowledge we presume that to the facts as they found them evidenced by ancient marks upon the face of the earth, they applied the well settled principle of law, that where the line described in a deed or charter, and that indicated by monuments established in the original survey and location of the tract or township, do not correspond, the latter, being the best evidence of the true line, must govern, however they may differ."
>
> *Inhabitants of Bethel* v. *Inhabitants of Albany, et al.*, 65 Me. 200, at page 202.
>
> "In construing a deed, the first inquiry is, what was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and cer-

> tain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern; but when, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the earth, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles."
>
> *Knowles* v. *Toothaker,* 58 Me. 172, at page 175.

There is uncontradicted evidence the defendant recognized that his deed did not vest title in him to that portion of the Wentworth property which he was making use of. Mrs. Wentworth testified:

> "A. Well, my nephew and I went to his camp to talk with him to see how he felt about the survey and see if he would agree to it so that we could straighten our line out and everyone know where we stood, and he wouldn't listen to anything. My nephew talked to him very nicely and he wouldn't listen to anything. He knew everything himself, and finally when we come out I asked Mr. LaPorte, 'Who do you think owns that land down there where you are parking your car?' Mr. LaPorte, said 'You do, Mrs. Wentworth, but I can take it by squatter rights.' That is just the conversation; I remember it distinctly, and that was about eight o'clock in the evening of August 23, 1952."

The case went to the jury, not on the question of the dispute of the town line between towns, but on the basis of a controversy between land owners as to their respective

boundaries. A portion of the town line lying between two granite monuments of ancient vintage, with one of them being specifically designated as a starting point in the chain of title to both properties, is pertinent and germane to the issue of the boundaries of both parties. The record shows that not only the property of these litigants is affected by this portion of the town line but also there are other land owners whose descriptions tie in to the monument and the town line. It is reasonable to deduce from the evidence that both the plaintiff and the defendant since 1922 and 1923 respectively, when their property was acquired, had no thought other than that the monument near the Cooper place and the location of the town line as contended by the plaintiff was the true line where their respective chain of title started. This appears to be true until litigation was commenced by the plaintiff. The location of the town line as affecting the boundaries of the properties of the litigants, in light of the descriptions in their deeds of conveyance and their respective chains of title, is a jury question.

A careful review of all the evidence, oral testimony, deeds and plans, leads us to the conclusion that there was sufficient credible evidence upon which the jury based its verdict.

Defendant took exceptions to certain portions of the charge of the presiding justice and also to the refusal to instruct. These exceptions we have considered and, finding no error in the charge and refusal to instruct, the exceptions are overruled.

Exceptions overruled.

Motion for new trial denied.

STATE OF MAINE
vs.
MELVIN W. BECK

Kennebec. Opinion, October 4, 1960.

Engineering. Architecture. Criminal Law.
Police Power. Constitutional Law. Words and Phrases.

R. S., 1954, Chap. 81 forbids the assumption of the title of practicing "architect" by one who is not qualified by state registration, although he be a "registered professional engineer."

The requirement of R. S., 1954, Chap. 81, that an engineer verify that he has special talent before he may publicly solicit patronage as an architect is constitutional even though the architectural and professional engineering vocations are not mutually separable and are overlapping.

The practice of both professional engineer and architect directly relate to the public health and welfare.

While all architects may be engineers, all engineers are not architects.

Word and Phrases—engineer, architect.

Malum prohibitum. In such cases no intent need be alleged or proved.

The intent can be inferred from the doing.

ON EXCEPTIONS.

This is a criminal action under R. S., 1954, Chap. 81, for appropriating the title of architect. The case is before the Law Court upon exceptions. Exceptions overruled.

Robert Marden, County Attorney,
Jon Lund, Assistant County Attorney, for State.

Jerome Daviau, for defendant.

SITTING: WILLIAMSON, C. J., TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ. WEBBER, J., did not sit.

SULLIVAN, J. On exceptions. Respondent was prosecuted and found guilty by jury verdict upon a complaint for the offense of appropriating the title of architect by publicly erecting and maintaining upon the building housing his professional quarters a sign with the legend, "Melvin W. Beck, Engineer & Architect," when he had not been registered by the Maine State Board of Architects in compliance with the provisions of R. S. (1954), c. 81.

Respondent at the time of his imputed misdemeanor was a professional engineer registered in accordance with R. S., c. 83.

At the trial it was stipulated that the respondent who was not a registered architect owned the sign and that it had been displayed at his direction. The issues here are of law.

At the close of the evidence respondent unsuccessfully moved for a directed verdict upon the contentions that the State had failed to prove an offense under R. S., c. 81 and that R. S., c. 81 is unconstitutional in not excepting the respondent from its purview and bane. Respondent excepted.

It is obvious that the respondent had violated the mandates of R. S., c. 81 as charged if he were not excepted by that statute. *State* v. *Huff*, 89 Me. 521.

R. S., c. 81, § 9 ordains as follows:

> "Nothing in this chapter shall be construed to apply - - - - to any person who is qualified under the law to use the title 'professional engineer' provided that such person may do such architectural work as is incidental to his engineering work - - - -"

The act could hardly have been more oblique in expressing the legislative purpose than it is in the foregoing quotation. Yet a comparison with the complete text of R. S., c. 81 manifests that the law forbids the assumption of the title of practicing architect by one who is not qualified by state registration although he be a registered professional engi-

neer. But the latter may, nevertheless, engage in architecture to the contained extent that such is incidental only to his engineering.

The respondent assails the constitutionality of R. S., c. 81 upon plural grounds. His challenge must satisfy certain familiar norms.

> "The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be solved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court. - - - -"
>
> *Laughlin* v. *City of Portland,* 111 Me. 486, 489.
>
> "The power of the judicial department of the government to prevent the enforcement of a legislative enactment, by declaring it unconstitutional and void, is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. - - - -"
>
> *State* v. *Rogers,* 95 Me. 94, 98.
>
> "- - The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. Warren v. Norwood, 138 Me. 180 - - - -"
>
> *Baxter* v. *Waterville Sewerage District,* 146 Me. 211, 214.

"- - To invalidate a statute, unconstitutionality must be shown beyond a reasonable doubt. - - -"

Re: John M. Stanley, 133 Me. 91, 98.

The particulars of the controverting of the constitutionality of R. S., c. 81 by the respondent may be summarized as follows:

The Legislature distinguishes no efficacious difference between professional engineering and architecture other than the aesthetics of the latter but aesthetics without more are not a proper or adequate object of police power. The act essays to control, by licensing requirements, the practice of art and such the Legislature can not do. The statute is an arbitrary and unwarranted interference with the right of a citizen to pursue a lawful livelihood. More schooling or training is required by the Legislature for professional engineering than for architecture. An architect is basically an engineer with training in art. The respondent's qualifications as a professional engineer are at least the equivalent of an architect's and, notwithstanding, the Legislature discriminates against the former and prevents him from applying art to his profession. If an engineer by the statute is qualified to practice architecture as it may be "incidental to his engineering work," then the stricture against such engineer holding himself out as an architect has no reasonable relationship to the stability of the public health, welfare or safety. The definition of the practice of architecture in R. S., c. 81, § 8 is a hodge-podge of statutory criminality and so vague as to lack that certainty requisite in a criminal law. R. S., c. 81, § 9 violates the principle of equal application of the law in excepting employees who need have no special education or qualifications but who may design a building, provide specifications and supervise construction although the safety of a large segment of the public may be jeopardized. Respondent queries as to how a trained and qualified engineer might endanger the public by

merely advertising that he performs architectural service while an employee without particular qualification may practice architecture without danger to the general public.

R. S., c. 81 as to architects and R. S., c. 83 as to professional engineers are exercises of the police power.

State v. *Old Tavern Farm, Inc.,* 133 Me. 468, 470.

The Legislature first regulated by licensing, engineering practice, P. L., 1935, c. 189, and subsequently, architecture, P. L., 1945, c. 356, and must be assumed to have been cognizant of the provisions of P. L., 1935, c. 189 (R. S., c. 83), when it adopted P. L., 1945, c. 356 (R. S., c. 81). The Legislature must be considered as having entertained a consistent design and policy embracing both acts.

Palmer v. *Sumner,* 133 Me. 337, 344.

Professional engineering and architecture in the Legislative estimation are patently regarded as separate *species* of the engineering *genus* and such a judgment seems objectively valid. While categorically an engineer, the architect —without disparagement toward the professional engineer—is required to demonstrate that he possesses and utilizes a particular talent in his engineering, to wit, art or aesthetics, not only theoretically but practically, also, in coordination with basic engineering. R. S., c. 81 prescribes that an engineer verify that he has such special talent to a sufficiently cultivated degree before he may publicly solicit patronage as an architect.

Professional engineering and architecture are not mutually separable and can never be completely disassociated. They are overlapping vocations. Nonetheless the Legislature in reason was justified in not regarding them as coextensive but as occasioning individualized attention for the public weal.

In the education of architects Massachusetts Institute of Technology informs us that:

> "The prerequisites for the study of architecture are sympathy for human institutions, aesthetic perception, and the ability to utilize effectively the methods of science in arriving at specific solutions of building problems. At bottom perhaps a special 'constructive' aptitude (important for various other careers as well) is, if not actually necessary, extremely desirable. The course of study must provide in different ways for work along various lines — humanistic, artistic, and technical. - - - - In this the elements of function, of structure, and of design in the layman's sense — that is form and expression — are combined and ultimately integrated. Like any other student, the student of architecture must proceed some distance analytically with the study of the separate aspects of his world before he can hope to reach a successful synthesis - - - -"
>
> *Education of Architects and Planners* (M. I. T.) P. 15.

In *Goldschlaz* v. *Deegan,* 238 N. Y. S. 3, 4, the court said:

> " - - - But I think it may be safely said that, speaking of to-day, there are many elements of service in the preparation of plans for the construction of a building of whatever type, and the superintendence of construction, that may be more properly left to what we now know as an architect than to what we now know as an engineer. Certainly, an engineer is not to be presumed to be 'one who understands architecture'. - - - -"

In *People* v. *Babcock,* 73 N. W. (2nd) 521, 526 (Mich.), it is said:

> "While it is a fact that the definitions of architects and engineers are somewhat similar, yet there is a distinction. The services of an architect require the application of the principles of architective or architectural design, while the services of an en-

gineer require the application of engineering principles."

We quote from *Rabinowitz* v. *Hurwitz - Mintz Furniture Co.*, 133 So. 498, 499 (La.):

> "In the Encyclopedia Britannica we find the following with respect to the profession of engineering:
>
> 'Specialization has brought about separate grouping of those interested in mechanical, electrical, mining, etc. engineering. Underlying all groups is the work of the civil engineer, whose field particularly is that of structures. Foundations, simple or extremely complicated, are within his realm. He designs and supervises the construction of bridges and great buildings, tunnels, dams, reservoirs and acqueducts.' From the same work we excerpt the following definition of an architect: 'One who, skilled in the art of architecture designs buildings, determining the disposition of both their interior spaces and exterior masses, together with the structural embellishments of each, and generally supervises their erection.' "

In *McGill* v. *Carlos*, 81 N. E. (2nd) 726, 729, the Ohio Court said:

> "Primarily, an architect is a person who plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge and skill are required in such preparation. The practice of architecture may also include the supervision of construction under such plans and specifications - - - -"

In *Architectural Research: Its Nature and Practice*, by Robert W. McLaughlin, FAIA, Director, School of Architecture, Princeton University (1958), we find the following:

> " - - - Man's decision to live in groups in stable locations led to the building of towns and cities. The

> ways in which men organize society determine the nature of our cities, and in turn the nature of our cities has a profound effect on the nature of society. An extreme example of this is the slum. *Architecture unrelated to the interests of society produces a slum as soon as it is built.* The study of human ecology, which is concerned with the relation of society to physical environment, and vice versa, holds keys to the understanding of the nature of our cities which can lead to wise planning. The methods and findings of the social scientists are applicable to this area. Urban research, which is architectural research in its widest aspects, leads to principles badly needed for understanding and conditioning the growth and deterioration of cities. - - -
>
> History records man's constant effort to change and improve his environment. He has changed it through building, and improved it through architecture. *He has also damaged his environment through architecture — bad architecture.*" (Italics supplied.)

We conclude that, while all architects may be engineers, all engineers are not architects. To restate these truths in one proposition, some engineers are architects. The Legislature confirmed these inferences when in 1945 it made requisite a special and classificational licensing of architects as such and enacted a separate statute for such a purpose in addition to the earlier engineering licensing act of 1935. While the respective functions of an engineer and those of an architect as recited in the two statutes superficially appear parallel and equivalent as predicated for each group they are designedly not so. Notably in the instance of architects studies, plans, specifications, etc., are coupled conjunctively with "a coordination of structural factors concerning the aesthetic." That element is absent from the engineering law. And although the architect licensing act states that it regulates as to the performing of:

> " - - - any other service in connection with the designing or supervision of construction of buildings located within the state, regardless of whether such persons are performing any or all of these duties - - -,"

architecture connotes the fulfillment of such duties — which are fundamentally done very well by engineers — in an ulterior manner and with certain finesse not indispensable to the vocation of basic engineering.

It is self-evident from mere definition that the practice of both the professional engineer and the architect directly relate to the public health and welfare.

Architects are commonly engaged to project and supervise the erection of costly residences, schools, hospitals, factories, office and industrial buildings and to plan and contain urban and suburban development. Health, safety, utility, efficiency, stabilization of property values, sociology and psychology are only some of the integrants involved intimately. Banking quarters, commercial office suites, building lobbies, store merchandising salons and display atmospheres, motels, restaurants and hotels eloquently and universally attest the decisive importance in competitive business of architectural science, skill and taste. A synthesis of the utilitarian, the efficient, the economical, the healthful, the alluring and the blandished is often the difference between employment and unemployment, thriving commerce and a low standard of existence. Basic engineering no longer suffices to satisfy many demands of American health, wealth or prosperity.

R. S., c. 81 is necessary to assure the public in these times of expanding and mobile populations that one who publicly offers himself in the role of an architect may evidence his competence by due registration with the State Board.

The classification of architects and that of engineers are:

> " - - - based upon an actual difference in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens - - -"
>
> *York Harbor Village Corp.* v. *Libby,* 126 Me. 537, 542.

Respondent censures the statute, R. S., c. 81, and contends that it is vitiated by included exceptions which exempt from the requirement of licensing certain kindred and occasional or gratuitous architectural - engineering functions which the Legislature did not deem to be seriously subversive of the objectives of the act. The Legislature judged that the exceptions contained reasonable deterrents or were innocuous. The issue is at most only narrowly debatable and as such is not a sufficient cause for invalidation.

Heron v. *Denver* (Colo.), 283, P. (2nd) 647, 650.

R. S., c. 81 and R. S., c. 83 are very advantageous to the professions of architecture and of engineering. They do not discriminate against either vocation but do much to protect and promote each. A professional engineer with architectural competence need only undergo an examination to become registered as an architect.

Incidentally it may be observed that R. S., c. 81, § 9 permits a registered architect to perform any prerogatives of a professional engineer only as it may be "incidental to his architectural work."

The wording of the sign owned and displayed by the respondent was uncontroverted at the trial. Nor was there any occasion to resort to evidence to render its meaning or application clear.

> "The construction of all *written instruments* belongs to the Court. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as of

> any local or commercial meanings attached to particular words by usage; and the ascertaining of this is for the jury. But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction from the Court - - -"
>
> *Wigmore on Evidence,* 3rd ed., Vol. 1X, § 2556, P. 522.

There was no error in the preclusion of testimony offered by the respondent to prove that he had done architectural work incidental to his engineering. Such evidence would have been extraneous to the issue posed by the State's complaint as to whether or not the respondent, unregistered, had used the title "architect."

> "Some acts are in themselves indifferent and become criminal only when done with a particular intent.- - - Other acts, however, are sometimes made unlawful absolutely, without reference to any intent or other state of mind of the doer. In such cases no intent need be alleged or proved. The intent to do is sufficient and that can be inferred from the doing. The acts prohibited by this statute are of the latter class. They are prohibited absolutely. Having intentionally committed them, though innocent of any turpitude, the appellant has violated the statute. State v. Goodenow, 65 Maine, 30."
>
> *State* v. *Huff,* 89 Me. 521, 523.

Respondent excepts to inconsistent statements in the court's instruction to the jury. Such error as there was favored the respondent and is not exceptionable. *State* v. *Siddall,* 125 Me. 463, 464.

Exceptions overruled.
Judgment for the State.

GARFIELD BEAL
vs.
LESTER WOOD, ET AL.

Cumberland. Opinion, October 5, 1960.

Negligence. Left turn.
Contributory Negligence.

It is familiar law in this jurisdiction that the operator of a motor vehicle intending to cross the right of way of cars coming from behind, has the duty of so watching and timing the movements of the other car as to reasonably insure himself of safe passage either in front or rear of such car, even to the extent of watching and waiting if necessary.

ON EXCEPTION.

This is a negligence action before the Law Court upon exceptions to an order directing a verdict. Exceptions overruled.

Basil Latty, for plaintiff.

Robinson, Richardson & Leddy, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SIDDALL, J. This action in tort comes to this court upon plaintiff's exception to a directed verdict for the defendant. The directed verdict was based on the ground that the plaintiff was guilty of contributory negligence.

On September 18, 1957, the plaintiff was operating a small truck in a general southerly direction on Route #35 in Standish, Maine. The defendant was operating an automobile on the same highway and in the same direction. Route #35 is a two lane, black top road, the lanes being

delineated by a broken white line. The plaintiff attempted to make a left-hand turn into his driveway on the easterly side of the highway, and a collision occurred between the two vehicles. The highway in both directions from the place of collision was straight and without obstructions.

In the trial of the case the plaintiff had the burden of proving negligence of the defendant and due care on his own part.

We are here concerned only with the question of whether the plaintiff was guilty of contributory negligence as a matter of law. There is no necessity to discuss the question of negligence on the part of the defendant. If the plaintiff was guilty of negligence which contributed to his injuries, then he cannot recover, although the defendant might also have been negligent.

The story of the accident as given by the plaintiff is that when about 200 feet from his driveway, he signaled to make a turn into the driveway. At that time there were two cars about eight hundred or a thousand feet behind him. We now quote from plaintiff's testimony.

"Q. Now before you turned left did you notice any vehicles behind you?

A. Yes, there were two cars coming behind me.

Q. And where were they at that time?

A. Well, at that time, just as I started to turn the wheels, I would say, at that time they were four hundred feet or a little better back of me.

Q. And how were they spaced?

A. They were very close.

Q. Close to what?

A. There was one that had just started to come out behind the other.

Q. Could you tell us which lane on the highway they were on at that time, the easterly or westerly?

A. Well, the Wood car was on the left side.

Q. Just a moment. There is a broken center line on Route 35 in the vicinity of the Beal driveway, is that correct?

A. I don't understand.

Q. There is a broken center line?

A. Yes, a white strip in the road.

Q. We will call the westerly side of that center line the westerly lane and the easterly side of that center line the easterly lane. Now where was the Wood car just before you began to make your turn?

A. Well, before I made the turn he was on the easterly side, the Wood car.

Q. And where was the other car?

A. The other car was on the other side.

Q. Now did you make your left turn?

A. I made my left turn.

Q. What happened to the other car?

A. The other car passed on the right. Mr. Wood didn't - - -

MR. LEDDY: I object to this witness testifying to something that he didn't see and which, in the nature of things, he probably couldn't see.

(Last question read by the reporter)

THE COURT: If you know, Mr. Beal, if you have your own knowledge on the subject, you may answer.

A. I saw the other car pass, that is true.

Q. (By Mr. Latty) Passed you?

A. Passed me on the right, so help me.

Q. You mean on the westerly side?

A. Yes.

Q. What happened to the Wood car?
A. Just as that car passed me, almost the same time he hit me in the rear of the truck.

Q. What part of the truck did he hit?
A. He hit the tail-gate part of the left side.

Q. Do you want to tell me how the tail-gate was at the time of impact?
A. The tail-gate was out to make the truck longer.

Q. Extended horizontally?

* * * * *

Q. Now where were you in the highway when the Wood car struck you, where was your car?
A. I was turning in.

Q. Was any part of your car in the westerly lane?
A. No.

Q. Where was it?
A. It was over on the left.

Q. In the easterly lane?
A. Sure."

The deposition of Albert F. Denette was introduced by the plaintiff. He testified that he was driving on Route #35 at the time of the accident and that he drove at the rear of two cars, one of which was the defendant's car. He testified that the defendant's car was endeavoring to pass the other car. The defendant's car was travelling along the highway at a rate of speed of 55 to 60 miles an hour. We quote from his testimony.

"Q. So that if you were 1500 feet from the accident, and they were 1,000 or 1500 feet ahead of you, is it fair to say that they were pretty close to the Beal car?
A. I would say yes.

Q. When the Beal car turned left?
A. Right.

Q. Should we also understand that when the Beal car turned left that the Wood car was abreast of this unidentified car?
A. It wasn't quite abreast, but pretty close to it.

Q. In any event, the Wood car was occupying the easterly lane of Route 35, is that correct?
A. Yes.

Q. That is when you saw the Beal truck turn left?
A. Yes."

There is no evidence in regard to the width of the highway. However, photographs of the highway, with tire marks of defendant's vehicle showing, were admitted in evidence. Comparing the width of the tire marks with the width of the highway as shown on these exhibits, it must be concluded that the highway was not over thirty feet in width. Taking the evidence in the light most favorable to the plaintiff he could not have travelled over twenty feet, at the most, after making his turn, at a speed he himself estimates at approximately ten miles per hour, before being struck. If the plaintiff's story is correct, the defendant must have been travelling at least twenty times as fast as the plaintiff in order to have come into collision with defendant's truck. This, of course, is highly improbable. No testimony was offered on behalf of the defendant, but the only conclusion to be reached from the entire evidence in the case, considering it in the light most favorable to the plaintiff, is that the plaintiff either failed to look to his rear as he started to make his turn to the left, or that he grossly misjudged the distance between his vehicle and that of the defendant's at the time the turn was started.

It is familiar law in this jurisdiction that the operator of an automobile intending to cross the right of way of cars coming from behind has the duty of so watching and timing the movements of the other car as to reasonably insure himself of a safe passage either in front or rear of such

car, even to the extent of stopping and waiting if necessary. *White* v. *Schofield,* 153 Me. 79, 134 A. (2nd) 755, *Verrill* v. *Harrington,* 131 Me. 390, 395, 163 A. 266.

We must conclude that the plaintiff was guilty of contributory negligence as a matter of law and that the verdict directed for the defendant was proper.

The entry will be

Exceptions overruled.

STATE OF MAINE
vs.
GEORGE LASKY

Kennebec. Opinion, October 12, 1960.

Taxation. Legislation. Revenue.
Constitutional Law. Finding. Industry.

The legislature by its "Act to correct Errors and Inconsistencies" does not enact a "revenue" measure within the meaning of the constitutional provisions, Art. IV, part Third, Sec. 9 (calling for all bills for raising revenue to originate in the house) merely because it repeals the "Quahog Tax Law" by Sec. 21 and reenacts it by Sec. 22 with new section numbers, since sections Sec. 21 (the repeal) and Sec. 22 (the reenactment as corrected) of the "correction Act" accomplish neither more nor less than the amendment of the original tax law.

A finding by the Legislature that quahogs "constitute a renewable natural resource of great value to the Casco Bay Coastal Region and the State" is entitled to the greatest respect as a finding by a coordinate branch of state government.

The purpose of a tax to benefit the public through benefit to the industry is not to be denied for the reason that the numbers engaged in the industry may be relatively small.

Cf. *State* v. *Vahlsing,* 147 Me. 417.

ON REPORT.

This is an action to recover a tax before the Law Court upon report. Judgment for the State in the amount of $1282.02.

Ralph W. Farris, Asst. Atty. General, for state.

Harold J. Rubin, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

WILLIAMSON, C. J. On report. The State seeks to recover the "quahog tax," so-called, assessed against the defendant, a licensed shellfish dealer, under the provisions of R. S., c. 16, §§ 294-301, enacted in P. L., 1957, c. 429, § 22. It is agreed that if the quahog tax statute is "constitutional and a valid exercise of the taxing powers of the State," the State is entitled to judgment in the amount of $1282.02.

The defendant contends that the quahog tax is unconstitutional for two reasons: first, that the statute originated in the Senate and not in the House of Representatives, in violation of Art. IV, Sec. 9, of the Constitution of Maine, and hence was not validly enacted; second, that the tax is not levied for a public purpose.

Art. IV, Part Third, Sec. 9 of the Constitution reads:

> "Bills, orders or resolutions, may originate in either house, and may be altered, amended or rejected in the other; but all bills for raising a revenue shall originate in the house of representatives, but the senate may propose amendments as in other cases: *provided,* that they shall not, under color of amendment, introduce any new matter, which does not relate to raising a revenue."

We will consider only the two issues stated above. In no way do we intimate by our decision what our judgment

might be in the event of an attack on the constitutionality of the quahog tax statute on grounds not here presented. The pertinent statutory provisions in R. S., c. 16 read as follows:

> "**Sec. 294. Purpose.**—The quahogs in Maine constitute a renewable natural resource of great value to the Casco Bay coastal region and the state, and sections 294 to 301 are enacted into law in order that funds may be available to the research division of the sea and shore fisheries department to cooperate with the coastal communities in paying for the purchase, maintenance and operation of boats and equipment to transplant seed quahogs from heavy concentrations to commercially depleted shellfish areas, and carry on other management and scientific work deemed necessary for the financial benefit of the industry.
>
> "**Sec. 295. Definitions.**—The terms used in sections 294 to 301 shall be construed as follows:
>
> **I.** 'Quahogs' shall mean a marine mollusk (Venus mercenaria) commonly called hard shelled clams.
>
> **II.** 'Primary producer' shall mean any person who digs or takes quahogs from the flats or waters of the coast of Maine for commercial purposes.
>
> **III.** 'Shellfish dealer' shall mean any person, partnership, association, firm, corporation or entity holding a sea and shore fisheries department wholesale seafood dealer's and processor's license or a resident or nonresident interstate shellfish transportation license engaged in buying quahogs from the primary producers and dealing in quahogs in the wholesale trade.
>
> **IV.** 'Landed value' shall mean the price payable to the primary producer by the shellfish dealer for quahogs dug or taken from the coastal waters.

"**Sec. 296. Tax on quahogs.**—There is levied and imposed a tax at the rate of 5% on the landed value of all quahogs purchased from the primary producers by shellfish dealers."

* * * * * * * * * * *

"**Sec. 301. Appropriation and use of moneys received.**—Money received under the provisions of sections 294 to 301 by the treasurer of state shall be appropriated and used for the following purposes:

I. For the collection of the tax provided for by section 296 and for the enforcement of all the provisions of sections 294 to 301.

II. The balance in such amounts as shall from time to time be determined by the commissioner of sea and shore fisheries:

A. For the purpose of buying, maintaining and operating boats and equipment to transplant seed quahogs to flats and waters of the state.

B. To carry on scientific and management work deemed necessary for the benefit of the quahog industry. Any unexpended balance from the above apportionment shall not lapse, but shall be carried forward to the same fund for the next fiscal year."

The first objection, namely, that the quahog tax as a bill "for raising a revenue" was not validly enacted inasmuch as it was introduced in the Senate, arises in this manner. The quahog tax was first enacted at the regular session of the 1957 Legislature in P. L., 1957, c. 355, as Revised Statutes c. 16, §§ 282-289, effective in due course in August 1957. At a special session in October 1957 the Legislature enacted "An Act to Correct Errors and Inconsistencies in the Public Laws" (P. L., 1957, c. 429), effective on approval under the emergency clause. Art. IV, Part Third, § 16, Maine Constitution.

In the correcting statute we are interested in the following sections:

> "**Sec. 21. R. S., c. 16, §§ 282-289, repealed.** Sections 282 to 289 of chapter 16 of the Revised Statutes, as enacted by chapter 355 of the public laws of 1957, are hereby repealed.
>
> "**Sec. 22. R. S., c. 16, §§ 294-301, additional.** Chapter 16 of the Revised Statutes is hereby amended by adding thereto 8 new sections to be numbered 294 to 301, to read as follows: . . "

There follows the precise language of the original act of the regular session (in terms repealed in Section 21 above) apart from changes in the section numbers of R. S., c. 16.

The correcting act consists of 98 sections touching many subjects. For our purposes we need consider only sections 21 and 22, above. The two "quahog" sections neither affect nor are they affected by the remaining 96 sections.

Sections 21 and 22 obviously must be considered together. No one would suggest that the Legislature intended to repeal the first or original quahog tax in section 21 without enacting the correcting section 22. No new revenue was provided in the correcting act not previously in existence until the very moment of the effective date of the Act.

A bill to repeal the quahog tax, taken alone, would not be a bill to raise revenue. There is no constitutional prohibition against the origination of such a measure in either branch of the Legislature. If, however, repeal was the purpose of the Legislature in the October 1957 session, we would not expect to find the repeal hidden in an act with 98 sections designed "to Correct Errors and Inconsistencies in the Public Laws."

A bill to create a quahog tax as provided in the first act (P. L., 1957, c. 355), taken alone, however, would be a bill to raise revenue under the Constitution. The first or orig-

inal act goes beyond the bounds of a regulatory measure and provides for revenue from the quahog tax. The purpose of the tax is not to regulate the shellfish dealers, but to provide funds for the benefit of the quahog industry and thus the State.

If the issue before us was whether a bill providing for a quahog tax, taken alone, could be introduced only in the House, we would be called upon to determine whether the point could be raised in court, and if so, in what manner.

In *Weeks* v. *Smith,* 81 Me. 538, 547, 18 A. 325 (1889), we said

> "But when the original act, duly certified by the presiding officer of each house to have been properly passed, and approved by the governor, showing upon its face no irregularities or violation of constitutional methods, is found deposited in the secretary's office, it is the highest evidence of the legislative will, and must be considered as absolute verity, and cannot be impeached by any irregularity touching its passage shown by the journal of either house."
>
> * * * * * * * * * * *
>
> "The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and, if they carry no 'death wounds' in themselves, to be absolute verity and of themselves conclusive."

In 1935 the justices of the court, in 133 Me. 537, 539, 178 A. 620, joined in an opinion to the House of Representatives that a bill, "An Act Relative to Resident Fishing and Hunting Licenses", was "regulatory. . . " and not a bill for " 'revenue' which should have originated in the House of Representatives."

The opinion of the justices is not in conflict with the *Weeks* case, *supra.* In *Weeks,* the court declined to look behind the endorsement of a veto on the act as passed by the

Legislature. In the Opinion of the Justices, advice was sought by the House in the course of the legislative process.

We deem it unnecessary, however, to consider the place of origin of the correcting act. To say that in October 1957 the Legislature in one breath repealed the quahog statute, effective only since August 1957, and enacted as something new the same statute, identical in all respects apart from section numbers, gives weight only to the form of words and figures and not to the true intent of the Legislature. Sections 21 and 22, the repeal and enactment sections, accomplish neither more nor less than the amendment of the original quahog tax statute by changing the assignment of section numbers in the Revised Statutes. In *Stuart* v. *Chapman,* 104 Me. 17, 24, 70 A. 1069, the court said:

> "We apprehend that no man can have any doubt that this is precisely what the legislature intended to accomplish. The means it adopted were appropriate to the end, and we know of no iron rule of statutory interpretation which, under the circumstances of this case, must render its efforts abortive."

The reason for the correction (but not the need at the particular time) is found in the printed laws of the 1957 regular session. "An Act Imposing a Tax on Dry Beans" (P. L., 1957, c. 326), effective September 1, 1957, added twelve sections to Revised Statutes, c. 16, numbered 282 to 293. By "An Act Providing for a Tax on Quahogs," P. L., 1957, c. 355, effective August 28, 1957 (the first quahog tax), eight sections were added to the same Revised Statutes, c. 16, numbered 282 to 289.

Quahogs were thus given sections already occupied by dry beans. It is not surprising that an error of this nature should arise in the process of legislation. No harm came therefrom.

It would be absurd to say either that the quahog tax repealed the dry bean tax by implication or that the quahog tax failed because of confusion in numbering the sections. No more can it be said that the Legislature, in correcting the error, repealed the existing quahog tax.

All that the Legislature in fairness sought to accomplish, and did accomplish, was to give the quahog tax statute eight sections in the Revised Statutes c. 16 following the twelve sections of the dry bean tax statute. This result no doubt could have been reached by a simple amendment of the original quahog tax. It would be a strange result indeed if in correcting what was considered to be an error or inconsistency, the Legislature deprived the State of a source of revenue and the continuance of an activity.

To summarize, we are of the opinion that the statute (P. L., 1957, c. 429, § 22) at least insofar as it amended the original quahog tax statute, was not a bill to raise revenue within the meaning of the Constitution. Therefore we need not consider in what branch of the Legislature the measure was introduced.

We turn to the issue concerning the purpose of the quahog tax. Unless the tax is levied for a public purpose, and not for a private purpose, it must fail under the Constitution.

The State contends that validity of the tax is assured upon application of the principles set forth in the opinion of the court in *State* v. *Vahlsing,* 147 Me. 417, 88 A. (2nd) 144, sustaining a tax on potatoes to support the potato industry. On his part, the defendant stoutly asserts that the quahog industry is so far different from the potato industry that *Vahlsing* does not control.

We take judicial notice of the great importance of the fishing industry in the life of our State. *State* v. *Dodge,* 117

Me. 269, 104 A. 5 (lobster fisheries). The well being of large numbers of our citizens is directly dependent upon it. From colonial days we have drawn upon the sea and shore fisheries for a substantial part of our income and wealth.

The power of the Legislature "to regulate and control such fisheries by legislation designed to secure the benefits of this public right in property to all its inhabitants" has long been unquestioned. *State* v. *Leavitt,* 105 Me. 76, 79, 72 A. 875 (digging of clams). See also *Moulton* v. *Libbey,* 37 Me. 472, and *State* v. *Peabody,* 103 Me. 327, 69 A. 273, both involving the digging of clams.

The Legislature has stated that quahogs "constitute a renewable natural resource of great value to the Casco Bay coastal region and the state." Sec. 294, *supra.* This finding of fact by a coordinate branch of the state government is entitled to the greatest respect.

The defendant seeks to distinguish the quahog tax from the potato tax, upheld in *Vahlsing, supra,* in part, upon the unimportance of the quahog compared with the potato. We may readily agree that the quahog industry does not match in size the potato industry. We are left, however, with the fact found by the Legislature, as stated above. The defendant gains nothing from the argument about the size of the quahog industry.

The defendant further contends that the tax is not levied for the benefit of *fishing* as an industry, but for the benefit of a small group of *individuals* in the industry. There is nothing in the language of the act or in the record to compel this view. The purpose of a tax to benefit the public through benefit to the industry is not to be denied for the reason that the numbers engaged in the industry may be relatively small. The purposes set forth by the Legislature in Section 294 are expressly designed to be of financial benefit to the industry, and hence to the State.

The quahog act, the defendant correctly points out, makes no provision for the promotion and advertising of quahogs. In this respect the potato act has broader scope, and promotion and advertising are of great importance. We know, however, of no rule that requires in matters of this nature that promotion and advertising be made necessary purposes.

The defendant dismisses the experimental work proposed by the act as benefiting only the individuals primarily concerned with the digging and taking of quahogs, and no others. We read the act quite differently and find therein a broad purpose to restock the shores for the benefit of the shellfish industry in years ahead and thus of all those who may be engaged therein.

The increase in volume of potatoes marketed by reason of the potato tax law benefits those directly engaged in the business. So here the availability of more and better quahogs on the market will benefit diggers and shellfish dealers. The Legislature saw beyond this limited area and recognized that benefits would reach the citizens as a whole. The purpose is not plainly and unmistakably to benefit only the industry, but to bring benefits to all.

There is no necessity to repeat here the reasoning so aptly given in the opinion of Justice Thaxter in *Vahlsing, supra.* On page 425, the court said, in language here applicable to the quahog industry:

> "Where the industry involved has been of sufficient size and importance, and especially where the welfare of agriculture has been concerned, a tax levied for its support such as this, to wit, a tax for the benefit of agriculture as an industry, as distinguished from grants to those engaged therein, has almost invariably been held as levied for a public use."

We have approached this issue, bearing in mind the presumption in favor of the constitutionality of a statute. In *Vahlsing, supra,* we said at p. 430:

> "It is to be presumed, however, that when the legislature levies a tax and appropriates the proceeds thereof for a purpose which it declares to be for the public welfare that it has acted in good faith and within its constitutional powers. Unless it has clearly exceeded its constitutional powers in so doing, its action must be sustained. All rational doubts as to the constitutionality of statutes must be resolved in favor of the constitutionality thereof. Although it is the duty of the court to declare acts which transcend the powers of the legislature void, this judicial duty is one of gravity and delicacy and it is only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute that the inherent power of the court to declare statutes unconstitutional should be exercised."

See also *McGary et al.* v. *Barrows et al.*, 156 Me. 250, and cases cited.

In short, the tax, in our view, is levied for a public purpose and hence stands against the attack made by the defendant.

The entry will be

Judgment for State in the amount of $1282.02.

MARGARET G. WYMAN, ET AL.
vs.
MAYNARD W. ROBINSON, ET AL.

MAYNARD W. ROBINSON, ET AL.
vs.
MARGARET G. WYMAN

Cumberland. Opinion, October 14, 1960.

Account. Equity. Agency. Conversion.

Findings of fact by a single justice in equity will not be disturbed unless clearly wrong.

Limited possession for a lawful and proper purpose without any intention to deprive the owner of his possession is not tortious.

ON APPEAL.

This is an action for accounting before the Law Court upon appeal. Appeal denied.

Raymond S. Oakes,
Robert Oakes, for plaintiffs.

George F. Feeney,
Nathan W. Thompson, for defendants.

SITTING: WILLIAMSON, C. J., WEBBER, SULLIVAN, DUBORD, SIDDALL, JJ. TAPLEY, J., did not sit.

WEBBER, J. On appeal. These two cases, tried together by agreement before a single justice, involve an action for equitable accounting and a counter-suit for alleged conversion. For all practical purposes the cases may be discussed as though they were cross-actions as between Margaret G. Wyman and Maynard W. Robinson. The facts in the first case may be briefly stated as follows: Plaintiff Wyman

owned a gravel pit. Defendant Robinson was in the business of digging, hauling and selling gravel and like material. The parties entered into a written "lease" contract under which Robinson was to have the exclusive right to take material from the pit for a period of two years and was to pay Wyman 25c a cubic yard for all loam removed and 10c a cubic yard for all other materials taken. Subsequently the defendant sold to W. H. Hinman Company substantial quantities of material for which he was paid. At the rate provided for in the "lease" a substantial balance remains unpaid to the plaintiff. The justice below so found and fixed the amount due. The defendant claims additional credits. He testified that some time after the execution of the contract he and the plaintiff entered into a new oral agreement whereby he would forego his exclusive rights, act as the plaintiff's agent and attempt to sell her gravel to Hinman. He placed a value of 3c a cubic yard on his services as agent. The plaintiff flatly denied that any such agency agreement was ever made. The two versions are completely irreconcilable and obviously only one party can be telling the truth. It has been so often stated as to require no citation here that findings of fact by a single justice in equity will not be disturbed unless clearly wrong. The justice below saw and heard the witnesses and could best determine an issue of veracity. His finding in favor of the plaintiff Wyman is entirely consistent with all of the evidence in the case and cannot now be disturbed.

As to the alleged conversion, the evidence shows that there had been piled within the pit area a substantial quantity of loam which under the terms of the "lease" could be removed only by Robinson. Wyman, defendant here, discovered that trespassers had broken the chain and destroyed the padlock which protected the pit and had dumped old tires and other waste in the pit area. Wyman at once installed a new padlock, notified Robinson of her action, and

informed him where he could pick up the key at the home of a neighbor. Robinson asserts that Wyman thereby converted the loam which at the time of hearing still remained piled in the pit. The justice below found no intention on Wyman's part to keep Robinson out or prevent him from removing materials to which he was entitled, and therefore gave judgment to the defendant. It is important to note that the "lease" contract in no way deprived Wyman of the right to exclude persons other than Robinson and those acting for him from the pit nor did it prevent her from exercising full rights of possession of the pit area consistent with his exclusive right to remove materials.

In *Howard* v. *Deschambeault,* 154 Me. 383, the defendant's limited possession for a lawful and proper purpose without any intention to deprive the owner of his possession was held not to constitute tortious conversion. In the instant case, defendant was merely protecting the pit from intruders other than the plaintiff as she had a right to do. She had no intention to keep the plaintiff out and in fact did not keep him out. The means of exercising lawful dominion over the loam were immediately made available to the plaintiff. He had only to pick up the key and enter.

In each case, the entry will be

Appeal denied.

CHESTER R. HIBBARD
AND
STANLEY R. CURTIS
vs.
ROBERT G. FROMKIN WOOLEN CORPORATION

Somerset. Opinion, October 20, 1960.

Real Actions. Adverse Possession. Deeds. Rules of Construction. Estoppel.

The possession which will ripen into title must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive for a period of at least twenty years.

Possession must be such as to give implied notice to the true owner who thereafter is presumed to acquiesce in the claim of the intruder.

The overt acts must be such as to leave no question as to the intent to ouster the owner from possession and ownership.

Rules of Construction for Deeds, 53 Me. 356 and 133 Me. 115, 124.

Any doctrine of estoppel which has the practical effect of preventing one from asserting his own title after the lapse of a much shorter period must be carefully and sparingly applied and then only where actual fraud is shown or fault and negligence or a dishonest silence equivalent to fraud.

In order to create an estoppel, the conduct, misrepresentation, or silence of a person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, *and who did not have the same means* of ascertaining the truth as did the other party.

ON EXCEPTIONS AND MOTION.

This is a real action before the Law Court upon exceptions and motion for new trial. Motion denied. Exceptions overruled.

Merrill & Merrill, for plaintiff.

Richard J. Dubord, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., did not sit.

WEBBER, J. This was a real action brought for the recovery of certain land on Mill Island so-called in Fairfield. The defendant disclaimed as to a portion of the demanded premises but defended as to the remainder, asserting its own title thereto and attacking the plaintiffs' claim of ownership. The dispute was primarily over the projection of plaintiffs' lot in a northerly direction and specifically the location of plaintiffs' northerly bound. A jury found for the plaintiffs and under proper instructions by special finding in the verdict in effect adopted the plaintiffs' location of the north line.

Certain exceptions taken by the defendant to rulings on the admission of evidence have now been waived. An exception to the refusal of the presiding justice to give a requested instruction which would have eliminated any issue of adverse possession from jury consideration, an exception to his refusal to direct a verdict for the defendant, and a general motion for a new trial raise the issues for determination here.

Plaintiffs' immediate predecessor in title, one Bradbury, now deceased, entered into possession of the demanded premises in 1914 under a deed which described the northerly bound of the lot as "the south line of the original Nahum Totman lot on Mill Island (south of the F. J. Savage lot)." There were in fact two lots to which Nahum Totman had previously held title and in both of which he had acquired an interest on the same day, one north and one south of the Savage lot. The jury could properly find on the basis of credible evidence and reasonable inferences to be drawn therefrom that whether Bradbury had treated the description of his northerly bound as erroneous or whether he disregarded it entirely, he did in fact occupy and claim

title to land extending northerly to the southerly line of the Totman lot *north* of the Savage lot; that for a period of more than twenty years he maintained the type of possession calculated to satisfy the legal requirements of title by adverse user; and that thereby he made his title good against the world. There was evidence that Bradbury maintained certain small buildings on the premises in connection with a plumbing business; that he gave consent to one Bessey to occupy a small camp and a garden in the northerly portion; that he kept the bushes cut on much of the area; and that he pointed out his northerly line to a witness at the location now identified as the south line of the north Totman lot. The jury could properly conclude that here there was more than the mere occasional acts of trespass found insufficient in *Webber* v. *McAvoy,* 117 Me. 326; *Stewart* v. *Small,* 119 Me. 269; and *Webber* v. *Barker,* 121 Me. 259. In such cases as these the court has shown a natural reluctance to permit relatively furtive and secret encroachments on large woodland areas to ripen into title. Certainly no such considerations have application where, as here, the premises comprising cleared land were in proximity to a populous community and every act of occupancy was obvious and apparent. The possession which will ripen into title must be actual, open, notorious, hostile, under claim of right, continuous, and exclusive for a period of at least twenty years. *Shannon* v. *Baker,* 145 Me. 58. The nature of the possession must be such as to give implied notice to the true owner who thereafter is presumed to acquiesce in the claim of the intruder. The overt acts must be such as to leave no question as to the intention to oust the owner from possession and ownership. *Roberts* v. *Richards,* 84 Me. 1, 10. We think that the acts shown to have been done in the instant case supported a jury finding that all of the foregoing requirements for title acquisition by adverse possession were fully satisfied. Here was a relatively narrow piece of land lying between the street and the stream, slop-

ing toward the water and having a natural tendency to be wet at certain seasons. The acts of dominion openly performed upon the property were such as would ordinarily be performed by a true owner on premises of this character. See *Clancey* v. *Houdlette,* 39 Me. 451, 457; *Batchelder* v. *Robbins,* 95 Me. 59, 68; and rule stated in 1 Am. Jur. 866, Sec. 131.

In 1942, Bradbury conveyed a lot to the plaintiffs in which he described the north bound as the "south line of the original Nahum Totman lot on Mill Island." Quite significantly, we think, he omitted the words "south of the F. J. Savage lot" which had appeared in his own deed from one Smith, even though he gave the Smith deed as the source of his title. The jury could reasonably infer that Bradbury purposely omitted this limiting phrase believing that it incorrectly described his north line and was in fact an error in both the Smith deed and in the deed to Smith from his grantor in which the lot was first described. In any event, Bradbury accurately described the north line to which he had claimed and occupied for more than twenty years. The jury could also properly conclude on the basis of direct evidence and reasonable inferences therefrom that an error had in fact occurred in the two prior deeds if they first found, as they must have done, that the south Totman lot was bounded by Island Avenue and lay entirely to the east of it, whereas the north Totman lot projected to the west across the street and to the shore of the mill pond. If that were true, as one proceeded northerly along the west side of Island Avenue, the *only* line of a Totman lot which one would encounter would be the south line of the *north* Totman lot. The jury could justifiably conclude therefore that since the south Totman lot nowhere touched the premises, the intended monument to establish the north line must have been the north Totman lot. It is true that Bradbury set forth at the end of the description in his deed to plain-

tiffs: "This is *the same property* that was acquired by the grantor from Arthur D. Smith, as aforesaid, except that the grantor, within a year or two, sold to American Woolen Company a strip along the southerly side thereof." (Emphasis supplied.) Bearing in mind that the Smith deed contained the limiting phrase "south of the F. J. Savage lot" above referred to, the jury in ascertaining the intention of Bradbury and the plaintiffs was faced with the necessity of reconciling a seeming inconsistency. In so doing they were guided by careful instructions of the presiding justice based on rules of law enunciated in *Abbott* v. *Abbott,* 53 Me. 356. At page 360, the court said:

> "In construing a deed, the intention of the parties, if ascertainable, should in all cases govern. * * * The rules of construction * * * seem to be well established. When several particulars are named descriptive of the land intended to be conveyed in a deed, if some are false and inconsistent, the true are sufficient to designate the land, and those which are false and inconsistent will be rejected. * * * A clear general description of the property is not controlled by any subsequent expression of doubtful import in respect to any particular. * * * Erroneous or defective reference to the sources of title will not be permitted to vary a prior description, clearly and definitely given. * * * Where the description consists of several parts, it may prove, upon comparing the description with the land itself, that some of the particulars are incorrect, mistaken or false. 'In such case * * * the law is well settled that, if it can be ascertained from such parts of the description as are found correct what was intended to be conveyed, the instrument will be effectual, the property will pass, and the incorrect parts of the description will be merely rejected and disregarded. The authorities on this are very numerous and uniform.' If, in the description of the land intended to be conveyed by a deed, any part of the description is false or mistaken, it will be rejected. * * * So if there is a con-

> tradiction in the description, that part of it is to be taken which gives most permanence and certainty to the location."

See also *McCausland* v. *York,* 133 Me. 115, 124.

Applying these rules, the jury obviously concluded that Bradbury conveyed to the plaintiffs land extending northerly to the south line of the north Nahum Totman lot, these premises being all that he had acquired by adverse possession (save only the American Woolen Company lot not involved in this controversy). The physical location of that north line on the face of the earth is not in dispute.

As to any claim of the defendant that it had itself acquired title to the demanded premises by adverse possession, it is enough to say that the jury could find that the alleged acts of possession were not continued for the required period of twenty years. Insofar as the plaintiffs' theory of acquisition of the demanded premises by the adverse possession of their grantor depended upon a showing that much, if not all, of this land here in dispute has been formed by accretion and did not physically exist in 1888 and prior thereto when the island was first subdivided, the evidence and reasonable inferences therefrom were adequate to support such a finding.

In 1937, a predecessor of the defendant erected a storehouse on a portion of the demanded premises. As to whether the entry was then in the nature of a trespass or under some license from Bradbury the evidence does not disclose. The defendant now contends that Bradbury, and subsequently the plaintiffs, could not silently acquiesce in such user without thereafter being equitably estopped to assert claim of title. In support of this position the defendant cites *Martin* v. *Railroad,* 83 Me. 100. It must be borne in mind that the whole concept of prescriptive title rests on a theory of notice express or implied and implied acquiescence for a pe-

riod of twenty years. Any doctrine of estoppel which has the practical effect of preventing one from asserting his own title after the lapse of a much shorter period must, as *Martin* carefully points out, be "carefully and sparingly applied" and then only where actual fraud is shown or fault and negligence or a dishonest silence equivalent to fraud. In *Martin,* for example, the plaintiff actively misrepresented his own title as being in another and the defendant proceeded in reliance on that misrepresentation. The defendant entered as grantee under a deed from the very party represented by plaintiff as having the title. The court noted that the facts must be and were peculiarly within the knowledge of the party estopped. This requisite element of proof was again emphasized in *Card* v. *Nickerson,* 150 Me. 89. At page 95, the court said:

> "In order to create an estoppel, the conduct, misrepresentations, or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, *and who did not have the same means of ascertaining the truth as did the other party.*" (Emphasis ours.)

In the instant case the defendant's predecessor knew or should have known itself to be without any color of title to land west of Island Avenue, and all other facts relating to the true title were as available to it as to anyone. Although the exact circumstances are not shown, the storehouse seems to have been erected in disregard of the rights of the true owner, whoever he might prove to be. We do not reach the interesting question as to whether or under what circumstances a bona fide purchaser relying on the title of his grantor could be estopped by conduct of his grantor of which he had no knowledge. See *Proctor* v. *Libby,* 110 Me. 39, 44. In our view, the evidence in this case was wholly

insufficient to warrant any application of the doctrine as against these plaintiffs.

The entry will be

Exceptions overruled.
Motion for new trial denied.

WILLIAM F. HARRIMAN
vs.
EVERETT W. SPAULDING

Cumberland. Opinion, October 21, 1960.

Negligence. Passing. Rules of Court. Findings. Rule 73. Rule 52(a).

One operating a motor vehicle over a 3 lane highway is not guilty of negligence as a matter of law if he passes or attempts to pass to the left of a vehicle in the center lane, assuming there is no oncoming traffic in the left lane. R. S., 1954, Chap. 22, Sec. 114.

Rule 52(a) Maine Rules of Civil Procedure embodies the standard set forth in a long line of decisions to the effect that findings of fact of a single justice are final and binding if supported by any credible evidence.

The findings of a single justice must be sustained where there is sufficient evidence to sustain them.

Where no specific findings of fact are made it must be assumed that findings upon all issues of fact necessary to general finding were made.

ON APPEAL.

This is a negligence action before the Law Court upon appeal under Rule 73 of the New Rules. Appeal denied.

Berman, Berman, Wernick & Flaherty,
By *Thomas F. Monaghan,* for plaintiff.

Charles W. Smith, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. This case is before us by way of an appeal under the provisions of Rule 73 of the Maine Rules of Civil Procedure.

The cause is an action to recover for damages to personal property, arising out of an automobile accident. Both parties were proceeding in a northerly direction on a public highway leading from Kennebunk to Biddeford, in the County of York. The defendant was operating a truck loaded with junk. The plaintiff was operating a passenger vehicle and proceeding behind the defendant. The plaintiff contended that after sounding his horn, he attempted to overtake and pass the defendant in the lane to the left of the defendant; and that as he came abreast of the defendant, the latter without any indication as to his intention propelled his car sharply to his left, bringing about a collision between the two vehicles.

The case was heard by a single justice without the intervention of a jury and after listening to the evidence, a finding in favor of the plaintiff was entered.

The defendant advances two grounds as a basis for his appeal. First, he says that the plaintiff was guilty of contributory negligence and second that the findings of the trial court were clearly erroneous.

An examination of the record indicates numerous contradictions of fact. Plaintiff testified that the defendant appeared upon the highway from the right or easterly side of the highway and that just prior to the collision, was operat-

ing his truck in the extreme easterly lane of a four lane highway; and that the accident occurred in the third lane which would be the one to the left of the lane in which the defendant was driving before he made the turn which resulted in the collision.

The defendant, on the other hand, says that he had reached the highway from the westerly side where he had had his load of junk weighed upon certain available scales, and that he had returned to the highway with the intention of leaving it for the westerly side within about one hundred yards, for the purpose of delivering his load of junk. He says he was driving in the middle lane of a three lane highway.

The defendant contended that he had his directional lights on indicating his intention of making a left turn. This the plaintiff denied.

It is rather strange that there should be an unresolved conflict of evidence as to whether the parties to the action were operating their vehicles on a three lane or a four lane highway. It seems as if this point should have been one subject to agreement or stipulation, or at least definite proof. Failure of the parties to adduce this proof leaves much to be desired.

In any event, whether the highway had three lanes or four lanes is not important in the instant case. It is clear that the collision occurred in the lane next left to that in which the defendant had been driving before the collision occurred.

In support of his contention that the plaintiff was guilty of contributory negligence, defendant invokes subsection II, Section 114, Chapter 22, R. S., 1954, which reads as follows:

> "**II.** Upon a roadway which is divided into 3 lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation."

The defendant argues that an accident occurring in the lane to the left of the center lane of a three lane highway spells negligence on the part of the motor vehicle operator who passes, or attempts to pass, in such a lane. With this contention we cannot agree. Assuming that there is no oncoming traffic in the left lane, we cannot say as a matter of law that a driver who passes, or attempts to pass, a motor vehicle which is in the center lane is guilty of negligence. There is no evidence in this case that there was any oncoming traffic in the lane in which the accident occurred.

Moreover, subsection I, of the same section of the statutes provides that "a vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." There was evidence to substantiate a finding that the defendant violated this section.

Rule 52 (a), Maine Rules of Civil Procedure, is the one which relates to findings by the court in actions tried upon facts without a jury. This rule reads in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Previous to the promulgation of the rule, our records are replete with decisions to the effect that findings of fact of a

single justice are final and binding if supported by any credible evidence; and that the justice is the exclusive judge of the credibility of the witnesses and the weight of the evidence; and that only when he finds facts without evidence or contrary to the only conclusion which may be drawn from such evidence is there any error of law.

The new rule undoubtedly embodies the standard set forth in this long line of decisions, which standard was formulated by the court in various ways, as for example: *Ray* v. *Lyford,* 153 Me. 408, 140 A. (2nd) 749 (no error if supported by "any credible evidence"); *Ayer* v. *Railway Company,* 131 Me. 381, 163 A. 270 (findings final "so long as they find support in the evidence"); *Chabot & Richard Company* v. *Chabot,* 109 Me. 403, 84 A. 892 (findings final "if there is any evidence to support them").

As is pointed out in the Commentary, Section 52.7 Maine Civil Practice, Field & McKusick, this rule is intended to apply the same test as applied in the past to findings of a single justice sitting in law or equity or in the Supreme Court of Probate. However, the new rule does spell out in definite and positive language the applicable standard.

As to the "clearly erroneous" test, this court said in *Flagg* v. *Davis,* 147 Me. 71, 75, 83 A. (2nd) 319:

> "Sitting as an appellate court, we are very conscious of the principle which requires no further citation of authorities that the decision of any fact by the court below should not be overruled by the appellate court unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error, one of the main reasons for support of that principle being that one who sees and hears the witnesses is in a more favorable position to better judge of their credibility than others who merely review the printed testimony, * * *."

As previously pointed out there was a definite conflict of evidence for the consideration of the presiding justice. The plaintiff said that he blew his horn to warn the defendant of his intention to pass. This the defendant denied. The defendant said that he indicated his intention to turn to the left by way of his directional light. This the plaintiff denied. The defendant admitted in direct examination that he did not see nor hear the plaintiff's car. There was sufficient evidence upon which the presiding justice could find that he was negligent. Moreover, the evidence also sustains a finding of lack of contributory negligence on the part of the plaintiff. See *Verrill* v. *Harrington,* 131 Me. 390, 163 A. 266.

Although the justice made no specific findings of fact, it must be assumed that he found for the plaintiff upon all issues of fact necessarily involved. *Sanfacon* v. *Gagnon,* 132 Me. 111, 167 A. 695; *Everett* v. *Rand,* 152 Me. 405, 131 A. (2nd) 205.

Bearing in mind the admonition of the rule that this court must give due regard to the opportunity of the presiding justice to judge of the credibility of the witnesses, after a careful study of the record, we are of the opinion that the defendant has not sustained the burden of convincing us that the finding, both as to liability on the part of the defendant and freedom from negligence on the part of the plaintiff, is clearly erroneous.

Appeal denied.

THELMA M. GOULD, ET AL.
vs.
ERNEST H. JOHNSON

Androscoggin. Opinion, November 7, 1960.

Taxation. Inheritance Taxes.
Profit Sharing Plan. Trust. Power. Property.
Designation. Statutory Construction. Exemption.

Continued service and employment are considerations for an interest which the employee thus acquires under a profit sharing plan and trust which takes on the attributes of "property" for tax purposes. R. S., 1954, Chap. 155, Sec. 33.

An unconditional general power of appointment is the equivalent of ownership under R. S., 1954, Chap. 155, Sec. 6A.

Not every attribute of common law "property" need be present in order to make succession to "property" taxable under the inheritance tax statute.

Where under a profit sharing plan the interest of a decedent in a trust fund comprises what is, in effect, deferred compensation, earned by him through loyal service, it is not only a mere expectancy but is the "equivalent of ownership" for "purposes of taxation."

The designation of a widow as beneficiary is a "grant" of an "interest in property" intended to take effect upon death.

Profit sharing should not become a device for tax avoidance until the Legislature has provided specific exemption.

ON REPORT.

This is a petition for tax abatement. The case is before the Law Court upon Report and Motion to intervene under Rule 24(a). Motion to intervene granted. Abatement denied. Judgment for defendant without costs.

Skelton & Taintor, for plaintiffs.

Ralph W. Farris, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. On report. This was a complaint brought pursuant to the provisions of R. S., Chap. 155, Sec. 33 seeking abatement of an inheritance tax. In 1952 Gould & Scammon, Inc. established a profit sharing plan and trust naming the Manufacturers National Bank of Lewiston as trustee and providing for annual contributions by the employer for the benefit of its participating employees. Contributions to the trust were to be made only by the employer corporation. The plan was carefully prepared so that it might fully qualify for exemptions from federal taxation as provided by legislation currently in effect. In essence the plan provides for retirement benefits and a death benefit. The contributions out of net earnings are determined by formula. The share of each participating employee in the trust fund is likewise determined by formula in which the factors are salary or wages and continuity of employment. The plan is for the sole benefit of the participating employees and there is no possibility of reversion of any part of the trust fund to the employer. The trustee is to keep a separate account with respect to each participating employee, although the fund is to be managed and invested as a whole. Upon retirement as a result of age or disability, the share of the participating employee is to be determined and paid to him either in the form of an annuity contract or in instalments or in a single sum or by a combination of these methods as the trustee may determine. In event of the death of such an employee either while actively employed or during his retirement and before his share has been fully distributed, that share or the remainder of it is to be paid to the person or persons named by the participant in the last written document filed by him with the trustee. If no such designation has been filed, payment is to be made to the employee's estate. Upon termination of the trust, the fund is to be dis-

tributed to the participants in accordance with their interests. Upon termination of employment other than through retirement or death, the employee may forfeit part or all of his share depending on the length of his employment, but if employed for fifteen years or more there is no forfeiture. The employee's interest is protected by a spendthrift clause which forbids alienation, commutation, anticipation or assignment by him and puts his interest beyond the reach of his creditors. The employer may terminate, alter or amend the trust, but not so as to reclaim any part of the fund.

Ralph A. Gould, Sr., a salaried employee and participant in the fund, designated his wife, Thelma M. Gould, one of these plaintiffs, as the person to receive the death benefit. Mr. Gould died while still actively employed by the company and his share, computed to be $15,765.01, was paid to his widow. The State Tax Assessor, defendant here, imposed an inheritance tax against her based upon said sum passing to her from the trust at the death of her husband. Abatement is sought as to the whole tax amounting to $630.60.

The plaintiffs contend that the funds passing to the widow flowed in a direct stream from the employer corporation through the trustee to her and were never "property" or an "interest in property" in any sense acquired or owned by the decedent. They assert that at most decedent had only a "mere expectancy" coupled with a special and limited power of appointment, neither of which subjects the succession to inheritance tax.

R. S., Chap. 155, Sec. 2 contains as the only language applicable to this situation the following:

> "**Sec. 2. Property taxable; exemptions.** The following property shall be subject to an inheritance tax for the use of the state:

> **I.** All property within the jurisdiction of this state *and any interest therein* belonging to inhabitants of this state * * * which shall pass: * * *
>
> **B.** By deed, grant, sale or gift except in case of a bona fide purchase for full consideration in money or money's worth, * * * made or intended to take effect in possession or enjoyment after the death of the grantor or donor to any person in trust or otherwise."
>
> (Emphasis ours.)

The issue is then whether or not the decedent had an "interest in property" which by grant he transferred to his widow to take effect in possession or enjoyment after his death, all within the meaning and intendment of the statute. The question is novel in this jurisdiction and although we are aided by statements of general principles by the courts of other states, no case has been called to our attention in which both the applicable statute and the terms of the profit sharing trust are exactly like those now before us.

In a case which seems to us to involve greater difficulty in the identification of an interest in "property" than is found in the instant case, the Connecticut court declared the succession to be taxable. In *Dolak* v. *Sullivan* (1958), 145 Conn. 497, 144 A. (2nd) 312, the court was dealing with a non-contributory retirement plan for employees. The plan was not funded and did not involve a trust. Under its terms the decedent would have received benefits after retirement. If his employment should cease before retirement for any cause other than death, he would be automatically and completely withdrawn from the plan. In event his death occurred during active employment, the widow would receive a death benefit payable in twelve monthly instalments unless the decedent (as he in fact did) elected that she should receive a monthly annuity during her life. The commuted

value of the annuity was substantially greater than the alternative benefit. The plan was revocable by the employer without limitation. Connecticut imposed a tax on transfers of "property" made "by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor." The issue was clearly raised as to whether the tax fell only on "property" owned in the usual and strict sense by the decedent at the time of transfer. The lower court held that the decedent under the retirement plan had at most a "mere expectancy" rather than "property" in the statutory sense. The Supreme Court of Errors noted that the retirement plan was a contract for which decedent employee continuously furnished consideration by his continued employment. Although the obligations thereunder could have been terminated by the employer by the exercise of its reserved power of discontinuance or modification, they never were. The widow's right to possession or enjoyment under the contract did not become fixed until the decedent's death. The court said that this was more than a mere power of appointment such as might be gratuitously conferred by will — that this was a contractual right based on consideration to designate who, under certain contingencies, should receive benefits under an annuity contract. As such, the court held the designation taxable as a transfer of intangible property which took effect upon the death of the transferor. We cite this case primarily for its acceptance of the principle that continued service and employment are consideration for an interest which the employee thus acquires which takes on the attributes of "property" for tax purposes.

An underlying concept that the interest acquired by the employee is in the nature of deferred compensation was apparently a motivating factor in the decision in *In re Endemann's Estate* (1954), 307 N. Y. 100, 120 N. E. (2nd) 514. Here the employee at retirement could accept an annuity

for his own life or, at his option, an annuity in a reduced amount for his own life and the life of his wife if she survived him. He chose the latter and the court found the exercise of the option to be a taxable transfer of property. At page 518 of 120 N. E. (2nd) the court said:

> "Here, Endemann had built up for himself, by contributions of money and services, a fund which, at retirement, he had a contractual right to dispose of in any one of several ways—he chose a way which involved a transfer to his wife, effective at his death."

Although the decedent in Endemann gave up part of the benefit which he might have had for himself alone in order to create the benefit for his wife, the case does not seem to rest on such a narrow ground.

So, also, in *In re Stone's Estate* (1960), 103 N. W. (2nd) (Wis.) 663, a case involving a joint and survivor option, the court laid emphasis on the concept of deferred compensation as the equivalent of "property" for tax purposes. At page 666, the court said:

> "In the case before us, the assets in the trust fund devoted to carrying out the plan are property. In at least a broad sense, Mr. Stone had a valuable interest in the fund. This interest could have been destroyed, or defeated by various contingencies. The question before us is whether the existence of these contingencies prevent treatment of the interest transferred to Mrs. Stone as 'property' under (the applicable statute). The remoteness of the contingencies convinces us that he had a contingent or defeasible property interest, rather than a mere expectancy that payments would be made upon his retirement or death."

After discussing *Dolak* v. *Sullivan, supra,* and noting that the plan in *Dolak* was not funded, the court continued:

> "The existence of a trust fund for the fulfilment of the plan makes the case before us a stronger one."

Accordingly, Stone's election to accept an annuity providing smaller monthly payments but extending over the life of his widow if she survived him was deemed taxable under a statute, the pertinent portions of which imposed an inheritance tax "when a transfer is of property, made without an adequate and full consideration in money or money's worth * * * by * * * gift, intended to take effect in possession or enjoyment after the death of the * * * donor * * * ." We note no material distinction between this statute and our own.

In *In re Daniel's Estate* (1953), 159 Ohio St. 109, 111 N. E. (2nd) 252, the court was dealing with an employees' profit sharing trust bearing many similarities to the one before us. The statute taxed a succession by "grant" or "gift" without consideration and "intended to take effect in possession or enjoyment at or after (the) death" of the "grantor" or "donor." The trust fund was created entirely by the employer without any right to reversion. Upon the death of an employee, his share of the fund passed to his designated beneficiary, or if no such designation, then to his estate. The trustee maintained a separate account of the share of each employee. The designated beneficiary would take at the death of the employee only if the latter had remained actively employed until his death or retirement and if retirement benefits had not exhausted the share. The widow was so designated and in fact took the entire share. The opinion does not disclose whether or not the employer reserved under the plan rights of termination, alteration, and amendment similar to those involved in the instant case. The court held that the tax was properly imposed on the succession to "property."

The defendant readily concedes that a limited and special power of appointment is not "property" and if the decedent here had no greater interest, the exercise of such a power would not be taxable. *Boston Trust Co.* v. *Johnson, Asses-*

sor, 151 Me. 152. In 1957 the Legislature enacted a new Sec. 6A of R. S., Chap. 155 which makes an unconditional general power of appointment the equivalent of ownership, but that provision is not applicable here.

In *Estate of Annie E. Meier,* 144 Me. 358, the decedent had parted with legal title but had retained control of her property by means of a revocable trust reserving a general power of appointment. In distinguishing that case in our opinion in *Boston,* we recognized that not every attribute of common law "property" need be present in order to make succession to "property" taxable within the meaning of the inheritance tax statute. We said at page 159:

> "The Meier case falls within the principle that a donor with a general power of appointment reserved to himself is the owner *for purposes of taxation.* Clearly in such instances the donor does not *in substance* pass effective control from himself. In other words, the donor has given up nothing, and hence what he retains, by whatever name it is called, is *the equivalent of ownership.*" (Emphasis supplied.)

So in the instant case we think that the interest of the decedent in the trust fund, comprising what was in effect deferred compensation earned by him through loyal service, was not only more than a mere expectancy but was the "equivalent of ownership" for "purposes of taxation." Thus the designation of the widow as beneficiary was more than the exercise of a limited power of appointment over the property of another—it was a "grant" of an "interest in property" within the meaning of R. S., Chap. 155, Sec. 2 intended to and in fact taking effect upon the death of the decedent. The designation served effectively to change the flow of economic benefits in which decedent had acquired an interest away from his estate and to the widow.

In so holding we are mindful that taxation is the rule and exemption the exception, and the burden is upon him who

would claim the exemption. *MacDonald* v. *Stubbs,* 142 Me. 235. We anticipate a substantial increase in the use of such profit sharing trusts. Congress has looked upon them with favor and has encouraged their use by providing substantial tax advantages which are available whenever certain standards are met. We do not think that such plans should become an easy device for the avoidance of state inheritance taxes unless and until the Legislature has seen fit to accord them favorable treatment by providing a specific exemption. As the taxing statute is now written, we are satisfied that it is broad enough and was intended by the Legislature to cover such a transfer of an interest in a trust fund as is found here.

The trustee has filed a motion which we treat as seeking leave to intervene as a party claiming to be affected by the decision in this case, all as provided by Rule 24(a). The parties agree that such action is proper and no objection is made.

As already noted, the issues of law here presented are novel and important and there is no occasion for any party to recover costs.

The entry will be

Motion to intervene granted.

Abatement denied. Judgment for defendant without costs.

CITY OF BANGOR

vs.

PUBLIC UTILITIES COMMISSION ET AL.

Kennebec. Opinion, November 11, 1960.

P.U.C. Water Rates. Allocation. Fire Protection. General Users. Wisconsin Method. Tax Exempt Property. Tax Equivalent. Evidence. Similar Communities.

The burden of proof is upon the party seeking to set aside any direction or order of the P.U.C. complained of as unreasonable, unjust or unlawful.

R. S., 1954, Chap. 44, Sec. 17, prohibits unjust discrimination in the allocation of the burden of rates and charges between general water users and public fire protection.

If a factual finding, as a basis of an order of the P.U.C. is supported by substantial evidence, the finding is final.

Substantial evidence is such evidence as taken alone would justify an inference of fact.

The refusal of the P.U.C. to give consideration to "tax exempt" property of a municipality (due to military installations) is not legal error where the city was prosperous, financially sound, and no claim was made that the tax rate was abnormally high.

The refusal of the P.U.C. in applying the "Wisconsin method," so-called, to consider the "tax equivalent" of exempt property was not legal error where such refusal did not result in unjust or unreasonable allocation of rates.

Evidence of rates in other communities is properly excluded where substantially all of the physical and economic factors are not shown to be similar in both communities.

ON EXCEPTIONS.

This is an action before the P. U. C. for approval of water rates. The case is before the Law Court upon exceptions to an order approving the rates and rulings on certain evidence. Exceptions overruled.

Horace A. Hildreth, Jr.,
Vincent L. McKusick, for plaintiff.

Peter N. Kyros,
John E. Harrington, for Bangor Water District,
of Bangor

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SIDDALL, J. This case comes before us on exceptions by the City of Bangor, hereafter called the City, to the allowance and approval by the Public Utilities Commission, hereafter called the Commission, of a schedule of water rates filed by the Bangor Water District, hereafter called the District.

The District was incorporated under the provisions of Chapter 39 of the Private and Special Laws of Maine, 1957. At the time of the incorporation of the District, the source of water for public use in the City was the Penobscot River, and this water was of poor quality for drinking purposes. Among the purposes for which the District was organized was that of supplying the inhabitants of the District "with pure water for fire prevention and protection purposes, and also for domestic, sanitary, commercial, industrial, and other lawful purposes." The territorial boundaries of the District were the same as those of the City. The property of the District was tax exempt.

A new source of water supply, located about fifteen miles from Bangor, was decided upon by the District and a 30-inch transmission main was constructed to convey the new water to the Penobscot River, and two 24-inch mains were constructed to carry it beneath the river to the city.

The cost of constructing the new system necessitated an increase in annual revenue. The District filed a proposed

rate schedule designed to increase its annual revenue from $263,270.86 to $483,981.14. The proposed rate schedule was allowed and approved by the Commission. Exceptions were duly filed by the City.

The reasonableness of the total amount of the increase in revenue claimed by the District and allowed by the Commission is not questioned. However, the allocation of that total amount between the City and the other water users is questioned.

The contentions of the City, as argued in its brief, are summarized as follows:

1. That the allocation to public fire protection made by the Commission's decree is unjust, unreasonable, or discriminatory in "end result."
2. That the Commission purported to adopt the Wisconsin Method of making the allocation between general water users and public fire protection and that the Commission erred in refusing to admit or consider evidence with respect to the "tax equivalent" in applying that method.
3. That the Commission failed and refused to give any weight or consideration to the circumstance that 48% of all real property in the City of Bangor is tax exempt.
4. That the Commission erred (either because it misapplied the Wisconsin Method or violated general principles of law) in failing and refusing to give any weight in its allocation to the fact that the revenue increase was necessitated by expenditures incurred for the purpose of improving the quality of drinking water, and not for any purpose connected with public fire protection.

The Commission contends that the ultimate issue in this case is whether the rates set were just and reasonable, the

answer to which depends upon the determination of the question of whether or not the Commission has properly apportioned or allocated costs between public fire protection and general service use. The Commission asserts that the questions before the court are questions of fact and not of law.

R. S., 1954, Chap. 44, Sec. 17, provides that the rates or charges collected by any public utility for water must be just and reasonable. Section 39 of the same chapter provides that "if any public utility makes or gives any undue or unreasonable preference or advantage to any particular person, firm, or corporation or any undue or unreasonable prejudice or disadvantage in any respect whatever, such public utility shall be deemed guilty of unjust discrimination which is prohibited and declared unlawful." Furthermore, the rates must not be confiscatory in violation of the due process clauses of the Constitution of the United States and of the State of Maine. *Central Maine Power Company* v. *Public Utilities Commission,* 153 Me. 228, 230, 136 A. (2nd) 726.

The burden of proof is upon the party seeking to set aside any direction or order of the Commission complained of as unreasonable, unjust, or unlawful. R. S., 1954, Chap. 44, Sec. 71.

Questions of law only are presented by exceptions to a decree of the Public Utilities Commission. Determination of questions of fact is the sole province of the Commission. These principles are well set forth in *Central Maine Power Co.* v. *Public Utilities Commission, supra,* in the following language:

> "There are certain fundamental principles to be kept in mind in passing upon exceptions to a decree of the Public Utilities Commission. (1) Questions of law, and only questions of law, are pre-

> sented by exceptions. R.S. Chap. 44, Sec. 67. (2) The facts are found by the Commission and not by the Court. (3) The burden is upon the complaining party, here the Company, to establish the error of law. (4) Errors of law are committed if the Commission: (a) erroneously interprets and applies by its ultimate ruling the law applicable to the facts found by it, or, (b) in its findings of fact, which form the basis of such ultimate ruling, misinterprets the evidence, or, (c) makes such findings of fact unsupported by substantial evidence. (5) Further, the rates must not be confiscatory in violation of the due process clauses of the State and Federal Constitutions. State, Art. I, Sec. 19; Federal, 14th Amendment."

In *New England Tel. & Tel. Co.* v. *Public Utilities Comm.*, 148 Me. 374, 377, 94 A. (2nd) 801, in discussing the same principles our court said:

> "The Commission is the judge of the facts in rate cases such as this. This court under the statute which created it is only a court to decide questions of law. It must be so, for it has not at its disposal the engineering and the technical skill to decide questions of fact which were wisely left within the province of the Commission. Only when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions of the constitution, can this court intervene. Then the question becomes one of law. We cannot review the Commission's findings of fact and seek to determine what rates are reasonable and just. When the Commission decides a case before it without evidence, or on inadmissible evidence, or improperly interprets the evidence before it, then the question becomes one of law."

If a factual finding, as a basis for an order of the Commission, is supported by any substantial evidence, the finding is final. *Public Utilities Commission* v. *Johnson Motor*

Transport, 147 Me. 138, 143, 84 A. (2nd) 142, and cases cited therein. Substantial evidence is such evidence as taken alone would justify the inference of the fact. *Gilman* v. *Telephone Company,* 129 Me. 243, 248, 151 A. 440.

For many years the problem of allocating the revenues of a public utility between fire protection service and general customer service has been a most perplexing one. Obviously, a correct mathematical result cannot be attained. In *Central Maine Power Company Re Contract Rate,* 152 Me. 32, 37, 122 A. (2nd) 541, the court said:

> "When there is a general rate increase, and from such an increase the parties cannot here escape, there must of necessity be left for the judgment of the Commission a wide area of adjustment of rates in various classifications within the business of the utility. If the Commission with its accumulated experience and with the resources available to it cannot fairly adjust rates, to whom is this task to be entrusted? It is well understood that we do not make rates. Our function as a Law Court in considering exceptions to decrees of the Public Utilities Commission is to guard against violations of the Constitution and the law."

At one time the Public Utilities Commission applied a policy of apportioning from 28% to 32% of the gross revenue of a water company to public service. Re: *Biddeford & Saco Water Co.,* F. C. 1481 (Me. P. U. C. 1956). The Commission in that case said:

> "Our investigation satisfies us that of the gross annual revenue which a water company must receive if it renders both public and domestic service, the public service should pay an amount between 28% and 32% thereof. If those who use the public service pay less than 28% of this necessary annual gross revenue, other users of the service of the company must pay an amount disproportionate to the value of the service which they are receiving."

It is well recognized, however, that the proportionate costs of fire protection decreases with an increase in the size of a community and the consequent larger number of private users.

With these preliminary observations we discuss the contention that the Commission failed to give any weight to the fact that the revenue increase was necessitated by expenditures incurred for the purpose of improving drinking water, and not for any purpose connected with public fire protection.

Both parties refer in their briefs to an article written by Robert Nixon, Commissioner, Public Service Commission, Madison, entitled "Charges for Fire Protection Service as Determined by The Public Service Commission of Wisconsin" and published in the Journal of the American Water Works Association, Vol. 29, No. 12, December, 1937. In this article Mr. Nixon, in discussing the difficult task of dividing the cost of water service between general use and fire protection service, has this to say:

> "It is generally recognized that water utilities furnish two major classes of service: water for general use in homes, stores, and shops; and fire protection service. Because the same property is jointly used to furnish these two major services, the task of dividing the total cost of service between these two major uses has always been a perplexing one.
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> It appears advisable first to define what is meant by fire protection service. As we understand it, this service classification embraces what a water utility furnishes a city and its property owners by having a reliable source of water supply, pumping equipment, storage facilities, transmission and distribution mains, with hydrants attached thereto, adequate to supply the fire-fighting apparatus of

the city with all the water it requires at any time even under conditions of maximum draught or demand by general service customers. Keeping ready to supply water under adequate pressure is a more important feature in this service than the actual amount of water used. Essentially, therefore, the charge for fire protection service is primarily a stand-by or readiness-to-serve charge. The charge should be sufficient to cover what are primarily capacity costs, rather than costs of the water itself.

* * * * * * * * * * *

This is mentioned because of a tendency on the part of some people to adopt a theory that general water service should be considered as of more importance than fire protection service and that therefore charges for fire protection service should be determined upon what is called an additional cost or additional business basis. The Commission has not taken this view. From the various analyses of the investment and operating costs of water utilities and especially from reports of the National Board of Fire Underwriters, it appears that there would be just as much, if not more, reason and justice in doing exactly the opposite, namely, treating general service on the additional cost basis. As a matter of fact, however, the method developed by the Commission over a long period of years has been based upon the idea of dividing the joint investment and joint costs of water service on some fair and equitable basis.

The method used by the Commission can be briefly described as a cost analysis. This analysis can be broken down into steps described as follows: First, a separation of the used and useful property which can be said to have been built or installed for the purpose of being able to supply water at any time for fire protection service. Second, a determination of the maximum demands which each major class of service makes on the utility. Third, an estimate of the water used in fighting fires (usually a very small proportion of the total pumpage) plus a por-

tion of the lost and unaccounted for water, since part of this is due to holding water in the system under pressure available for fire protection use. Fourth, a separation of the detailed operating expenses plus allowances for fixed charges such as depreciation, taxes, and interest or return between the major classes of service.

In making a separation of the portion of jointly used property assignable to fire protection service the first task is to cull out from the used and useful property the investment in those items, such as meters and filtration plant equipment, which are wholly used in general service. Similarly, a separate listing should be made of the items of property wholly used for fire protection service, such as hydrants and their connections and fittings. What is left in the form of pumping equipment, reservoirs or standpipes and mains is jointly used property. In analyzing this jointly used property to arrive at a fair proportion assignable to fire protection service it is necessary to take the second step listed above, namely, determine the maximum demands which each major class of service makes on the utility. This is necessary because the bulk of the costs of fire protection service are in the nature of capacity costs.

* * * * * * * * * * *

It does not appear to be sound reasoning to say that because the pumps operate at the same rate irrespective of any fire demands that there is no investment in pumping equipment chargeable to this branch of the service.

One of the perplexing problems in determining a fair share of the investment in pumping equipment assignable to fire protection service is the treatment of surplus pumping capacity. Similar difficulties are met in connection with surplus main capacity. In order to supply either fire protection or general service every water department must of necessity supply a certain surplus capacity of both equipment and mains at large expense in order to

meet any emergency liable to arise at any time, day or night, as well as to provide for growth. If the water supply in the mains fails for a few hours, general consumers could still exist, but if it fails at time of fire, irremediable disaster and destruction of property might result. With these considerations in mind it seems only fair that the cost of providing reserve pumping capacity and mains should be shared between general water users and fire protection service.

* * * * * * * * * * *

Making an estimate of the amount of water used in fighting fires plus a portion of the lost and unaccounted for water, which is the third step in our method of analysis, is useful in estimating the amount of output expense assignable to fire protection service. Once such figures are determined those who take a limited view of the service furnished by a water utility may be inclined to say that because such a small proportion of the water is used for putting out fires that therefore a small proportion of the total costs of service are assignable to fire protection. That this is a limited and erroneous view should be apparent from what I have said previously. Let me reiterate that fire protection service is largely a stand-by service, the costs of which are principally the costs of providing capacity and holding it in readiness to furnish water at any time a fire breaks out.

The fourth step in our method of analysis is to split the operating expenses, plus allowances for fixed charges, between the two major classes of service supplied. Here, as in the case of the analysis of the property accounts, the initial step is to list first those expenses entirely associated with furnishing general service such as maintenance of meters and services, meter reading and collecting and, second, those expenses entirely associated with fire protection service such as hydrant inspection and maintenance. The remaining operating expenses are classifiable as joint and in

> our method of analysis are classified first between capacity expenses and output expenses on the basis of several factors as appropriate to each kind of expense (see Appendix). The capacity expenses are then split between fire protection and general service in the ratio of maximum fire demand to total demand on the system including fire demand. The output expenses are then split between the two major classes of service according to the estimated amount of water used, including losses, in the two services.
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> The fixed charges of depreciation, taxes, and interest are ordinarily split between general service and fire protection service on the basis of the division of the investment in physical property assigned to each class of service. This division of investment was determined in the first step of the analysis.
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> It is regrettable but unavoidable that the determination of fire protection charges often involves sharp conflicts of interest between city officials, taxpayers, and water users. Even Solomon, with his proverbial wisdom, might be hard pressed to find an amicable and reasonable solution of some of these problems. The Commission, without the talents of a Solomon, has hitched its wagon to the twin principles:
>
> (1) Consider each case on its merits
>
> (2) Determine fire protection costs by a method of analysis flexible enough to take into consideration peculiar local circumstances
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> In brief, we believe that cost analyses, not more rule-of-thumb guesses, are the best bases for fair fire protection charges."

The evidence discloses that the maximum fire service demand of the City as determined by the National Board of Fire Underwriters was 5,500 gallons per minute, and the

maximum pumping demand for general service was 4,236 gallons per minute. The estimated actual use or output of water for fire protection, however, constituted but a small percentage of the water estimated to be used for all purposes. In allocating the revenue requirements, the District and the City reached widely different results. This situation arose mainly because the City considered the new system was developed for the purpose of bringing improved drinking water into the City and did not contribute to improved fire protection. The City, therefore, allocated the new facility on the basis of estimated water use or output. The District claimed the new facility should be chargeable to fire protection and general users on a capacity basis. The theory of the City in its allocation resulted in charging against the general customers most of the expenses relating to the new source of supply.

Prior to the formation of the District the water taken from the Penobscot River was suitable and sufficient for fire fighting purposes. The Charter of the District, authorized by the Legislature and accepted by the voters of the City, not only contemplated the discontinuance of the use of water from the Penobscot River after the new supply became available but required the discontinuance of such use. In planning the new system provision for fire protection was necessary. The operation of two separate systems was not practicable, nor was such a separation contemplated by the Legislature. The transmission lines of the new system were designed to carry an adequate water supply for fire protection service as well as for general service, and upon completion of the system the use of water from the Penobscot River was abandoned. Under these circumstances the Commission in adopting the allocation of revenues as proposed by the District, gave proper consideration to the purposes for which the water was used in accordance with the Wisconsin Method and with sound principles of law.

The City, in its brief, on this issue, cited numerous cases involving the extension of services of public utilities in which the cost of such extension was charged to those customers who benefited from the extension. We do not consider these cases analogous to the facts in the instant case.

The City claims that the Commission erred in failing to take into consideration the tax exempt property in the City of Bangor.

The evidence indicates that a sizable percentage of all the real estate in the City of Bangor is tax exempt, due primarily to the location of military bases in the city. The Commission in approving the rate schedule of the District allocating the revenue between public fire protection and general water specifically ruled against the City in its contention that the fact that the City had a large proportion of tax exempt property should be given consideration in the determination of a reasonable allocation of rates.

The City quotes from *South Berwick Water Co., Inc.* v. *Itself,* 24 P. U. C. (N. S.) 409, as follows:

> "In setting up a charge for fire protection service, for the present at least, some consideration must be given to the financial condition of the community served, their tax rate, whether or not they are prosperous or in distress."

Assuming, without deciding, that this is a correct statement of the law, there was no evidence in the case that the City was other than prosperous and financially sound. No claim was made that the tax rate was abnormally high. Our Legislature has seen fit to exempt certain property from taxation. If a problem is presented thereby, it is a problem common to most communities. The effect of the existence of exempt property upon the economic life of a community differs under different circumstances. It could well be that in many communities the location of tax exempt property

therein is an important factor in bringing economic prosperity to such community and an aid in enhancing the value of other property therein.

No case which substantiates the position of the City in respect to tax exempt property has been called to our attention. We are unable to discover any reasonable theory for considering such property in the allocation of water rates between fire protection and general service. We therefore find that the Commission was not in error in failing to take tax exempt property into consideration in determining the allocation of rates in this case.

The City contends that the Commission adopted the Wisconsin Method and erred in refusing to include in its computation a "tax equivalent" which it claims is a basic and necessary component of the Wisconsin Method.

The Wisconsin Method is described as a cost analysis method in Mr. Nixon's article herein referred to, and is broken down and based upon the following steps:

> "First, a separation of the used and useful property which can be said to have been built or installed for the purpose of being able to supply water at any time for fire protection service. Second, a determination of the maximum demands which each major class of service makes on the utility. Third, an estimate of the water used in fighting fires (usually a very small proportion of the total pumpage) plus a portion of the lost and unaccounted for water, since part of this is due to holding water in the system under pressure available for fire protection use. Fourth, a separation of the detailed operating expenses plus allowances for fixed charges such as depreciation, taxes, and interest or return between the major classes of service."

In its reference to the Wisconsin Method the Commission said:

> "The Wisconsin Method of allocation is not new to this Commission, nor is it the sole method by which revenues may be apportioned; however, in our opinion it does have merit and can be used as a guide for determination of reasonable and just charges for Fire Protection Service. It is here noted that the District's allocation by this method results in a charge amounting to 23.02% of the required revenue being obtained from Fire Protection Service, whereas, the proposed rates as filed comprehend receiving only 20% of the revenues from this source."

In applying the use of the "tax equivalent" the City presented evidence, over objection, designed to show that the value of the tax exempt property of the district for the purpose of taxation, if taxed, would have been over two million dollars, and would have yielded a tax of $62,509. This sum, the City claims, should be treated as an expense of the District, a portion thereof allocated to general service and a portion to fire protection services. After the total expenses have been allocated between general service and fire protection, the City claims that the amount of the assumed tax, "the tax equivalent," should be credited against the gross amount allocated for fire protection service. The attached table illustrates the City's version of the application of the "tax equivalent."

The Commission in its decree considered that the proposal of the City to reflect the "tax equivalent" was a modification of the "Wisconsin Method" and ruled that the basic theory of allocation was that of relative demands, and concluded that the apportionment of revenues as proposed by the District, which did not take into consideration the "tax equivalent," was reasonable. In its findings the Commission specifically stated that any finding as to the reasonableness of allocation of rates for public fire protection must be predicated upon the fact that the District is a tax exempt entity. It thereby refused to consider the claim of the City in re-

gard to the "tax equivalent," and excluded all testimony and evidence relating thereto.

The Commission in Wisconsin for many years has included the "tax equivalent" in allocating charges by a municipally owned utility. In 1937 the Legislature included among the valid expenses of a municipally owned utility, which is tax exempt, local and school tax equivalents. Also, in Wisconsin a municipally owned water utility, contrary to the Charter of the District in this case, is permitted a fair return to its rate base. *Pabst Corporation et al.* v. *Railroad Commission, et al.,* 227 N. W. 18. See also *Village of Fox Point* v. *Public Service Commission,* 242 Wis. 97, 7 N. W. (2nd) 571.

> "The Wisconsin commission has ruled that municipalities operating public utilities may charge rates high enough to yield profit. Re Fennimore (1915; Wis.) P.U.R.1916A, 848 (electric and water plant) ; Skogmo v. River Falls (1917; Wis.) P.U.R. 1917E, 964 (electric and water plant) ; Re Kenosha (1918; Wis.) P.U.R.1918D, 751; and Re Milwaukee (1926; Wis.) P.U.R.1927B, 229 (both water plants)." Annotation 90 A. L. R. 703.

We have no history in this state of the inclusion of a tax equivalent by the Public Utilities Commission in allocating water rates. It is apparent that some factors which may be considered by the Wisconsin Commission do not apply in this jurisdiction. Under the Charter (Sec. 10), rates subject to approval of the Public Utilities Commission may be established to provide revenue for the following purposes only:

1) to pay current operation and maintenance expenses

2) to provide for the payment of interest on indebtedness of the District

3) to provide annually not less than 1% nor more than 5% of the entire indebtedness as a sinking fund for the extinguishment of said indebtedness

Under Section 9 of the Charter the property of the district is exempt from taxation. The point in issue is not whether the district may raise revenue for payment of taxes. It is whether the rates may be allocated by adding the equivalent of a tax to the rates of the customers other than the municipality with a corresponding reduction in the charges to the municipality.

The City contends, however, that the Commission adopted the Wisconsin Method of allocation, and having done so, the failure to include a "tax equivalent," which it claims is a basic component of the Wisconsin Method, was error.

In support of its position the City quotes the case of *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 163 F. (2nd) 443, 449 (3d Cir. 1947) as follows:

> "That the Commission might have adopted some other method or formula for determining the costs of the regulated business is beside the point. In so far as it purported to adopt the demand-commodity formula, our review must be upon that basis. The Commission cannot announce the applicability of a formula and then distort its application by failure to find accurately the factors required by the formula, or by departing from the essential progress of the formula from premise to conclusion. When the Commission announces principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces."

In the same case following the above quotation we find the following statement:

> "This is so not only upon the authority of *Securities Comm'n v. Chenery Corp.,* but because any other

course would permit an administrative agency to announce a proper principle and, under that protection, achieve an improper result *by unrevealed considerations* wholly apart from the announcement. The prescribed judicial review would be set wholly at naught by any such procedure. In so far as the Commission purported to act upon its own informed judgment, apart from formulae or general principles, *its findings and reasons must be clearly and completely shown.*" (Emphasis ours.)

The City, in its brief, cited the case of *City of Newport* v. *Newport Elec. Div.*, 116 Vt. 103, 70 A. (2nd) 590, 592 (1950) as bearing on the duty of the Commission to disclose the method employed to reach the prescribed rates. In that case we find the following pertinent statement by the court:

"The State cites *Federal Power Co. v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L.Ed. 333, in support of its statement that the result reached and not the method employed should control in determining what is a just and reasonable rate. But as pointed out in *Petition of New England Tel. & Tel. Co.*, 115 Vt. 494 at page 502, 66 A.2d 135, although this case held that a commission was not bound to the use of any single formula or combination of formulae in determining rates it is not thereby relieved from the duty *to disclose the 'method employed' to reach the prescribed rates,* so that the validity of its conclusions may be tested by judicial review. In the Hope case the company contended that it should be allowed a return of not less than 8%. The commission found that an 8% return would be unreasonable but that 6½% was a fair rate of return. The commission set forth many and various reasons on which it based its conclusions as to a fair rate of return. The Supreme Court held that in view of these stated reasons, it could not say that the annual return to the company which would produce 6½% on its rate base was not just and reasonable. Thus it is seen

> that in the Hope case the commission *fully disclosed the method it used* in determining a just and reasonable rate of return. In the present case no such method is disclosed, nor could it well be without evidence on which to base it." (Emphasis ours.)

Our statutes do not provide for any particular formula or formulas for allocating revenue between different classes of services in cases of this nature, and the Commission is not bound by law to follow any specific formula or formulas. The Commission has the duty to disclose the method employed to reach the prescribed rates so that the validity of its conclusions may be tested on review. This disclosure was made by the Commission. In doing so, isofar as its consideration of the "tax equivalent" was concerned, it set forth in clear language its refusal to consider the "tax equivalent," and gave its reasons therefor. Under such circumstances it becomes immaterial whether the so called tax equivalent is a component part of the Wisconsin Method as claimed by the City, or is a modification of that method as claimed by the District. It was not a part of the method of allocation approved by the Commission, and the refusal of the Commission to consider it was not in itself an error of law. The Commission properly excluded all oral testimony and written evidence relating to the "tax equivalent." The remaining question to be considered is whether the method approved by the Commission, including as a part thereof the failure to consider the "tax equivalent," resulted in an allocation of rates not just and reasonable.

The City contends that the allocation to public fire protection made by the Commission's decree is unjust, unreasonable, or discriminatory in "end effect." As bearing on this contention the City claims, in addition to the factors already discussed, that the percentage of increase in fire protection was many times that of general service, and that the City

turned over to the District without cost most of the entire existing water system. The District was created by legislative action and under the Charter of the District, approved by the voters of Bangor, the water system became the property of the District. No cases have been cited by the City substantiating its contentions in this respect, and we do not consider them as being necessary factors for consideration by the Commission. The City also sought to present evidence of rates in other communities. This evidence was properly excluded. The general rule is that such evidence is not admissible in the absence of evidence that all, or substantially all, of the physical and economic factors affecting the reasonableness of the rates are similar in both communities. See *Petition of New England Tel. & Tel. Co.*, 66 A. (2nd) 135, 144 (Vt.).

As we have previously stated, the method employed by the Commission in reaching the prescribed rates and its reasons therefor were set forth in its decree with such clarity that it can be tested by judicial review. That method gave proper consideration to the purpose for which the new system was installed without taking into consideration either tax exempt property or the "tax equivalent." The rulings of law by the Commission were correct and its findings were supported by substantial evidence. We cannot say that the method of allocation submitted by the District and approved by the Commission was not just and reasonable, or resulted in any undue or unreasonable preference or advantage to the City or to any user of water, including the United States Government, or that the rates were confiscatory in violation of the due process clauses of the State or Federal Constitution.

The entry will be

Exceptions overruled.

ILLUSTRATION OF APPLICATION OF THE "TAX EQUIVALENT"

	Total	*Allocation of Totals*	
		General Users	*Public Fire*
Actual Revenue Needs	$475,000	$385,000	$ 90,000
"Tax Equivalent"	60,000	45,000	15,000
TOTAL	$535,000	$430,000	$105,000
Credit "Tax Equivalent" to the City of Bangor			60,000
Final Allocation of Actual Revenue Needs	$475,000	$430,000	$ 45,000

STATE OF MAINE

vs.

CHARLES KEITH

Kennebec. Opinion, November 22, 1960.

Taxation. Debt. Accord and Satisfaction. Check. Settlement. Ratification.

A tax is not a demand, nor is it a debt. It is an impost creating an obligation to pay without the necessity of any consent, express or implied, on the part of the taxpayer.

The acts of state officials or employees in processing a check for less than the full amount of an unabated tax cannot serve by way of ratification to bind the sovereign.

ON EXCEPTIONS.

This is a suit to collect a tax deficiency. The case is before the Law Court upon exceptions. Exceptions sustained.

Richard A. Foley, Asst. Atty. Gen., for state.

Harvey & Harvey, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WEBBER, J. This was a suit brought in the name of the State of Maine to collect a deficiency assessment of retail sales tax, the action having been instituted under the rules of practice and procedure in effect prior to December 1, 1959. The facts are not in dispute. Upon notification given by the State Tax Assessor to the defendant of a deficiency assessment, the latter took no steps to obtain reconsideration or to pursue the orderly mechanics of appeal as provided by statute. Correspondence ensued between the defendant's counsel and the office of the Attorney General, who had the matter for collection. At this time all concerned recognized that the tax assessed, with penalties and interest, amounted to $823.17. On July 26, 1958 the defendant offered to compromise for $704.62 on waiver of penalties and interest. On August 13, 1958 this offer was declined. On September 30, 1958 the defendant was threatened with court action by the office of the Attorney General and through a typographical error was advised that with interest to date there had become due the sum of "$337.26." The defendant immediately forwarded to the Bureau of Taxation by registered mail his check for $337.26 on which was noted: "By endorsement this check is accepted in full payment of the following account—Includes all taxes due to date plus interest and penalties * * * If incorrect please return, no receipt necessary." This check was at once processed for negotiation by the bureau through the office of the Treasurer of the State of Maine and was subsequently cleared and paid. On October 9, 1958 the office of the Attorney General acknowledged receipt of the $337.26 and called attention

to the fact that the total claim had reached the amount of $837.26 and that the figure set forth in the prior letter had been in error. Request was made for the payment of the balance of $500. On October 14, 1958 the defendant acknowledged the claim of the State that an error had been made and demanded the return of his check for $337.26. On October 17, 1958 he was informed that the check had been previously negotiated and therefore could not be returned. He was again advised that suit would be instituted for the balance. On this evidence a single justice below found for the defendant on the theory that the negotiation of the check after knowledge of the error was a ratification of the prior erroneous offer to accept $337.26 in full. Exceptions by the plaintiff raise the issues here to be determined.

In our view the issue is narrowed by the fact that defendant was not here dealing with a private individual or corporation in an effort to compromise a claim in the nature of debt. He was dealing with the sovereign in connection with an unpaid tax. The defendant operates a store and as such is engaged in making taxable sales at retail.

The sales tax is by statute made a tax upon the retailer, the incidence of which is made to fall upon the consumer. *W. S. Libbey Co.* v. *Johnson,* 148 Me. 410; *State* v. *Hiscock,* 150 Me. 147.

One is precluded from legal action upon a "demand" settled by accord and satisfaction under the provisions of R. S., Chap. 113, Sec. 64. A tax is not a "demand" nor is it a debt. It is an impost creating an obligation to pay without the necessity of any consent or agreement, express or implied, on the part of the taxpayer. *Frankfort* v. *Lumber Co.,* 128 Me. 1; *Old Colony Trust Company* v. *McGowan,* 156 Me. 138; 163 A. (2nd) 538, 542. Accordingly, taxes are not the subject of accord and satisfaction. *Frankfort* v. *Lumber Co., supra.*

The orderly process for challenging this tax was provided by statute and was available to the taxpayer. Within fifteen days after notice of assessment he could have filed a petition for reconsideration by the State Tax Assessor as provided by R. S., Chap. 17, Sec. 32. Upon a showing of cause he could have obtained an extension of the time for filing such a petition, also as provided by Sec. 32. Such action could have been followed by an appeal to the Superior Court as provided in Sec. 33. The taxpayer did none of these things and the assessment became final as to law and fact in accordance with the provisions of Sec. 32.

Apart from this method of reversing an unfavorable decision of the assessor only one other course was open to the taxpayer. R. S., Chap. 17, Sec. 15 provides in part: "If the failure to pay such tax when required to be paid is explained to the satisfaction of the assessor, he may abate or waive the payment of the whole or any part of such interest and, for cause may abate the whole or any part of such tax." The tax was subject to formal abatement but without such abatement no compromise, even if one were ever consummated here, was binding on the State of Maine.

Nor could the acts of state officials or employees in processing a check for less than the full amount of an unabated tax serve by way of ratification to bind the sovereign. The underlying principle involved is the same as that expressed in *Town of Milo* v. *Water Company,* 131 Me. 372, 379, wherein our court gave its opinion "that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right."

We are satisfied, however, that no hardship has in fact been imposed upon the taxpayer. He has paid the state

$337.26 on account of an obligation approximately $500 in excess of that amount. He has been given full credit for the amount so paid and has thereby stopped the running of interest thereon. If his check for $337.26 had not been erroneously processed by state employees but had been returned to him as he requested, a final judgment for the State in this proceeding, which upon the facts and applicable law now appears inevitable, would simply be increased by that amount with interest, and the position of the defendant would in the final result be the same.

Errors of law having been made to appear in the decision of the justice below, the entry will be

Exceptions sustained.

GEORGIA E. MCCULLOUGH
vs.
HENRY J. LALUMIERE, JR.

Cumberland. Opinion, November 25, 1960

Negligence. Pedestrians. Infirmities. Deafness.

It is not negligence as a matter of law in the instant case for a pedestrian upon approaching the center of the street to fail to glance to her right even though by so doing she could have avoided the accident.

Crossing the street in violation of an ordinance is only evidence of negligence, not negligence itself.

The amount of care required of one with an infirmity is increased to reach the standard of due care but the standard itself is not thereby altered.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions. Exceptions sustained.

Julian G. Hubbard, for plaintiff.
Robert W. Donovan, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

WILLIAMSON, C. J. This case is before us on exceptions to the direction of a verdict for the defendant. The only issue is whether the plaintiff was negligent as a matter of law. For our purposes negligence of the defendant is assumed. Under the familiar rule we take the evidence in the light most favorable to the plaintiff. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438.

A jury could find the following:

The plaintiff, aged 76 and totally deaf, was struck by a police car driven by the defendant, a policeman, while she was crossing Congress Street in Portland. Congress Street is a city street described by the plaintiff as "the main shopping street" running generally east and west from High Street on the east to State Street on the west. The accident took place about three feet easterly of a crosswalk at Park Street entering Congress Street on the south. The street is forty feet in width from curb to curb, with about twenty-eight feet between cars parked on each side of the street open for travel at the time of the accident. Traffic is plainly visible from High Street which is four hundred feet easterly and a substantial distance westerly toward State Street. The accident occurred at 11:30 o'clock on a Saturday morning in March in clear weather.

The plaintiff attempted to cross from the south to the north side of Congress Street. After several cars passed proceeding toward High Street, she "stepped out beyond the parked cars." Upon seeing no cars approaching either from High Street or State Street, she started to cross. When

she was within three or four feet of the cars parked on the north side, she was struck by the left front of defendant's car. At no time did she see the defendant's car, and we must infer that she did not look to her right or in the direction of High Street from the time of her observation of the street before she started to cross.

On his part the defendant in the line of duty was driving two women from a point east of High Street in a westerly direction on Congress Street to a hospital. The car first came within the range of vision of the plaintiff as it passed through the intersection of Congress and High Streets. A blue light on the top of the car was flashing and the siren was blowing as the defendant advanced on Congress Street toward the plaintiff. The defendant's speed when the plaintiff was "a little over halfway across the street" was placed at forty-five to fifty miles per hour. The defendant stopped his car at almost the point of collision. Brake marks extended twenty-five to thirty feet easterly from the accident.

Under the city ordinance, except within a crosswalk, it is unlawful for a pedestrian to cross Congress Street (at least in the area in which we are interested), and further, the pedestrian shall yield the right of way to all vehicles. In short, the plaintiff was crossing the street in violation of the ordinance, and also failed to yield the right of way to the defendant.

The defendant in substance says: that while he was traveling at twenty-five miles per hour the plaintiff suddenly appeared in the path of his car from between cars parked on the north side of the street; that he turned to the right as far as he could in the belief she would pass safely beyond the car; that he was unable to stop before striking her. It is not for us to determine the facts. As we read the record there is nothing inherently improbable in the plaintiff's evidence. For our purposes under the rule it is

sufficient if the facts we have stated could reasonably be found from the evidence.

This in brief is the picture: the plaintiff, totally deaf, first observing no approaching traffic from either direction, started to cross twenty-eight feet of a busy city street and continued to cross without making any further observation of traffic approaching from her right. On the plaintiff's evidence, it is apparent that the defendant's car with its flashing light and sounding siren must have passed High Street and have come within range of vision of the plaintiff at almost the very moment after the plaintiff made her observations.

Without undertaking to reconstruct the action of a few seconds, we may say with certainty that the plaintiff on looking to her right — merely glancing if you will to her right — as she approached the center of the street, would have seen the defendant's car with flashing light coming toward her in his normal traffic lane. If she had looked (for with her deafness she could not listen) she could, so far as this record is concerned, have avoided the accident by simply stopping and letting the defendant pass.

Could reasonable persons conclude that the conduct of the plaintiff was that of the reasonably prudent person under the circumstances? If so, the issue was for the jury; if not, the verdict was properly directed.

In *Shaw* v. *Bolton,* 122 Me. 232, 119 A. 801, a case cited repeatedly with approval, in which the negligence of the pedestrian was held a jury question, the court said, at p. 234:

> "With greater reason there is and can be no hard and fast rule that a foot passenger about to cross a street must as a legal duty look and listen. Thousands of streets and roads, some crowded with motors, others infrequently used by them, are be-

ing crossed by pedestrians every minute in the day. Each instance presents its own problem.

"The only legal rule that can be laid down is that when entering upon crossings and at all times while traversing them foot passengers shall exercise due care, to wit, such care as an ordinarily prudent and careful person exercises under like circumstances. Under some conditions it may be manifestly negligent to cross a street without first looking and listening. Under some conditions it may be negligent to fail to look and listen again when reaching the center of the street especially when the center is marked by a silent policeman. But what ordinary care and prudence demands and whether the conduct of the traveler conforms to such demand are questions of fact to be left to the judgment of a jury."

See also *McMann* v. *Reliable Furniture Co.*, 153 Me. 383, 140 A. (2nd) 736; *Gosselin* v. *Collins*, 147 Me. 432, 87 A. (2nd) 883; *Lange* v. *Goulet*, 144 Me. 16, 63 A. (2nd) 859; *Dyer v. Ayoob*, 134 Me. 502, 187 A. 757; *Sturtevant* v. *Ouellette*, 126 Me. 558, 140 A. 368.

There are certain other principles useful in determining negligence to be considered in the instant case. We comment briefly upon them.

In crossing outside of the crosswalk, the plaintiff violated the ordinance obviously enacted to facilitate the safe and free flow of traffic. The breach of law is a fact to be considered with other facts by the fact-finder. It is evidence of negligence, but not proof of negligence. *Stearns* v. *Smith*, 149 Me. 127, 99 A. (2nd) 340; *Rice* v. *Keene*, 129 Me. 489, 151 A. 199.

The deafness of the plaintiff is another fact to be considered in finding whether she met the standard of due care of the reasonably prudent person under the circumstances. It seems plain from the record that one with normal hear-

ing would have been warned of the approaching police car by the sound of the siren. The amount of care required of one with an infirmity is increased to reach the standard of due care, but the standard itself is not thereby altered. We may expect the person who cannot hear to use more care to look. Sight may compensate for lack of hearing in a given situation. ". . . the driver (must exert more care) to be alert through the sense of sight, to make up for any handicap because of less than normal acuteness of hearing, . . ." *Brown* v. *Railroad Company,* 127 Me. 387, 389, 143 A. 596. Her infirmity, however, did not render the plaintiff negligent as a matter of law in attempting to cross the street. Again we have evidence bearing upon negligence, but not proof thereof. *Catanese* v. *MacEntee,* 333 Mass. 132, 128 N. E. (2nd) 783.

We have seen that for purposes of our review the negligence of the defendant is admittedly a jury question. In the recent case of *Johnson* v. *Rhuda,* Me. (September 1960), we stated again the principle "that a pedestrian in crossing the street is not negligent as a matter of law because he fails to anticipate negligence on the part of the driver of a car." See also *Ross* v. *Russell,* 142 Me. 101, 48 A. (2nd) 403; *Day* v. *Cunningham,* 125 Me. 328, 133 A. 855.

Lastly, it is urged that the plaintiff was negligent as a matter of law in failing to look to her right before entering the far side of the street. In other words, was the plaintiff charged with a duty not only to look before starting to cross, but as well to continue her observations while crossing? We paraphrase the argument of the defendant in *Marsh* v. *Wardwell,* 149 Me. 244, 100 A. (2nd) 423.

The defendant seeks to support his position by reference to *Clancey* v. *Power & Light Co.,* 128 Me. 274, 147 A. 157, and *Glazier* v. *Tetreault,* 148 Me. 127, 90 A. (2nd) 809. In *Clancey,* the plaintiff without looking after leaving the curb

walked upon a streetcar track. The court held that the collision was not due to any negligence of the motorman, but to the negligence of the plaintiff. In *Glazier,* the court, in holding the defendant was not negligent as a matter of law, said at p. 133:

> "So it must have been in this case. Assuming that Mrs. Glazier looked carefully in both directions before she started to cross the street, as she says, she admits that she did not look again as she made her crossing and entered the farther side thereof, where a car proceeding as the defendant was would normally be traveling. She did not produce evidence which would justify a finding that defendant was negligent. Her own evidence makes it apparent that she did not exercise due care for her own safety."

There is, in our opinion, a wide difference between *Clancey* and *Glazier* and the case at hand. In the earlier cases, the defendant was in the exercise of due care as a matter of law. In the instant case, the negligence of the defendant is assumed. In the earlier cases, the pedestrian did not even guard against collision with a car driven by the careful or non-negligent driver. Here, the pedestrian, as we have seen, was entitled to some extent to rely upon the exercise of due care by the driver. Further, in neither *Clancey* nor *Glazier* was negligence of the plaintiff the decisive issue. Due care of the defendant as a matter of law ended each case. They are analogous to the situation described by Justice Thaxter in *Ross* v. *Russell, supra,* at p. 105:

> "This is not a case of a child darting out into the street directly into the path of a car. We have had in the past a number of such cases not only of children, but of adults, who have stepped suddenly from behind a line of cars into the path of a moving automobile. The issue in those cases has been, not one so much of contributory negligence, but of

> whether the act of the pedestrian may not have been the sole proximate cause of the accident."

Page v. *Moulton,* 127 Me. 80, 141 A. 183, in which there is language supporting the defendant, is distinguishable from the case at bar. In *Page,* the pedestrian in crossing through congested traffic and beyond streetcar tracks in the center of the street "took a chance" of crossing between passing automobiles. Here the street was empty of traffic from the east for a distance of four hundred feet when the plaintiff started to cross. A pedestrian rightly held negligent as a matter of law in *Page* could here be considered in fact either negligent or in the exercise of due care.

In *Marsh* v. *Wardwell, supra,* the plaintiff before crossing a city street on a crosswalk looked and saw defendant's car approaching. The plaintiff did not look again while crossing to observe the manner of the car's approach. The issue of negligence was held a jury question.

Differences in fact between *Marsh* and the instant case are apparent. In *Marsh,* before crossing on a crosswalk the plaintiff observed the automobile approaching at a distance on his right. In the case at bar, before crossing three feet outside of a crosswalk the plaintiff looked and saw no traffic within four hundred feet on her right. These differences (and others could be noted) do not spell the difference between a question of fact and a question of law. In each instance a judgment upon the safety of crossing was made by the pedestrian before starting to cross.

In our view reasonable men would be warranted in finding that the plaintiff was in the exercise of due care. *Sturtevant* v. *Ouellette, supra.* The issue of contributory negligence on this record is a question of fact for a jury and not a question of law for the court. *Catanese* v. *MacEntee, supra.*

We express no opinion upon what the facts are or what a jury should find. We say no more than that the plaintiff is entitled to "go to the jury."

The entry will be

Exceptions sustained.

GEORGE E. BURPEE

vs.

INHABITANTS OF TOWN OF HOULTON ET AL.

Aroostook. Opinion, November 28, 1960.

Workmen's Compensation. Limitation of Actions. Waiver. Estoppel. Payments.

The time limitations of R. S., 1954, Chaps. 31, 33; P. L., 1957, Chap. 325 for filing workmen's compensation claims is not waived by the voluntary payment of hospital and medical bills during the year following the accident where the defense of the time limitation is specifically pleaded in bar.

The payment of medical bills beyond the first 30 day period by the respondents is evidence of a concession of liability but is not an adequate basis for such an inference of waiver or estoppel as would obviate petitioner's compliance with the statutory time limitation for filing claims.

Quare: Whether the one year time limitation may be tolled by waiver or estoppel.

ON APPEAL.

This is an appeal from a decree awarding compensation. Appeal sustained.

Malcolm Berman, for plaintiff.

Bishop & Stevens, for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

RESCRIPT.

SULLIVAN, J. This is an appeal from a statutory and routine decree of a Superior Court Justice, which affirmed the award of workmen's compensation to the petitioner, against the respondent Town and its insurer.

On July 21, A. D. 1956 the petitioner whilst working for the Town sustained an injury to his back, by accident arising out of and in the course of such employment. He suffered discomfort and pain in doing so but completed his day's work. He passed the next day in bed and two days thereafter engaged treatment from a physician of his own selection. The Town through its Road Commissioner was officially informed of the casualty by the petitioner on the very day of its happening and reported in prompt course to its insurer. The petitioner was disabled for 2 or 3 weeks and upon medical advice resorted to diathermy at the hospital. He discussed his misfortune with the Town Manager. He resumed his employment with the Town by operating a light truck, a task which occasioned no lifting or loading. He so functioned until November, 1956 when he was assigned to driving a tractor but because of resultant pain had to desist from the latter occupation after one day's experiment. X-rays were taken in the fall of 1956. The petitioner was obliged to terminate his work relation with the Town because of the dearth of less strenuous duties within his restricted capacity and available in the municipal service. Some six weeks later he obtained a job driving a single horse and yarding wood for a new employer. Such work he performed until July, 1957 when he moved to Massachusetts for want of any further employment at Houlton within his lessened competency. He felt continuous distress from his accident and remained under the medical super-

vision of his doctor so long as he resided in Houlton. In Massachusetts although construction jobs were quite plentiful he could accept no employment for 2 months because of his inability to lift much weight. Following labor for 2 months as a helper upon a light truck he graduated to the status of operator and fulfilled that position until the beginning of 1960 and the hearings before the Industrial Accident Commission in this case.

The petitioner had imputed his disability to injured muscles and had assumed that the condition would correct itself. Six months after the accident, however, he had begun to experience prickly sensations over both of his lower extremities whenever such effects were superinduced by prolonged sitting. In the fall of 1958 he became more acutely concerned and consulted a doctor in Massachusetts. From April, 1959 there was aching in both lower extremities. He was hospitalized for 11 days but returned to work because of a deficiency of funds. Advised to undergo surgery he had to decline for financial reasons. His legs enjoyed relief after myelograms. He lost some weight. He became nervous and subject to dizziness. He walked with a limp. There were other symptoms. The ultimate diagnosis was a herniation of the nucleus pulposus due to trauma, with surgery requisite.

From the accident to the time of hearing in this case the petitioner had lost 18 days of employment besides the original 3 weeks of disability and the 2 months he spent in quest of compatible work in Massachusetts.

The petitioner never received any bills from his doctor in Houlton or from the hospital there. The Town's insurer paid those charges which amounted to $57.50. $17.50 were paid to the hospital on August 21, 1956 for 7 treatments extending from July 28 to August 4, 1956. $9.00 were paid to the doctor on August 21, 1956 for visits of the patient on

July 23, July 29 and August 4, 1956. This amount of $26.50, it will be noted, was for medical and hospital services during the first 30 days after the petitioner's injury. R. S., c. 31, § 9.

The Town's insurer later made the following payments to the petitioner: October 9, 1956, $3.00 to the doctor for a visit of September 6, 1956; May 13, 1957, $3.00 to the doctor for a visit of April 2, 1957; May 13, 1957, $25.00 to the hospital for an X-ray on April 2, 1957. This sub-total of $31.00 with the above amount of $26.50 yields a composite sum of $57.50 for all expenses paid. It will appear that all such disbursements by the insurer were incurred and paid within one year from July 21, 1956, the date of petitioner's accident.

The Town and its insurer had investigated the petitioner's claim and were compliant with paying the petitioner his compensation and lawful charges. The insurer in September, 1956 mailed 2 letters to the petitioner asking him to sign a compensation agreement. The petitioner did not reply. The insurer's representative sought the petitioner at his home without success and then enlisted the cooperation of the Town to close an agreement with petitioner. The petitioner called at the insurer's office and declined to sign a form or accept compensation. Petitioner explains that the paper for his signature was believed by him to be a release.

On January 30, 1959, 2 years, 6 months and 9 days after his accident the petitioner filed his claim for compensation and benefits under the Workmen's Compensation Act. He admits that he had never been told by the insurer or anyone that there was no necessity for his filing a claim. He testified that he did not file a claim within one year after his accident because he had been told by his Houlton doctor not to sign any papers until his back was well.

Presented in evidence by the respondents, the Town and its insurer, was a medical report, dated August 14, 1956

and we may infer rendered by the petitioner's Houlton physician to the respondents. The statement identified the petitioner as patient, described the accident of July 21, 1956 and diagnosed his injury as follows:

> "Muscle spasm, tenderness in lower lumbar region — marked limitation of forward bending treated by adhesive strapping and diathermy."

Then the report imparted the following prognosis:

> "Should not result in permanent disability. At last examination 8/2 it was felt patient could probably resume light work on 8/6/56. Total disability estimate 2 weeks 2 days. Ended 8/6/56. Partial disability estimate 4 weeks — days. Ended — 19 — Estimated cost of medical treatment $15 + hospital charge for diathermy."

The quotations immediately above are the findings and predictions of petitioner's doctor written one week before the respondents paid the first bills of the petitioner and comprise the only professional data of record in respect to the petitioner's condition actual and prospective which were possessed during the accident year by the respondents.

R. S., c. 31, § 33 as worded at the time of petitioner's accident was pertinently as follows:

> "An employee's claim for compensation, under the provisions of this act shall be barred unless an agreement or a petition as provided in the preceding section shall be filed within 1 year after the date of the accident; provided, however, that any time during which the employee is unable by reason of physical or mental incapacity to file said petition shall not be included in the period aforesaid. - - - - No petition of any kind, however, may be filed more than 10 years following an accident."

To the petition of the employee here the respondents pleaded the bar of the foregoing statute in as much as the

petitioner had not filed his claim within the year following his accident.

The respondents had not denied their liability to pay compensation during the year subsequent to the petitioner's injury but admitted their obligation and sought to consummate a written agreement with the petitioner.

Following hearing upon the petitioner's claim the Commissioner presiding found:

> "- - - that the petitioner did not file a Petition within one year from date of alleged accident. Neither was he prevented from so doing by reason of physical or mental incapacity to file said Petition.
>
> "- - - failure to file a petition within one year from date of accident was waived by the payment of medical and hospital treatments and other acts of the respondents and that his filing of a Petition on January 30, 1959 was in order under the provisions of the Act - - - "
>
> "- - - We feel that under (sic) our Maine Statute on all the facts we have cited, justifies us in finding that the acts of the respondent in voluntarily paying doctors and hospital bills for treatment, same not being merely for the purpose of first aid or routine examinations, plus its admitted conduct in presenting this petitioner with Agreements, Settlement Receipts and a check for compensation, even though the petitioner did not consummate the Agreement and accept the check, did constitute a waiver on the part of the respondents and did toll the Statute of Limitations."

The Commissioner thereupon decreed that the petitioner is entitled to compensation and the respondents appeal.

In issue before this court is the sufficiency of the evidence in the record (*Eleanora Gagnon's Case,* 144 Me. 131) to sustain the finding of the Commissioner that:

> " - - - failure to file a petition within one year from date of accident was waived by the payment of medical and hospital treatments and other acts of the respondents - - - "

The term waiver is now considered as indiscriminately inclusive of common law waiver and of the less delimited equitable estoppel in *pais,* (*Libby* v. *Haley,* 91 Me. 331, 333), both of which media our court has often commendably invoked to prevent unjust forfeitures.

Except for those cases in which this court has held that the defense of failure of the petitioner to have filed his claim within the accident year had been waived because such a defense had not been specifically pleaded (*McCollor's Case,* 122 Me. 136; *Comer's Case,* 130 Me. 373, 375; R. S., c. 31, § 35) there appears to be no precedent in which this court has sustained a waiver of that time limitation imposed by the Legislature. R. S., c. 31 contains time extension provisions for the filing of claims, R. S., c. 31, § 33; P. L., 1957, c. 325, but not for periods of grace for such filing where respondents have voluntarily paid the petitioner's hospital or medical bills.

This court in 1921 in the case of *Smith* v. *Boiler Co.,* 119 Me. 552, 560, concerning an accident on December 10, 1916, found that the petitioner had complied with the conditions of the statute then extant and had seasonably asserted her claim for compensation. The opinion appended a dictum that notice of claim may be and had been in fact waived by the employer.

In 1922 there followed the decision in *Graney's Case,* 121 Me. 500, 502. The court determined the issue presented and tangentially reiterated the dictum in *Smith* v. *Boiler Co., supra:*

> " - - - Next, within one year after the occurrence of the injury, a claim for compensation must be

> made - - -; but this may be subject of a waiver. Smith v. Boiler Company, 119 Maine, 552 - - -"

In 1925 in the *Garbouska Case,* 124 Me. 404, 405, a belated claim was disallowed and this court said:

> " - - - It is not open for the Commission to award compensation in magnanimous indifference to restrictive law. The whole power over the subject of compensation is derived from and limited by the act. - - - The words of the statute book are plain, positive and inexorable.
>
> "Each limitation period for the beginning of proceedings is jurisdictional. It pertains to the remedy. The filing of an agreement or petition is action essential to the allowing of compensation. It is mandatory that the one or the other should be placed on record sufficiently early. This petition, not having been filed within the fixed limit, is forever shut out."

Waiver was not adverted to.

In 1929, P. L., c. 300, § 32 our statute was amended:

> "No proceedings for compensation - - - shall be maintained unless - - -"

was supplanted by - - -

> "An employee's claim for compensation - - - shall be barred unless - - -" (R. S. 1954, c. 31, § 33.)

In 1938 in *Thibodeau's Case,* 135 Me. 312, 313 this court in rejecting a claim filed more than one year after the accident said:

> "Notice and petition, given within the time limited by law, are prerequisite to an employee's right to recover compensation for accidental injury, except that, 'any time during which the employee is unable by reason of physical or mental incapacity to make said claim or file said petition shall not be included in the periods aforesaid.' "

Again in 1938 in *Wallace* v. *Booth Fisheries Corp.*, 135 Me. 336, 337, this court ruled against an employee who had suffered his year for claim to elapse because his own physician had told him he would get better. The *Garbouska Case, supra,* was reaffirmed. The court did observe:

> " - - - There is no finding by the commissioner, and no evidence in the record of any waiver of these (time) requirements - - - "

In the instant case we shall review the record with respect to evidence of waiver or estoppel on the part of the respondents.

> "1. Waiver is a voluntary relinquishment of a known right, benefit or advantage which would otherwise have been enjoyed.- -It is essentially a matter of intention which may be proved by a course of acts and conduct or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive. - - - It is also a question of fact. - - -
>
> "2. Estoppel is a rule of law which prevents a party from asserting his rights when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. His conduct need not be characterized by an actual intent to mislead or deceive. His acts, declarations or silence must be of such a character as to have the natural effect of influencing the person to whom it is addressed to do, or not to do, to his detriment, what he would not otherwise have done - - -
>
> Estoppel is a question of law.- - - It will be seen from these rules that waiver is a voluntary relinquishment of a known right; yet if a party without such intention by his conduct or silence, misleads the other party, he then is estopped."
>
> *Holt* v. *N. E. Tel. & Tel. Co.*, 110 Me. 10, 12.
>
> "Acquiescence and waiver, however, are positive acts, the relinquishment of some known right or

advantage, the burden of proving which is on the party claiming it. Full knowledge of the rights waived must be shown. - - - "

Denison v. *Dawes,* 121 Me. 402.

"A waiver of a right is primarily based on the intent of the person possessing it to forego its benefits. - - - This court has held that evidence of such intention must be clear and convincing."

Johnson v. *Life Insurance Co.,* 130 Me. 143, 145, 146.

" - - - To make a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part - - - "

Medomak Canning Co. v. *York,* 143 Me. 190, 196.

" - - - however well calculated the conduct of one may be to induce or influence another to act in a particular manner, no estoppel can arise unless he who alleges it was thereby induced or influenced to, and did in fact act. - - - "

Tower v. *Haslam,* 84 Me. 86, 90.

" - - - But it is undoubtedly true that this doctrine of equitable estoppel should be applied with great care in each case, so that a person may not be debarred from the maintenance of a suit based upon his legal rights, unless the conduct relied upon as creating an estoppel has been of such a character, and has resulted in such injury to the person relying upon such conduct, that, in equity and good conscience, he should be thereby prohibited from enforcing the legal rights which he otherwise would have, nor unless in any given case all the elements exist which have been universally held to be essential for the purpose of creating an estoppel."

Rogers v. *P. & B. St. Ry.,* 100 Me. 86, 91.

See, also, *Hooper* v. *Bail,* 133 Me. 412, 416.

> "The burden of proof is upon the one who asserts the estoppel. This burden must be maintained by proof that is clear. - - - Not only must the proof be clear but estoppel cannot rest upon mere conjecture - - - This rule as to the quantum of proof, which is another way of stating that the proof of an estoppel must be full, clear and convincing applies to every essential element necessary to the creation of estoppel. - - - "
>
> *B. & M. R. R.* v. *Hannaford Bros.*, 144 Me. 306, 314.

The petitioner in this case from the time of his mishap until the hearing before the Commissioner was continuously distressed and impeded in lesser or greater degree. He was thus constantly kept aware of his injury. He was at no moment excusably ignorant of his legal rights or duties.

> " - - - The petitioner knew he had received an injury. He knew that injury had resulted in his incapacity to perform his work. He is charged with knowledge that, if he sustained an accident arising out of and in the course of his employment, he was entitled to compensation upon compliance with the established rules of procedure."
> *Wallace* v. *Booth Fisheries Corp.*, 135 Me. 336, 338.

Petitioner admits that he was never told by anybody that he did not have to file a petition within one year from his accident. Neither he nor other witnesses cite any efforts by the respondents to lull him into security or wittingly or unwittingly to encourage him to postpone his claim filing. The petitioner with plain candour testified that his default in filing claim within the year resulted solely from what his personal physician advised him. He does not implicate the respondents.

> "The Commissioner: Now I would like to ask you one or two questions, Mr. Burpee.
>
> "Why was it that you didn't file any petition within a year from the date of the accident?

"The Witness: I was told not to sign no papers.

"The Commissioner: Who told you that?

"The Witness: By Dr. Harrison until my back was —

"The Commissioner: Yes

"The Witness: (continuing) - - well.

"The Commissioner: Now, did anyone from the insurance company,- - did you ever, either verbally or by letter, did anyone ever tell you that you didn't have to file such a petition, outside of what Dr. Harrison told you?

"The Witness: No, sir.

"The Commissioner: I think that explains the thing pretty well up to this point.

"Any questions."

The petitioner refrained from filing in obedience to the advice of his physician as the petitioner understood such counsel. That was his sole motivation, upon the record. There is no evidence of the influence of any other person or factor.

The record reveals that the Town and its insurer had received prompt notice of the petitioner's accident and investigated the incident to their satisfaction. R. S., c. 31, § 9 required:

"During the first 30 days after an injury aforesaid the employee shall be entitled to reasonable and proper medical, surgical and hospital services, nursing, medicines - - - when they are needed. The amount of such services and aids shall not exceed $100 - - -

"Upon *knowledge or notice of such injury* the employer shall promptly furnish to the employee the services and aids aforesaid. In case, however, the employer fails to furnish any of said services

> or aids, or in case of emergency or other justifiable cause, the employee may procure said services or aids and the commission may order the employer to pay for the same provided that they were necessary and adequate and the charges therefor are reasonable - - -" (Italics supplied.)

When, therefore, the Town or its insurer on August 21, 1956 paid to the petitioner's physician and to the hospital, charges in the sum of $26.50 for medical and hospital services rendered to the petitioner between July 23 and August 4, 1956 because of the accident on July 21, 1956, the payments were made not from grace or choice but in accordance with the statutory mandate quoted above.

> "Upon the happening of the accident, the contractual right of Mr. White to have compensation vested, and the obligation to pay it became definite. Gauthier's Case, 120 Maine 73. That is, to begin with, the employer was bound to furnish, or pay for, medical, surgical, and hospital services, nursing, medicines, and the like, during the first thirty-day period, to an extent not exceeding one hundred dollars; the obligation being enforceable by petition to the Industrial Accident Commission in behalf of the employee. Ferren v. Warren Company, 124 Maine, 32.
>
> "That right to have professional skill and services and care was property. Melcher's Case, 125 Maine, 426."
>
> *White's Case,* 126 Me. 105.

The Town and its insurer had received from the petitioner's physician, dated August 14, 1956 the medical report and prognosis which are quoted earlier in this opinion. That communication depicted the petitioner's injury as mild and his recovery as of brief duration. There is no evidence that any other or revised medical bulletin was afforded to Town or insurer by the petitioner or by any person during the accident year. The petitioner continued at work for the

Town at lighter labor until November of 1956. During the year subsequent to the accident the respondents upon the record had no demonstrated reason to apprehend the much protracted disability from which the petitioner was destined to suffer.

The Town and its insurer in September, 1956 were prepared to acknowledge and satisfy the petitioner's right to compensation. The respondents were "anxious" to pay the claim and get the matter "off the books." They prepared the first check and companion papers and sought the agreement of the petitioner in various approaches but the latter would not comply. He states that he understood that one instrument for his signature was a release but agrees that nobody advised him to sign it. Upon inquiry of the Commissioner the petitioner testified:

> "A. Well the only thing that I could make out of it (insurer's letter) was that they wanted me to sign a release.
>
> "Q. Well, did they say release or did they say receipts?
>
> "A. Well, it would mean the same thing to me as far as my education is concerned."

As for a release, R. S., c. 31, § 24 in the matter of waiver of rights to compensation and R. S., c. 31, § 32 as to the requirement of official approval of agreements for compensation render it difficult to believe that an insurer would propose a release. The Commissioner found that the documents sent to the petitioner by the respondents were in fact an agreement, settlement receipt and compensation check.

On October 9, 1956 the insurer paid $3.00 to petitioner's doctor for an office visit by the petitioner on September 6, 1956, at a time when respondents were striving to effect an agreement with the petitioner. On May 13, 1957 the insurer well within the accident year paid the hospital $25 for X-rays of the petitioner on April 2, 1957.

It is quite obvious that the respondents in effect admitted their liability to pay compensation but it is equally clear that they were prevented from doing so only by the obdurate refusal of the petitioner to execute a statutory compensation agreement. The conformity of the respondents with their limited information in paying the additional and modest bills contracted subsequent to the first 30 day period is evidence of a concession of liability but it is not an adequate basis for inference that the respondents had in addition justified the petitioner in assuming or had assented to the fact that he was excused from compliance with the statutory time limitation for claim filing. Recognition of liability is not, without more, inconsistent with a lawful expectation that a petitioner will heed the statutory time bar and conserve his right to prosecution. It does not appear affirmatively in this case that the petitioner was ever aware that the bills were paid. He did not receive any of the bills.

Two months and eight days of the accident year remained after the payment of the last bill by the respondents and more than 1 year and 8 months were to lapse thereafter before the petitioner filed his claim with the Commission. There was never any obstacle to impede the petitioner from filing.

The action of the respondents in paying the bills was equivocal in that such payments may consistently have been made from motives of duty or routine administration without indulgence to the petitioner.

> "- - - It (waiver) is essentially a matter of intention; and when the only proof of that intention rests in what a party does or forbears to do his acts or omissions to act relied upon should be so manifestly consistent with and indicative of an intention to voluntarily relinquish a then known par-

> ticular right or benefit that no other reasonable explanation of his conduct is possible - - -"
>
> *Berman* v. *Accident Association,* 107 Me. 368, 373. See, also, *Johnson* v. *Life Insurance Co.,* 130 Me. 143, 146.

Petitioner's counsel observes that the respondents might have filed their petition to have the petitioner's status determined by the Commission, R. S., c. 31, § 32. The statement is correct but the statute is permissive and not mandatory. The respondents had no obligation.

An intention of the respondents to waive the statutory limitation of time has not been demonstrated nor is there proof that payments by the respondents influenced or decided petitioner's conduct or could have done so in this case.

It is not necessary to this decision and we express no opinion as to whether or not the limitation of 1 year for the filing of an employee's claim for compensation under the provisions of R. S., c. 31, § 33 may be tolled by waiver or estoppel.

Appeal sustained.

GEORGE N. ELWELL, ET AL.
vs.
EBEN ELWELL, ET AL.

Waldo. Opinion, November 11, 1960

Education. Schools.
Sinclair Act. Districts. Equity.
Parties. Constitutional Law.

The issuance of a certificate of organization under Chap. 41, Secs. 111A-111U, R. S., 1954 of the Sinclair Act is not void because made without notice and hearing, since the certificate by legislative mandate is conclusive evidence of the fact of incorporation, R. S., 1954, Sec. 111-G.

14th Amend. Constitution of U. S.

ON APPEAL.

This is an appeal under Rule 73 of M. R. C. P. Appeal dismissed, with costs. Decree below affirmed.

Harmon & Nichols by David A. Nichols, for plaintiff.

Eaton & Glass by Richard W. Glass,
George A. Wathen, Asst. Atty. Gen.,
Verrill, Dana, Walker, Philbrick & Whitehouse
and Roger A. Putnam for First Nat'l
Bank of Belfast, for defendant.

SITTING: WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.
WILLIAMSON, C. J., did not sit.

DUBORD, J. This is an appeal filed in accordance with M. R. C. P. 73, from the decision of a single justice granting motions to dismiss plaintiffs' complaint.

Nine of the plaintiffs describe themselves as residents and taxable inhabitants of the Town of Brooks, in the County

of Waldo and State of Maine. The remaining five plaintiffs describe themselves as residents and taxable inhabitants of the Town of Monroe, in the aforesaid County.

The defendants are the eleven men elected as Directors of School Administrative District No. 3, hereinafter referred to as SAD No. 3, the organization of which was authorized under the provisions of Section 111-A through 111-U, Chapter 41, R. S., 1954, first enacted as Chapter 364, P. L., 1957 and reenacted by Chapter 443, P. L., 1959, and known as the Sinclair Act, the Treasurer of the State of Maine, and the First National Bank of Belfast.

The plaintiffs asserting that the issuance of a certificate of organization to SAD No. 3 was in violation of constitutional limitations, seek to enjoin the alleged Directors of SAD No. 3 from exercising the rights and powers of school directors and from raising money by taxation. They further seek to enjoin the State Treasurer from paying out further tax monies to SAD No. 3; and they seek to enjoin The First National Bank of Belfast from making, extending, or renewing loans which pledge the credit of SAD No. 3.

The plaintiffs maintain in argument that their complaint is brought under the general equity jurisdiction of the court, viz., Section 4 (XIV) Chapter 107, R. S., 1954. The defendants, on the other hand, aver that the action is brought as a so-called "ten taxpayers' suit," under the provisions of Section 4 (XIII), Chapter 107, R. S., 1954. However, this distinction becomes only academic in view of the opinion we propose to express.

The basic contention is that the issuance by the School District Commission of a certificate of organization to SAD No. 3, having been made without notice and without hearing, is void and in violation of the Fourteenth Amendment of the Constitution of the United States.

The defendants who are the Directors of SAD No. 3 filed a motion to dismiss the complaint on the grounds that the plaintiffs have no rights, privileges, immunities, liberties or property that could, in any way, be abridged or of which they could be deprived under the provisions of Article 14 of the Constitution of the United States, by virtue of the alleged failure of the School District Commission to grant notice and hearing, before the issuance of the certificate of organization to SAD No. 3.

The Treasurer of State moved that the action be dismissed upon the theory that an action against the Treasurer of State was equivalent to an action against the sovereign State of Maine and could not be maintained; and also that the complaint failed to state a claim against him, upon which relief could be granted. The First National Bank of Belfast filed a motion to dismiss the complaint for the alleged reason that it failed to state a claim or cause of action upon which relief could be granted.

Although there is nothing in the pleadings covering these points, it appears that in argument before the presiding justice, the defendants advanced, as further reasons for a dismissal of the complaint, the fact that SAD No. 3, an alleged indispensable party to the action had not been joined as a party defendant; and also that the School District Commission, another alleged indispensable party, had not been joined as a party defendant.

The presiding justice, after consideration of the matter, ruled as follows:

(1) That SAD No. 3 was an indispensable party. However, he did not base his final opinion upon this point, recognizing that under M. R. C. P. 19 (b), SAD No. 3 could be made a party to the action.

(2) That the School District Commission, although it might well be a proper party, was not an indispensable party.

(3) That the present complaint against the Treasurer of State, in his official capacity, was a suit against the State and could not be maintained, except upon consent of the State; and

(4) That the plaintiffs are precluded by force of the provisions of Section 111-G of the Sinclair Act which reads as follows:

> "The issuance of such certificate by the school district commission shall be conclusive evidence of the lawful organization of the school administrative district."

Pursuant to M. R. C. P. 75 (d), the plaintiffs-appellants gave notice that they would rely in their appeal upon the following points:

> "1. The Court erred in ruling that the purported School Administrative District No. 3 was an indispensable party to this action.
>
> "2. The Court erred in granting the motion to dismiss the complaint as to the Defendant, Frank S. Carpenter in his capacity as State Treasurer.
>
> "3. The Court erred in granting the motion to dismiss the complaint for failure to state a claim upon which relief can be granted."

The issues before us are, therefore, clearly specified by the foregoing points set forth in the record on appeal.

The plaintiffs, having placed their main reliance upon the third point, viz., that the issuance of a certificate of organization to SAD No. 3, was void because it was made without notice and without hearing, we give this question our first consideration.

The same issue was squarely raised in the case of *McGary* v. *Barrows,* 156 Me. 250, 163 A. (2nd) 747, which was a petition for a declaratory judgment seeking a determination by this court on the constitutionality of that portion of Section 111-G of the Sinclair Act, which provides that the issuance of a certificate of organization by the school district commission shall be conclusive evidence of the lawful organization of a school administrative district.

In the *McGary* case this court, after asserting that it found no improper delegation of legislative power in this portion of the statute, had this to say:

> "The remaining objection to Sec. 111-G relates to the conclusive effect of the certificate of organization. Here again we see no objection under the constitution to the action of the Legislature in making such a certificate conclusive evidence of the fact of incorporation.
>
> "The intention of the Legislature is plain and certain, that the certificate of organization issued by the School District Commission shall be conclusive evidence of its lawful organization.
>
> "The question before us is whether the Legislature has exceeded its constitutional powers and this we find was not the case. We hold, therefore, there are no constitutional objections to the exercise by the School District Commission of the powers set forth in Sec. 111-G, and further, that the lawful organization of School Administrative District No. 9 is conclusively evidenced by the certificate of the School District Commission issued under Sec. 111-G."

The finding of this court in the *McGary* case is conclusive upon the issues raised in the instant case. It is unnecessary for us to consider the other issues relating to whether or not SAD No. 3 is an indispensable party and whether or not an action of this type can be maintained against the State Treasurer in his official capacity. Neither it is neces-

sary for us to express any opinion upon the effect of the validation statute, enacted by the Maine Legislature, namely, Chapter 221 of the Private and Special Laws of 1959.

The entry will be:

Appeal dismissed, with costs.

Decree below affirmed.

CASCO BANK & TRUST CO., APPLT. FROM DECREE OF JUDGE OF PROBATE IN RE: DISAPPROVAL AND DISALLOWANCE OF LAST WILL OF CHRISTOS DILIOS

BERTHA TOMUSCHAT, APPLT. FROM DECREE OF JUDGE OF PROBATE IN RE: DISAPPROVAL AND DISALLOWANCE OF LAST WILL OF CHRISTOS DILIOS

Cumberland. Opinion, November 30, 1960

Burden of Proof.
Wills. *Undue Influence.* *Probate.*
Evidence. *Coercion.*

The burden of proving undue influence rests upon the party asserting it.

Undue influence defined.

Undue influence is such influence as deprives the testator of his power to act as a free agent in the manner that he otherwise would. The true test is not in the nature of the influence but in its effect upon the testator.

Undue influence can be proven by circumstantial evidence and inferences to be drawn therefrom.

Undue influence need not be exerted by one who is a beneficiary, it may invalidate a will if exerted by others.

Circumstantial evidence consists in several distinct circumstances so naturally associated with the fact in controversy and so logically connected with each other as to acquire from the combination a weight and efficiency that will be accepted as convincing.

Coercion may be inferred from less evidence where the person charged therewith was in an illicit relationship with the testator.

ON EXCEPTIONS.

The case is before the Law Court upon exceptions to findings of the Superior Court sitting as Supreme Court of Probate. Exceptions overruled. Decree below affirmed. Counsel fees and expenses to be awarded to counsel for proponents and contestants, the amount thereof to be fixed by the Probate Court and charged as an expense of administration of the estate.

Bernstein & Bernstein, for appellant.

Jacob Agger, Robert C. Robinson and Arthur A. Peabody, for appellee.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

DUBORD, J. These two cases which were tried together in the Probate Court within and for the County of Cumberland and before the Supreme Court of Probate, are before us to be heard together, upon exceptions filed by the Casco Bank & Trust Company and Bertha Tomuschat, to the findings of the Superior Court sitting as the Supreme Court of Probate for the County of Cumberland holding the will of Christos Dilios, late of Portland, Maine, as invalid because of undue influence and mistake.

Christos Dilios died on June 27, 1958. An instrument dated and executed by him on March 14, 1958 was presented in the Probate Court within and for the County of Cum-

berland as and for his last will and testament. In this purported will, he named the Casco Bank & Trust Company and Israel Bernstein, a Portland attorney, as joint executors.

By decree dated April 7, 1959, the will was disallowed by the Probate Court within and for the County of Cumberland. This order was entered without the filing of any opinion or expressing any legal reason for the action taken.

An appeal from this decree was filed by the Casco Bank & Trust Company to the Supreme Court of Probate. Bertha Tomuschat, a beneficiary named in the aforesaid purported will, filed a similar appeal.

Both appeals were heard together and on August 28, 1959 the sitting justice of the Superior Court, acting as the Supreme Court of Probate, filed decrees in both cases in which it was ruled that the testator, at the time of the execution of the purported will was in possession of mental capacity sufficient to execute a will, but the appeal was dismissed and the purported will held invalid, because of undue influence and mistake.

To these findings, the proponents filed their exceptions.

The issues for our determination are as follows:

(1) Was the instrument purporting to be the last will and testament of Christos Dilios procured by undue influence?

(2) Was this instrument executed by Christos Dilios under mistake and misunderstanding as to its composition?

The proponents maintain that the execution of the instrument in question was not the result of undue influence and that there was no mistake or misunderstanding on the part of the testator. These assertions are denied by the appellees and to the aforesaid issues, the appellees advance the additional argument that the findings of the Justice of the Su-

preme Court of Probate should not be disturbed, for the reason that such findings can be attacked only for errors of law or for abuse of judicial discretion, and that such findings are conclusive if there is any evidence to support them. Appellees contend that no such error or abuse is shown and that there was sufficient evidence to support the findings.

We start out with the premise, of course, that an instrument purporting to be a last will and testament obtained by undue influence is void; and likewise, that a mistake which defeats the intention of a testator is sufficient to invalidate a purported will.

We turn our attention, therefore, to what constitutes undue influence such as to invalidate a purported will and the burden of proof when an instrument purporting to be a last will and testament is contested on the grounds that it was obtained by undue influence.

That the burden of proof of undue influence rests upon the party asserting it has been frequently asserted by this court. *Barnes* v. *Barnes*, 66 Me. 286, *Chandler Will Case*, 102 Me. 72, 66 A. 215, *Norton, et al., Applts.*, 116 Me. 370, 102 A. 73, *Hiltz, Applt.*, 130 Me. 243, 154 A. 645, *Thibault, Applt.*, 152 Me. 59, 122 A. (2nd) 545, *Royal, et al., Applts.*, 152 Me. 242, 127 A. (2nd) 484.

Now, what of the nature of the influence which can be construed as undue and thus invalidate a purported will?

Undue influence such as will invalidate a will has been found not too easy to define with precision.

> "As applied to a will contest, undue influence has reference to the means and methods resorted to and employed by a person for the purpose of affecting and overcoming, and which ultimately do affect and overcome, the free and unrestrained will of a testator. Concisely stated, undue influence invalidating a will is that which substitutes the

wishes of another for those of the testator. Although it has often been stated that undue influence is an unlawful influence, it appears that no more is meant by the expression 'unlawful influence,' as used in this connection, than that it is the influence which deprives the testator of his free agency." 57 Am. Jur., Wills, § 350.

"The different definitions which have been suggested for undue influence are substantially alike in the idea involved, and differ only because in part of difference in expressing the same idea, and in part because of a difference in the standpoint from which the idea of undue influence is viewed. In some cases the idea of coercion is emphasized. It is said to be influence which 'amounts to moral or physical coercion so that the testatrix was prevented from exercising her own judgment and free will and that her act became, in effect, that of another,' or 'imprisonment of mind or body.' The use of the term coercion is not meant to limit undue influence to physical force or threats of physical force. Any pressure upon testator's mind, which overpowers it, is coercion in this sense. The fact that it is not physical coercion is sometimes indicated by calling it moral coercion.

"Emphasis is also laid on the idea that in undue influence, testator's free agency is destroyed. It is influence 'such as in some measure destroys the free agency of testator and prevents the exercise of that discretion which the law requires that a party should possess.' His loss of free agency is such that he is compelled to make a will which he would not have made if he had been left to the free exercise of his own judgment and wishes.

"Undue influence exists only when the will power of the testator is destroyed, and his own will is borne down. His freedom of will must be so destroyed as to substitute the will of another for his own. Undue influence exists when 'testator's volition at the time of testamentary act was controlled by another and . . . the will was not the result of

the free exercise of judgment and choice.' It consists of 'a pressure which overpowered the mind and bore down the volition of testator at the very time the will was made.' Undue influence is that ascendency which prevents testator from exercising his unbiased judgment. It is 'any improper or wrongful constraint, machination or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not have done or forborne had he been left to act freely.' It deprives testator of his usual volition, so that his will is not free and unconstrained, and his act in executing the will is not voluntary." Page on Wills, Vol. 1, § 183.

"Upon the other hand, whatever may be the nature and extent of the influence, if, because of the physical or mental weakness of the testator, and the nature and persistency of the influence exerted, it is such that the testator is unable to resist it, if it deprives him of his power to act as a free agent in the manner that he otherwise would, it is sufficient to avoid the will, because a will made under such circumstances is not the will, and does not carry out the wishes, of a capable testator, acting as a free agent. It follows that the true test is to be found, not so much in the nature and extent of the influence exercised, as in the effect that such influence has upon the person who is making his will.

"Whatever the nature and extent of the influence exercised, if in fact it is sufficient to overcome the volition and free agency of the testator, so that he does that which is not in accordance with the dictates of his own judgment and wish, and what he would not have done except for the influence exerted, it is undue influence." *O'Brien, Appellant,* 100 Me. 156, 158; 60 A. 880.

"By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator unable to withstand the in-

fluence, or too weak to resist it, was constrained to do that which was not his actual will but against it.

"Undue influence often closely resembles and is near akin to actual fraud. But strictly speaking it is not synonomous with fraud. In the making of a will, undue influence is exerted, where the mind of the nominal maker of the document, in yielding to the dominancy and supervision of another's designing mind, does what otherwise the ostensible actor would not have done. Undue and improper influence, to go a little further, presupposes testamentary capacity. Were there no capacity, there could be no will, and the question of whether or not there was influence would be an idle one. The strength of the person's will, in connection with other facts, may be material in relation to whether an exerted influence became operative, but total incapacity negatives the very suggestion of influence. The influence must arise either from proof or presumption of law. It is never inferred from mere opportunity or interest, though these facts if shown should weigh with other facts." *Rogers, Appellant,* 123 Me. 459, 461; 123 A. 634.

See also *Royal, et al., Appellant,* 152 Me. 242, 250; 127 A. (2nd) 484.

"As has been often reiterated, the burden of proof is on the party alleging undue influence. The true test is the effect on the testator's volition. It must be sufficient to overcome free agency, so that what is done is not according to the wish and judgment of the testator." *In Re Will of Ruth M. Cox,* 139 Me. 261, 272, 29 A. (2nd) 281.

The nature of the undue influence that will vitiate an alleged will was elaborately considered in an opinion by Chief Justice Rugg in *Neill* v. *Brackett,* 234 Mass. 367; 126 N. E. 93. Here the court said:

"Fraud and undue influence in this connection mean whatever destroys free agency and con-

strains the person whose act is under review to do that which is contrary to his own untrammelled desire. It may be caused by physical force, by duress, by threats, or by importunity. It may arise from persistent and unrelaxing efforts in the establishment or maintenance of conditions intolerable to the particular individual. It may result from more subtle conduct designed to create an irresistible ascendancy by imperceptible means. It may be exerted either by deceptive devices or by material compulsion without actual fraud. Any species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person signing the instrument. Any influence to be unlawful must overcome the free will and eliminate unconstrained action. The nature of fraud and undue influence is such that they often work in veiled and secret ways. The power of a strong will over an irresolute character or one weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities. Undue influence may be inferred from the nature of the testamentary provisions accompanied by questionable conditions, as for example when disproportionate gifts or benefactions to strangers are made under unusual circumstances. When the donor is enfeebled by age or disease, although not reaching to unsoundness of mind, and the relation between the parties is fiduciary or intimate, the transaction ordinarily is subject to careful scrutiny. In such an inquiry all the attributes, sensuous, intellectual, ethical and religious, of the individuals concerned are involved. Strength or infirmity of will, natural and cultivated tastes and temperament, and tendencies to passion, resentment, obstinacy, prejudice and calm, all are elements to be considered. A strong sense of justice, determination and steadfastness of purpose are

> significant considerations, as are also a spirit of domination, persistent desire to rule, and deep-seated selfishness. Age, weakness and disease are always important factors. Relations of intimacy, confidence and affection in combination with other circumstances are entitled to weight."
>
> "Fraud or undue influence, such as if found to have been exercised, invalidates a will, may be manifested in divers ways. It is not practicable or desirable to attempt to lay down any hard and fast rule. Whatever may be the particular form, however, in all cases of this character three factors are implied: (1) A person who can be influenced, (2) the fact of deception practiced or improper influence exerted, (3) submission to the overmastering effect of such unlawful conduct." *Neill* v. *Brackett, supra.*

See also *Aldrich* v. *Aldrich* (Mass.), 102 N. E. 487, 489; and *Morin* v. *Morin* (Mass.), 124 N. E. (2nd) 251.

A search, which may perhaps not be exhaustive, fails to disclose any decisions of this court exactly on the issue of whether or not undue influence must be proved by direct evidence or may be established by inferences created by circumstantial evidence. However, there are many decisions in other jurisdictions holding that direct proof is not necessary, albeit it is held that the inference must amount to more than mere suspicion or conjecture.

> "The exercise of undue influence may be shown by circumstantial evidence, and the provisions of the will, and the circumstances attending its execution, may be sufficient to warrant a finding against its validity, but it is not correct to say that a mere showing of such circumstances, even in the absence of an explanation by the party implicated, creates a presumption of law that the will is invalid, and that the court might thereupon so instruct the jury. This question, like others in issue, must be left to the determination of the jury in the exer-

cise of their sound judgment, after weighing all the facts and circumstances given in evidence." *Friedersdorf* v. *Lacy* (Ind.), 90 N. E. 766, 769.

"Mere suspicion, however strong, is not of itself enough to warrant a finding of fraud and undue influence. On the other hand, it is not necessary that there should be direct evidence of fraud and undue influence in order to justify such a finding, though it often happens that such evidence is produced. It is of the nature of fraud and undue influence that they may be exercised in indirect and underhanded ways difficult to be come at, and to be judged of only by their results. The will of a testator may be coerced and fraud committed upon him in various ways, and what would constitute fraud and coercion in one case, might not in another. There is no hard and fast rule. A person may be so situated, so weak and feeble or so dependent on another, for instance that mere talking to him or pressing a matter upon him would so affect him, that, for the sake of quietness, he might do that which he did not want to do, and which, if his health had been better or his will stronger, he would not have done. Such a case would constitute or might be found to constitute coercion as truly as force or duress." *Hoffman* v. *Hoffman* (Mass.), 78 N. E. 492, 493.

"Undue influence need not be proved by direct evidence but may be inferred from attendant circumstances, though there must be more than mere suspicion." *Mirick* v. *Phelps* (Mass.), 8 N. E. (2nd) 749, 751.

"The sufficiency of the evidence to sustain a verdict on appeal depends solely on the presence in the record of some competent evidence which tends to support that verdict." *Davis* v. *Babb* (Ind.), 125 N. E. 403, 405.

"In determining whether the evidence is sufficient to sustain the verdict of the jury, this court will consider, not only the positive testimony of the

witnesses, but also such inferences as flow naturally from established facts." *Davis* v. *Babb, supra.*

"Undue influence need not be proven by direct and positive evidence, but it may be inferred from or shown by the facts and circumstances in evidence. Nor is it necessary that the overt acts of undue influence should have been exercised at the exact time of the execution of the will and codicil, but it is sufficient to show that such influence over the mind of the testator had been acquired previously and did operate at the time the will and codicil were made." *Davis* v. *Babb, supra.*

"In the contest of a will on the ground of undue influence the evidence required to establish the undue influence need not be of that direct, affirmative, and positive character which is required to establish a tangible physical fact. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred.' *Davis* v. *Babb, supra.*

"Undue influence need not be proven by direct and positive testimony, but it is sufficient if it is shown by, or can be inferred from, the facts and circumstances in evidence." *Mowry* v. *Norman* (Mo.), 103 S. W. 15, 20.

"Nor is it required that the overt acts of undue influence were exercised at the exact time of the execution of the will, but it is sufficient to show that such influence over the mind of the testator had been acquired previously and did operate at the time of making the will in the disposition of the testator's property." *Mowry* v. *Norman, supra.*

"It is not necessary that there be direct proof of fraud or undue influence." *Duckett* v. *Duckett,* 134, F. (2nd) 527, 528.

"Undue influence may be established by circumstantial evidence." *In Re Eiker's Estate* (Iowa), 6 N. W. (2nd) 318, 320.

"Whenever issues of duress, undue influence, fraud, and good faith are raised, the evidence must

> take a rather wide range and may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, explain the acts of the parties, and throw light on their objects and intentions.
>
> "Such matters are ordinarily not the subject of direct proof, but to be inferred from the circumstances, and in all such cases, great latitude of proof is allowed and every fact or circumstance from which a legal inference of the fact in issue may be drawn is competent." 20 Am. Jur., Evidence § 345.

Although the point does not appear to have been discussed in any opinion of this court, in other jurisdictions it has been determined that the one who exercises undue influence need not benefit personally as a result of such exercise.

> "Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless." *Gidley* v. *Gidley* (Neb.), 265 N. W. 245, 250.
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> "The undue influence is generally exerted by the beneficiary under the will; but this is not necessary. If undue influence is exerted by one who is not a beneficiary under the will, the will which is caused thereby is as invalid as if the influence were exerted by one of the beneficiaries." Page on Wills, Vol. I, § 190.

We have seen that undue influence can be proven by circumstantial evidence and inferences to be drawn therefrom. Now, what is circumstantial evidence? Section 270, 20 Am. Jur., Evidence, defines it as follows:

> "The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected

facts which reasonably follow, according to the common experience of mankind. Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what in human experience has been found to be generally the cause or result of similar occurrences."

"Circumstantial evidence simply comprises the minor relative facts standing around the principal fact to be proved. To use the expressive term of the Roman law, these facts are the *indicia* of truth, serving to point out the object sought. They stand as silent witnesses of the main fact, continually pointing to it and aiding to fix its true character and significance. This method of investigating truth by circumstances is often characterized as a 'convergence of rays of light to a common focus or centre,' but more frequently as the formation of a chain out of a number of separate links. The former simile more aptly illustrates the operation of independent, and the latter of dependent, circumstances. But however figuratively expressed, the idea to be conveyed is, that several distinct circumstances, no one of which is conclusive in its nature and tendency, may be found so naturally associated with the fact in controversy and so logically connected with each other, as to acquire from the combination a weight and efficacy that will be accepted as absolutely convincing." *State* v. *Richards,* 85 Me. 252, 254; 27 A. 122.

" 'Circumstantial evidence' consists of proof of certain facts and circumstances from which court may infer other facts which usually and reasonably follow, according to common experience of men." *Taylor* v. *Director of Public Works,* 121 Ind. App. 650; 100 N. E. (2nd) 831, 834.

Many definitions can be found for what is meant by a reasonable conclusion or deduction from circumstantial evidence.

"An 'inference' is a conclusion which, by means of data founded upon common experience, natural

> reason draws from facts which are proved." *State* v. *Nevius,* 147 Ohio St. 263; 71 N. E. (2nd) 258.
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> "An 'inference' is a deduction of an ultimate fact from other proved facts, which proved facts, by virtue of the common experience of man, will support but not compel such deduction." *Ayers* v. *Woodard,* 166 Ohio St. 138; 140 N. E. (2nd) 401, 406.

So far, we have seen what undue influence such as will invalidate a will consists of, and the burden of proof in cases where an instrument purporting to be a will is contested on the grounds of undue influence. We have further seen that undue influence may be proven by circumstantial evidence and that the court hearing such a case may arrive at conclusions based upon logical inferences from such circumstantial evidence.

Now, what of the facts of this case?

Christos Dilios came to this country from Greece and became a naturalized American citizen. He went into the restaurant business and was conducting an apparently successful venture in the City of Portland, for a number of years prior to and at the time of his death.

He made and executed at different times in the later years of his life, three wills and a codicil to his first one. All of these instruments were highly complicated, due in large measure to the fact that at the time he executed his first will and codicil his entire family consisting of his wife, two sons and a daughter, were residents in the country of Albania; and at the time of the drafting of the last two instruments, his wife and daughter still remained in Albania, a country dominated by communistic influence and in which the ordinary modes of communication no longer existed. Because of this situation, the testator realized the difficulties in making provisions for distribution of money, first to his entire family, and then to his wife and daughter after the boys had managed to escape and come to this country.

The record discloses that it was the hope and ambition of the testator that his entire family might some day be able to leave Albania and emigrate to this country. His ambition and hope insofar as his wife and daughter were never realized, but after substantial expenditure of money and tireless effort on the part of the father, the two sons succeeded in escaping from Albania and in reaching this country. It was determined that they were American citizens by virtue of their father's naturalization.

The first name of the older son was Dhimitrios, and the first name of the younger son was Basilios. After the boys had arrived in this country, the older son became known as James and the younger son as William.

A study of the three wills and the codicil to the first one indicates, insofar as the wife and daughter are concerned, a similar pattern relating to their rights in the estate of Christos Dilios.

The first will was dated January 29, 1954. In this instrument the Casco Bank & Trust Company and Israel Bernstein were named as executors and trustees. Among the directions and powers given to the trustees was that of carrying on the restaurant business previously conducted by the testator.

The first will did not provide for any specific legacies and it is to be noted that it makes no provision of any kind for Bertha Tomuschat.

All of the estate is given to the trustees for the benefit of the testator's wife, his daughter and his two sons. There is also a provision for some support for his sister during her lifetime. It is finally provided that if any money remains in the trust fund after the death of the last survivor, that such balance shall be divided between the Hellenic Orthodox Church of Portland, Maine, and Maine General

Hospital of Portland, Maine. As indicative of his interest in his two boys, it is provided that the trustees shall have authority to expend such funds as may be necessary to enable them to come to this country and the trustees are also instructed to pay for the education of William by means of increased payments to him if necessary.

On July 11, 1956, Christos Dilios executed a codicil to his will and the substance of this change is that provision was made for the payment by the trustees of $200.00 per month to the older boy, and in the event the older son was unable to receive the money to the younger boy, apparently upon the theory and belief on the part of the testator that his sons would take care of the other members of the family in an appropriate manner from this monthly payment.

That the testator at this time intended that eventually either or both of his sons should have his entire estate, subject to their taking care of their mother and sister, is indicated by a provision in the codicil that at the request of either or both of the sons, the trust assets should be liquidated and the proceeds paid over to the sons in equal shares, or wholly to either of the sons, as the trustees may determine. It was further specified that if either or both of the sons should come to the United States, then upon the request of either son, the trust should be determined and the assets paid over to such son or in equal shares to the sons, if both of them were in this country. The testator expressed confidence that either or both of them would take care of the other members of the family.

Up to this point we have seen, therefore, that the testator had clearly declared his intention, albeit in a complicated manner, of making sure that his estate would be used for the benefit of his wife, daughter and two sons, and eventually be shared by the two boys.

The boys arrived in this country in the summer of 1957 and it is evident that shortly after their arrival, trouble

ensued between the boys and Bertha Tomuschat, who was then, and had been for many years, a cashier in the restaurant. The evidence discloses that there was a close relationship between Bertha Tomuschat and the testator, a relationship which had existed for a long period of years. There is nothing in the case to show the marital status of Mrs. Tomuschat, but it is indicated she was the mother of a seventeen year old daughter. Of course, the testator was a married man with a wife in Albania. The two sons resented this relationship between their father and this woman.

Shortly after the arrival of the two boys, it appears that trouble developed, at first between the older boy and his father, and later between the younger boy and his father. More will be said later in this opinion concerning some of the evidence and the proof which the court below had before it for consideration from the standpoint of drawing conclusions and inferences.

In any event, Christos Dilios executed a new will on December 31, 1957.

By this will, he bequeathed Bertha Tomuschat the sum of $1,000.00, in recognition he said, of her many years of faithful and devoted service. He then requested that his executors and trustees, and a son he did not name, continue to employ her as manager or assistant manager at a salary of not less than $40.00 per week. The son he had in mind must have been William because in subsequent provisions in the will he specified for eventual distribution of the restaurant to him.

In this will of December 31, 1957, he cut off his elder son, James, with a bequest of only $100.00. The other provisions relating to the benefits for his wife, his daughter, and his son William, are somewhat similar to those contained in the prior will and codicil.

In the will of December 31, 1957 we find the following paragraphs:

> "C. Anything herein to the contrary notwithstanding, I direct that if my Trustees determine that my said son, William, is capable of managing his own affairs and the business affairs of my estate, has a sense of financial responsibility, has developed maturity and good judgment, has qualities of industriousness, honesty and sincerity, and has demonstrated proper respect and consideration for his Mother and other members of our family, then they may, in the exercise of their sole discretion, when my said son, William, has reached the age of twenty-three (23), or at any time thereafter, distribute to my said son, William, free of trust, at any time and from time to time, all, or any part of, the assets forming a part of my estate and upon any such distribution or distributions, my Trustees shall determine whether the right to receive all or any part of the income herein provided for my said son, William from this estate shall be determined and ended. I expressly authorize the complete termination of this trust and the distribution of all of its net assets to my said son, William, if, in the exercise of their sole discretion, my Trustees determine that William has made appropriate commitments and arrangements to provide proper support to meet the determinable needs of his mother and sister who would otherwise be beneficiaries of this estate had it continued.
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> "D. Anything herein to the contrary notwithstanding, I direct that within five (5) years after the date of my death the Trustees shall, in accordance with the provisions of the foregoing Paragraph, distribute, free of trust, to my said son, William, those assets of my estate which make up the restaurant enterprise which I carried on during my lifetime, provided that my estate at that time still owns and operates said restaurant enterprise. I request, but do not direct, that my Executors and Trustees carry on my said restaurant

business for such eventual distribution to my said son, William, if at all possible.

"E. Anything herein to the contrary notwithstanding, I direct that, if an opportunity arises for my said wife and my said daughter, or either of them, to come to the United States, my Trustees may, without regard to any of the other provisions of this Will and any other rights herein created, in the exercise of their sole and uncontrolled discretion use any and all of the funds of this estate to enable my said wife and daughter, or either of them, to come to the United States for the purpose of establishing a permanent residence and in the hope of eventually securing United States citizenship; and further that, if an opportunity arises for my said son, William, to continue his education, my Trustees may, without regard to any of the other provisions of this will or any other rights herein created, in the exercise of their sole and uncontrolled discretion increase the payments being made to my said son, William, in such amounts and at such time or times as they shall determine, to enable my said son, William, to continue his education."

Although there are prior paragraphs providing for distribution of any balance remaining after the death or remarriage of the wife, the death of the daughter and the death of William, to the Hellenic Orthodox Church and to Maine Medical Center of Portland, Maine, it is clear from the three foregoing paragraphs that as of December 31, 1957, Christos Dilios, having cut off his older son with a bequest of only $100.00 showed an intention, first that his son, William, might eventually receive his entire estate, and second an expectation that the trustees named in the will were to see that he received a proper education.

The will which was presented for probate, which is the subject of this case, was executed on March 14, 1958, about two and one-half months after the will of December 31, 1957.

In this will he devised to Bertha Tomuschat the so-called camp property on Highland Lake in satisfaction, Dilios said, of debts owed by him to her, and conditioned upon her giving the estate an appropriate release and discharge of all the obligations incurred by him to her during his lifetime. It was further provided that she be continued as manager or assistant manager of the restaurant at not less than $40.00 per week.

He then gave each of his sons a legacy of $100.00 and this was the sole provision made for them.

After making a few specific bequests, he then made provision for the care of his wife, daughter and sister, still in Albania with bequests of any residue after the death of all beneficiaries, to the Hellenic Orthodox Church and Maine Medical Center.

We propose now to digest briefly the evidence applicable to occurrences leading up to the drafting of the will of December 1957 and the final will of March 1958.

For many years, Christos Dilios, had employed a firm of attorneys, one of whose members drafted the will. He had the utmost confidence in them and it is fair to recite at this point that there is nothing in the record which in any manner can point the finger of suspicion at these highly competent and honorable attorneys.

A study of the evidence of the scrivener indicates that the bringing of his sons to the United States by the testator was the culmination of a life long dream. Nobody, the scrivener said, could have been happier than he was when at last his two sons were here. However, the scrivener further said that after a very short period, Dilios came to him and talked to him and told him he was having serious problems, particularly with his oldest son. This was in the fall of 1957 and the boys, it will be noted, had been in this country at that time less than six months. The oldest boy

the scrivener said, was causing his father terrible heartache because he had no respect for him, would not tend to business, and would not obey instructions. He told the scrivener a story of a physical beating administered by the older boy to the younger boy at the family home, at which time when the father attempted to intervene he had been struck. This story incidentally was denied by both of the boys. The scrivener said, "to make a long story short, he came to me and said that he wanted his eldest son taken out of his will." The scrivener said he advised him to go slow, but finally at the end of the year after a serious illness on the part of the testator, he informed the scrivener that he was determined to cut off the older boy. Then about a month after this will was drawn, very early in 1958, either in January or February, the testator came to the office again and gave directions for the drafting of a new will in which the younger son was disinherited. The reasons attributed by the father for this change was that the younger son was siding in with his older brother. After giving definite instructions that a will be drafted, in which both sons were given only the sum of $100.00, the scrivener said that the testator indicated that he hoped the boys might reform in which event, he might make a new will.

Upon being asked whether or not the testator had ever told him that part of the trouble with the oldest son was because of the cashier, he replied, that the testator told him that they did not work well in the restaurant; that they did not take his instructions; and that they did not take instructions from Mrs. Tomuschat; that they were constantly doing things which disturbed him in the restaurant. He further said that he was disturbed because the older boy insisted on having social contacts with the waitresses. He also questioned the honesty of the older boy.

It is clear from some of the remaining testimony of the scrivener that much trouble had developed because of ill feeling between Mrs. Tomuschat and the boys.

The scrivener also testified that the testator informed him that Mrs. Tomuschat had mentioned to him incidents of alleged misbehavior in the restaurant on the part of the older son.

A witness, of Greek extraction, the operator of a restaurant in Biddeford, testified that he was a close friend of Christos Dilios; that he knew that Dilios had executed a will in which he disinherited his sons, because Dilios went about broaching this information to his friends. This witness testified that in a discussion with Dilios, he told Dilios he had heard he had disinherited his sons, and asked him particularly about the younger boy. To this, he said, Dilios informed him that the executors would take care of him, and there was nothing to worry about, and he discussed with him the matter of the education which should be furnished to William. He also testified regarding the relationship between Mrs. Tomuschat and the testator, and that the sons disapproved of it.

He said Dilios made this statement to him: "I have been going around with this lady 12, 13 years; taken the best years of her life. I have received something in return. I just can't put her away now because the boys come in. I am getting old, not long to live."

Upon being asked if Dilios had told him of the problems existing between the sons and the woman, he said that the boys objected to his relationship with her. Dilios informed this witness that the boys had personally indicated their objections to their father.

He further said that upon pressing Dilios for the real reason for his action of disinheritance, Dilios replied: "You know the real reason. They can't get along with the lady."

Under cross examination he repeated that Dilios stated that the younger boy was to be taken care of by his attor-

neys and executors. There is, of course, no provision in the last will instructing or directing the attorneys and executors to expend money for William's education, but there was such a provision for his education in a prior will.

Another witness of Greek extraction described himself as a close friend of Dilios. As a result of talks with the testator, he attributed the trouble arising over the boys as due to Mrs. Tomuschat.

Note the following testimony:

"Q. Can you tell us what Mr. Dilios told you about the trouble he had?

"A. Well, Mr. Dilios and I, very, very close friends, and I took authority, I says: 'Why you have this kind of trouble with sons?' I says: 'Your big dream to bring your sons over here to United States. You spend so much money.' He says to me: 'I am pleased. Don't ask me any more questions. I am in big trouble with woman.' I says: 'All right. What kind of trouble? You throw your sons on street for one woman.' I says: 'What is trouble? Are you married legal?' I am very, very close friend and I ask many details. He says to me: 'You couldn't know, but I am big trouble. Don't ask me any more.' He started to cry.

"Q. Did you know Mr. Dilios had drawn a will in 1958, sometime in March?

"A. That's right.

"Q. Did Mr. Dilios talk with you about the will?

"A. Yes.

"Q. Did he say anything about his sons in the will?

"A. That's right.

"Q. Tell us what Mr. Dilios told you?

"A. That's right. I am going to tell Mr. Dilios told me.

"Q. You understand that? Tell us what Mr. Dilios told you.

"A. He told me he cut the old son, Jim, from the will, and left the whole for his wife and the small, Bill. I says: 'O.K. for the old one.' I says: 'How about for Bill?' He says to me: 'My wife and Bill, it is all set and my lawyer is going to take care of my Bill, going to send high school'."

As to the relationship between the testator and Mrs. Tomuschat this witness testified as follows:

"Q. Whether or not you have ever seen Mr. Dilios and Mrs. Tomuschat, the cashier, together outside of the restaurant?

"A. So many times. Sometimes she, he give her with me ride to my tailor shop.

"Q. Were they always together?

"A. Together, Mrs. Shaw and Mr. Dilios together.

"Q. Was she always at camp?

"A. Many times, going from my tailor shop, he left his stuff and start car in my front, and I say: 'Where you go?' And he says: 'I am going to camp.' And Mrs. Shaw was in his car."

The record indicates that Mrs. Tomuschat was also known as Mrs. Shaw.

There was entered into the record the following testimony of this same witness given by him in the hearing in the Probate Court:

"Did you have any conversation with Mr. Dilios about his sons when they first came over here? Answer: None the first two months. They live happy, because his dream is to bring his sons to the United States. After two months he started to talk. Question: About troubles? Answer: Yes. Question: What kind of troubles? Answer: About Mr. Dilios, he live with another wife."

James Dilios testified that he arrived in this country on June 8, 1957 and he recited a story of the happiness experienced by his father.

Upon being asked whether or not he ever had any trouble with Mrs. Tomuschat in the restaurant he replied: "I did not have any trouble at the beginning when we first came over here, but we did have trouble later on, when I found out my father had relations with the woman. In other words, that my father was on a friendly basis with the woman, that was when the trouble started."

He denied ever having struck his father and said he had great respect for him. He said he had discussed with his father the relationship with Mrs. Tomuschat. He said that after a period of a few months, he realized his father was a sick man and he asked if it would be possible for him to learn the restaurant business to which his father said it would not be possible at that time because Mrs. Tomuschat did not approve of the idea of James working behind the counter and that the entire proposition would be disagreeable to her. He related an episode occurring at the restaurant about Mrs. Tomuschat objecting to having him behind the counter, lost her temper with him and threw all of his clothes outside, and then telephoned his father. Upon arriving at the restaurant, the father not knowing the facts, but relying entirely upon Mrs. Tomuschat's story ordered him out of the restaurant. He then called the police and informed them that his son was making trouble in the restaurant and the police took him to headquarters. A few days later he decided to go back to the restaurant to work, but before he had a chance to begin, two police officers entered, he said as a result of a telephone call, and they took him to police headquarters again. As to accusations that he took money from the cash drawer, he said that several persons had access to the cash drawer, including Mrs. Tomuschat, and that accusations about money missing, which he says

were false, were made by Mrs. Tomuschat. He further testified that it was a usual occurrence for Mrs. Tomuschat to make complaints to his father on various subjects always in criticism of the boys.

In telling of the relationship between his father and Mrs. Tomuschat, he said, "knowing my father's past, and after being here 5 to 6 months and seeing the very close relationship that my father had with this woman, and realizing every day we were being driven farther and farther apart from one another, my brother, and especially myself, I sat down to have a mind, to talk with him."

He then said that as a result of this talk which he instituted, an argument developed with his father.

> "Q. Will you tell us in your own words, what the argument was between you and your father in 1957?
>
> "A. I asked my father to tell me everything that had happened up to December, 1957, and by asking him that question, my father was deeply hurt. However, I went on and asked my father to explain the situation and to straighten out before things developed into a worse mess than what they already had been into.
>
> "Q. Are you through?
>
> "A. From that moment on, my father sort of withdrew himself from me. However, I continued and told him to stop going to this woman's house every day. My father told me he was sick and he had to have someone to take care of him. However, in return, I told him that he had two sons who could take care of him if he was sick. I did not ask my father to fire this woman from the restaurant. I simply asked him to tell this woman not to infringe on us all the time, not to find certain things that she would throw the blame on, that is, concerning us. My father, in return, told me that: 'I could not tell her anything because

I have been with her for a good many years. If I told her anything to that effect, she would get very mad.' "

William Dilios, the younger boy testified as follows:

"Q. Ever have any fights with your father?
"A. No, I didn't never.

"Q. Ever have any discussion with him about any woman?
"A. Yes, I did.

"Q. Have any discussion about the cashier?
"A. Yes, especially.

"Q. Can you tell us about that?
"A. When we first came here, we are from different country. We didn't know the language. We couldn't understand many things first days, but we saw plenty. We saw father, when we came, introduce us everybody in restaurant and to that lady to say: 'Here is my cashier.' We were, we have respect for everybody, to her. After a little while, we saw things different. We saw father to act different, go in her house, to go out with her, go and came with her, we saw father sit and wait for her to come in restaurant, to eat together. I ask my brother what is going on here. He explain to us this, my brother, after I went in, told father what I told him. Father come and said: 'I know what I am doing. You are too young.' I kept quiet."

He then relates a story of increasing trouble fanned by arguments between the older boy and his father.

He testified that Mrs. Tomuschat accused him and his brother "about everything happen in the restaurant." He said, these accusations were made to his father.

He denied that his brother ever struck their father. While the testimony is somewhat confused because of lack of knowledge of the English language, it appears that his

father was either taken sick at Mrs. Tomuschat's home or died there and William was not notified of his father's death until several hours later.

In describing arguments with his father, he said:

> "Q. Had arguments with your father?
> "A. We had arguments.
>
> "Q. About what?
> "A. About the lady and about the things happen about her. That was the conversation every day.
>
> "Q. Did he come back to you and complain to you and tell you she complained to him about what you did in the restaurant?
> "A. Yes.
>
> "Q. Did you admit that you did these things in the restaurant?
> "A. Yes. He was so close to her; he was so scare from her, he couldn't see in front of her nothing."

Mrs. Tomuschat was called as a witness, but her testimony was very brief. She was not asked to explain her marital status, but said she had been employed in this restaurant since 1943, having first started to work for the predecessor of Dilios. She denied having trouble with the boys. Upon being asked whether or not Dilios had trouble with the boys, she said, because she could not understand Greek, she did not know what he was saying to them. She was evasive in her answers regarding arguments between the father and the sons and said he did not discuss with her what took place at his home. She denied having any arguments with either or both of the boys and said that no problems existed. Upon being asked whether or not Dilios was indebted to her. She said:

> "Well, it is hard to say how it was. I never kept track. Sometimes he borrowed some from me when

he was short, a lot of times. I worked a lot of over time and never got paid for it.

"Q. At the time of his death, you have any indication of the amount?

"A. I have no record of it.

"Q. As far as you are concerned, he owed you nothing?

"A. Just from my working there, and working the way I did.

"Q. Would you hazard a guess as to what you feel he owed you for money?

"A. No, I will not guess."

The testimony of the Portland Chief of Police, called as a rebuttal witness by the appellants is of interest. It seems he says he became rather friendly with Dilios late in 1957. This friendship or relationship started as a result of the fact that the wife of the Police Chief was in the hospital for a period of over three months beginning November 1957 and that because of convenience, the Chief ate his noon meal at the restaurant. He relates conversations with the testator in particular reference to alleged troubles with his sons and it is to be noted that these conversations began in November and December, just before the time the new will was drafted. It appears that shortly after the beginning of the year 1958, Dilios requested that the police officer on the beat early in the morning be on hand as the father anticipated trouble with the older boy. Note that this is immediately after the execution of the will of December 31.

He said that Dilios had informed him of an incident where the older boy took a bed post and struck the younger boy with it. Such a story hardly seems reasonable as it is difficult to conceive how a bed post could be extracted from a bed. Moreover, the Chief admitted that upon one of the trips when James was taken to police headquarters, his father did not accuse him of beating up his younger brother.

In the conversation with the Chief, Dilios told him that it was his intention that the boys should learn the business and eventually take it over. The Chief admitted in cross examination that during the three and one-half month period from November 1957 to February 1958, Dilios said William was a good boy and that he was proud of him. The Chief testified that Dilios was not in good physical shape during this period.

In approaching the issue of undue influence, we may well ask ourselves several questions. Was there proof of facts from which the presiding justice could draw inferences and reach a conclusion, based upon the ordinary experience of mankind, that the will of Christos Dilios was obtained by undue influence? Was there proof of facts giving rise to a logical inference on the part of the presiding justice that undue influence was present at the time Christos Dilios executed the instrument purporting to be his last will and testament? Was there proof of facts from which the presiding justice could properly infer and conclude that the mind of Christos Dilios at the time he executed the instrument now before us for interpretation was not free and untrammelled?

Unless the decrees of the presiding justice of the Supreme Court of Probate are clearly erroneous, there is no other course for us to follow except to overrule the exceptions and affirm the decrees.

This is the admonition given us by Rule 52 (a) M. R. C. P. which reads in part as follows:

> "Findings of fact shall not be set aside *unless clearly erroneous,* (emphasis supplied) and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

As pointed out in the very recent decision of *Harriman* v. *Spaulding,* 156 Me. , this rule now spells out in definite and positive language the applicable standard previously

set forth in a long line of decisions of this court, and applies to findings of a single justice sitting in the Supreme Court of Probate. See *Chabot & Richard Company* v. *Chabot,* 109 Me. 403, 84 A. 892; *Ayer* v. *Railway Company,* 131 Me. 381, 163 A. 270; *Flagg* v. *Davis,* 147 Me. 71, 75, 83 A. (2nd) 319; *Waning, Applt.,* 151 Me. 239, 252, 253; 117 A. (2nd) 347; *Everett* v. *Rand,* 152 Me. 405, 407; 131 A. (2nd) 205; *Ray* v. *Lyford,* 153 Me. 408, 140 A. (2nd) 749.

Now, what of the proven facts which were before the presiding justice for his consideration?

We find a situation where it is admitted that the bringing to this country of the two sons of the testator represented the culmination of a life long dream; that his happiness knew no bounds upon their arrival; and yet within the short period of a few months after their arrival he turned against them to such an extent that he first disinherited the older son and shortly thereafterwards, took the same course in reference to his younger son.

There was ample evidence in the record to authorize the presiding justice to find that the trouble between the father and the sons developed as a result of the machinations of Mrs. Tomuschat, the cashier, in his restaurant. The record indicates that from the very beginning, the older boy made known to his father his objections to the relationship with the cashier, and that later, the younger boy voiced the same objections. There is evidence permitting the presiding justice to find that bitter feeling on the part of the father towards his sons developed as a result of continued accusations made by Mrs. Tomuschat to the father about alleged improper actions on the part of the sons in the restaurant, accusations which were unfounded in fact and which were concocted by Mrs. Tomuschat.

That there was a close relationship between the testator and Mrs. Tomuschat is proved by the evidence of the two

boys as well as by the testimony of two friends of the testator.

While illicit relationship between the testator and the person alleged to have exerted undue influence is not enough *per se* to raise a presumption that a will was procured by undue influence, such a relationship is a fact to be considered along with other facts relating to the question of whether or not a purported will was procured by undue influence.

It is pointed out in 54 Am. Jur., Wills, § 444, that although the existence of an illicit relationship does not of itself justify finding that undue influence was in fact exerted on the testator, that the law recognizes that the difficulty of uncovering undue influence is greatly increased where the persons involved have been in an illicit relationship, and coercion of the testator may be inferred from less evidence where the person charged therewith was in an illicit relationship with the testator.

The testimony of Mrs. Tomuschat and her demeanor upon the witness stand, may well have had a bearing upon the final conclusions of the presiding justice. While there is no evidence in the record to show that she knew that Christos Dilios was executing new wills, it is difficult to believe, in the light of human experience, when her close relationship with the testator was so clearly shown, that she did not know that the testator was executing wills in which he was disinheriting his sons. True, she testified that she had no trouble with the boys and that she did not know their father was having trouble with them. However, the presiding justice did not have to believe her testimony.

Moreover, the presiding justice had for consideration the testimony of the two friends of Dilios, one of whom testified that Dilios told him that he had been going around with Mrs. Tomuschat for 12 or 13 years and had taken the best

years of her life, and that he could not put her away because the boys had arrived, and that the real reason for disinheriting the boys was the fact that "they cannot get along with the lady." The testimony of the other witness was to the effect that he was in "big trouble"; that he requested this witness not to ask him any more questions and then started to cry.

While we have seen that the person who is alleged to have exerted the undue influence does not necessarily have to be a beneficiary, there was a basis for an inference on the part of the presiding justice that Mrs. Tomuschat had a motive for the disinheritance of the boys. Not only was she given some property in payment, the will said, for money loaned by her to the testator, a fact left in serious doubt by her own testimony, but she had an expectation of a long period of employment, which without question would cease as soon as either of the boys acquired possession of the restaurant for which possession and ownership previous wills had made provision.

Christos Dilios was in a condition enfeebled by a serious illness when he executed the will of December 31, 1957 and he died a very short time after he executed the instrument which is now before us for consideration. One fact which has a bearing upon the condition of his mind at the time of the execution of the instrument in question, is that although there was no provision for taking care of the younger boy in the instrument, he nevertheless told his close friends that his lawyers were to take care of the boy.

There is no set formula to determine the workings of the human mind. The existence of the mind, its nature, and its operations, can be deduced only from the known conduct of the human being.

Here we find an unnatural and unjust testamentary disposition, and while this does not alone carry the issue of undue influence, along with other circumstances, it may well be sufficient.

We have examined the record with great care. We have been assisted by very excellent briefs filed by counsel for both sides. We arrive at the conclusion that the record indicates that there were facts proven from which the presiding justice could logically infer that when Christos Dilios executed the instrument purporting to be a last will and testament, his act was not that of a mind free and untrammelled.

Two eminent jurists have resolved the issue in similar manner. There were facts proven permitting a finding that Christos Dilios, because of his weakened physical condition and other factors, was a person whose mind could be influenced; and facts proven from which a logical conclusion could be reached that he submitted to the overmastering effect of unlawful influence, such as to invalidate the instrument now purporting to be his last will and testament. The contestants have not sustained the burden of showing that the decrees of the presiding justice of the Supreme Court of Probate upon the issue of undue influence were clearly erroneous.

Having determined that the decrees of the presiding justice below to the effect that undue influence invalidated the instrument purporting to be the last will and testament of Christos Dilios, are well founded in law and in fact, it is unnecessary for us to consider the issue of mistake.

The entry will be:

Exceptions overruled.

Decrees below affirmed.

Counsel fees and expenses to be awarded to counsel for proponents and contestants, the amount thereof to be fixed by the Probate Court and charged as an expense of the administration of the estate.

STATE OF MAINE
vs.
CITY OF WESTBROOK

Cumberland. Opinion, December 23, 1960.

Municipal Corporations. Minimum Wages.

The powers and liabilities of municipal corporations, as political agencies of the State, are only such as are conferred and created by the legislature.

The minimum Wage Law withheld members of the municipal fire departments from its purview, R. S., 1954, Chap. 30, Sec. 132-A. The law refers to "any occupation" . . . (meaning) "an industry, trade or business or branch thereof or class of work therein."

ON REPORT.

This case is before the Law Court upon demurrer and report. Demurrer sustained.

Arthur Chapman, Jr.,
Peter Kyros,
Jacob Agger, for State.

James E. Gagan, for City of Westbrook.

Barnett I. Shur, Amicus Curiae.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

SULLIVAN, J. This case is reported to the Law Court by agreement of the parties.

The respondent city is charged with having paid an employed member of its fire department a wage less than one dollar per hour in violation of R. S., c. 30, §§ 132 - A - 132-J, additional (P. L., 1959, Chapter 362). To such complaint against it the respondent has demurred and thereby pre-

sents the issue whether that fireman has been excepted from inclusion within the provisions of the Minimum Wage Law cited *supra* in as much as:

> " - - - a demurrer admits all such matters of fact as are sufficiently pleaded."
>
> *State* v. *Peck,* 60 Me. 498, 501.

The respondent is a body corporate whose members are its residents. R. S., c. 90-A, § 2 (P. L., 1957, c. 405, § 1).

This court in an advisory opinion quoted with approbation in *Chase, Adm.* v. *Litchfield,* 134 Me. 122, 127, has said:

> " - - - Extensive powers are conferred on these corporations, — but they are public corporations for public purposes - - - "
>
> *Opinion of the Justices,* 58 Me. 590, 596.

In *Home* v. *Presque Isle Water Co.,* 104 Me. 217, 225, it is stated:

> "It is only necessary to be reminded here that the inhabitants of the several cities and towns in this State are not voluntary associations or business corporations, but political agencies created for the more effectual discharge of certain duties of political government, and that the powers and liabilities of these agencies are only such as are conferred and created by the legislature."

In *Eames* v. *Savage,* 77 Me. 212, 218, we find:

> " - - - Towns, however, are not full corporations. They have no capital stock, and no shares. They are only quasi corporations, — created solely for political and municipal purposes, and given a quasi corporate character for convenience only - - - "

The Minimum Wage Law, R. S., c. 30, § 132-A, announces:

> "It is the declared public policy of the State of Maine that workers employed in any *occupation* should receive wages sufficient to provide adequate maintenance," etc. (Italics supplied.)

R. S., c. 30, § 132-B, specifies as follows:

> **Definitions.** Terms used in sections 132-A to 132-J shall be construed as follows, unless a different meaning is clearly apparent from the language or context:
>
> -
>
> "**IV.** 'Occupation,' *an industry, trade or business or branch thereof or class of work therein* in which workers are gainfully employed." (Italics supplied.)

The conclusion is compelling that the Legislature withheld members of municipal fire departments from the purview of the Minimum Wage Law.

Demurrer sustained.

SAMPSON-SAWYER CO., INC.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR
STATE OF MAINE

Kennebec. Opinion, December 28, 1960

Taxation. Sales Tax.
Permanent Classified Permits.

R. S., 1954, Chap. 17, Secs. 14 and 20 authorize a retroactive deficiency assessment based upon an amended permanent classified permit.

The establishment of a formula or standard by the assessor to determine the inaccuracy of exempt sales of a classified permit is not legislative but explanatory and interpretive.

Regulation 13(b) of the Sales and Use Tax Law was issued by the assessor for the purpose of administering R. S., Chap. 17, Sec. 14 and the rule is not repugnant to, nor does it exceed the legislative intent.

Bulletins do not have the force of the law but are, in some respects, guides to the taxpayer informing him of the assessors interpretation of the law and of the manner he intends to enforce it.

Administrative rules are sometimes legislative, sometimes interpretative and sometimes merely procedural, others implement the statute by stating policy. A tax administrator, however, has no authority to promulgate a rule so as to impose a tax where one is not taxable under the statute.

ON EXCEPTIONS.

This case is before the Law Court upon exceptions to the dismissal of an appeal. Exceptions overruled.

Preti & Preti, for plaintiff.

Ralph W. Farris, Asst. Atty. Gen., for defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, DUBORD, SIDDALL, JJ.

TAPLEY, J. On exceptions. The appellant was assessed a tax of $1328.99 as a deficiency assessment. An oral hearing for reconsideration of assessment was held before the State Tax Assessor. The assessor refused reconsideration of the assessment and to this refusal the appellant appealed to a single justice of the Superior Court, as provided by statute (Chap. 17, Sec. 33, R. S., 1954). The justice below, after a hearing, dismissed the appeal. Appellant took issue by filing exceptions and it is on these exceptions that the matter is before this court for consideration.

The appellant, Sampson-Sawyer Co., Inc., is a supermarket, a retail grocery store having a place of business in Augusta, Maine. It handles meats, produce, dry groceries and other classifications normally found in supermarkets. Five thousand items constitute the inventory. Malt beverages have been sold by the appellant since August 15,

1954. On December 16, 1953 the appellant was granted a permanent classified permit of 90% by the State Tax Assessor, meaning that for sales tax purposes the appellant would collect and pay to the State Tax Assessor the sales tax computed by applying the applicable sales tax rate against 10% of the gross sales of the store. Following an audit a deficiency assessment was made covering a period from September 1, 1956 through July 31, 1958. Subsequent to the audit, and as a result of it, the tax assessor, in accordance with the terms and provisions of Sec. 14, Chap. 17, amended the permanent classified permit from 90% to 86.7%. This meant that the sales tax would be applicable to 13.3% of the gross sales of the store.

The exceptions, in substance, present these issues:

1. That the findings of fact of the presiding justice are not supported by sufficient credible evidence.

2. The State Tax Assessor has unconstitutionally administered a constitutional statute through his regulations by using words upon which he relies for his deficiency assessment which are so vague, indefinite and confusing to persons to whom the act or regulation applies that they cannot tell with sufficient definiteness what the regulation requires of them.

3. The State Tax Assessor has unconstitutionally administered a constitutional statute through his use of an administrative "rule of thumb" in that the administrative rule discriminates, by its very nature, between retailers having identically the same types or kinds of businesses and similar changes in the percentage of taxables upon audit, thus not affording the appellant equal protection of the law.

The State Tax Assessor bases his authority for making a retroactive deficiency assessment on Sec. 20, Chap. 17, and Regulation 13 (b) (4).

"**Deficiency assessment.** — After a report is filed under the provisions of this chapter, the assessor shall cause the same to be examined, and may make such further audits or investigations as he may deem necessary and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under this chapter, he shall assess the additional taxes and interest due the state, give notice of such assessment to the person liable, and make demand upon him for payment but no such additional assessment can be made after 2 years." Sec. 20, Chap. 17, R. S., 1954.

"**b. Permanent Permits.** A permanent classified permit will be issued after the business of the temporary permit holder has been audited by the Bureau of Taxation. The permanent percentage will be based upon such audit. *The permanent percentage will be used for reporting purposes, and its use will not result in any additional assessment upon audit unless some major change in the retailer's business has occurred in the interim. Therefore, if the retailer changes his type of business in any material respect, as by adding other lines of taxable or non-taxable merchandise, he should notify the Bureau of Taxation promptly so that an adjustment in the permit may be made.* For further information as to permanent permits, see (4), below." (Emphasis supplied.) Sales and Use Tax Regulation 13.

"**4. Permanent Classified Permit.** A permanent classified permit will be issued to the applicant at such time as it is possible for the Sales Tax Division to make a thorough audit of the taxpayer's business. The permanent permit will be issued only upon written consent of the retailer. *The percentage granted in a permanent classified permit will not be subject to change unless the nature of the retailer's business changes materially. The holder of a permanent classified permit should report any material change in his business, likely to affect the percentage issued, to the Sales Tax Division promptly.* Except in the case of such change,

> the percentage granted by the permanent classified permit will not be subject to change except upon further audit by the Sales Tax Division. So long as the permanent classified permit is in effect, the retailer's liability so far as the breakdown of sales of tax exempt commodities is concerned, will be limited by the percentage granted. Any audit made for the period covered by the permanent classified permit for the purpose of verifying returns of the retailer will be based upon such percentage. Thus no deficiency assessment will be based upon any variance between the permanent percentage issued and the retailer's actual records, *except in the case of a material change in the type of business.*" (Emphasis supplied.) Sales and Use Tax Regulation 13.

The appellant concedes the assessor had the right to change the classified permit, after audit, but that under the circumstances of this case there was no vested authority for him to make a retroactive deficiency assessment for the period between September 1, 1956 through July 31, 1958, because the fact that the appellant added the sale of malt beverages to its business did not conform to the terms and definitions contained in Regulation 13 or in the various information bulletins issued by him. This presents the question as to what part Regulation 13 and the informative bulletins play in the administration of the sales tax law and what bearing they may have on the authority of the tax assessor to impose the retroactive deficiency assessment. The Legislature saw fit to provide the assessor with authority to make reasonable rules and regulations for the proper and efficient administration of his office.

> "**Administration.** — The Assessor is authorized and empowered to carry into effect the provisions of this chapter and, in pursuance thereof, to make and enforce such reasonable rules and regulations consistent with this chapter as he may deem necessary." Sec. 23, Chap. 17, R. S., 1954.

Here lies the power, in the first instance, for the issuance of Regulation 13 and various informative bulletins. The authority of the assessor to amend or revoke a classified permit is found in Sec. 14 of the Act:

> "Such classified permit may be amended or revoked as to its classification whenever the assessor shall determine that the percentage of exempt sales is inaccurate."

The authority conferred is the right to amend or revoke when he, the assessor, determines that the percentage of exempt sales is inaccurate. The authority given to the assessor lacks direction as to method of determining when exempt sales are inaccurate. The assessor in the proper administration of his office must of necessity establish a formula or standard which when applied to a given situation would determine the inaccuracy of the percentage of exempt sales. In establishing this standard he was not legislating the imposition of taxes but was explaining and interpreting a provision of the statute to the end that the retailer would be in possession of information which would be helpful to him in meeting the requirement of reporting new lines of merchandise which would give rise to an amended or revoked classification of percentage of exempt sales.

The appellant argues that because the assessor in his regulation and general information bulletins used words of definition which were vague, indefinite and confusing that he is unconstitutionally administering a constitutional statute and that he is further unconstitutionally administering a constitutional statute by establishing a "rule of thumb" rule in defining a "major change" as a change in excess of 30% of taxables from a previously granted permanent classified permit. The general information bulletins and Regulation 13, insofar as they treat of classified permits, were issued to assist in carrying out the intent of the Legislature. The rules promulgated therein do not exceed

legislative intent nor are they repugnant to or inconsistent with the provisions of Sec. 14 of the Sales and Use Tax Law. Recognition is given to the fact that interpretative bulletins issued by administrators play an important part in the administration of laws. In this connection reference is made to the case of *James P. Mitchell, Secretary of Labor, U. S. Department of Labor, Applt.* v. *The Kroger Company,* 248 F. (2nd) 935. In this case the court said, on page 941:

> "Reliance is had herein on an Administrator's interpretative bulletin of 1944, wherein it was indicated that traveling auditors under the facts given there would be included in the exemption. The Administrator's interpretative bulletins carry weight but are not controlling."

The assessor, with authority, issued Regulation 13 for the purpose of administering that portion of Sec. 14, Chap. 17 concerning classified permits wherein the percentage of exempt sales was established. This regulation is in part explanatory and also in its terms procedural. That portion germane to the issue states that the permanent percentage established in a classified permit shall be used for reporting purposes and its use will not result in any additional assessment *"unless some major change in the retailer's business has occurred in the interim."* The assessor by way of explaining or defining *"some major change in the retailer's business"* says, in Regulation 13 (b):

> " - - - - Therefore, if the retailer changes his type of business in any material respect, as by adding other lines of taxable or non-taxable merchandise, he should notify the Bureau of Taxation promptly so that an adjustment in the permit may be made."

Not only does the assessor define what he means by a "major change" but he adds a note of caution to the retailer saying that if he changes his type of business *"by adding other lines of taxable or non-taxable merchandise"* he shall notify the Bureau of Taxation promptly so that an adjustment in

the permit may be made. In addition to this regulation the assessor in furtherance of the proper administration of the Act caused to be issued and circulated among the retailers general information bulletins. In some of these bulletins he informed the retailer of what he meant by the following words contained in Regulation #13, (4), "the percentage granted in a permanent classified permit will not be subject to change unless *the nature* of the retailer's business changes materially." and in the regulation (b), "unless some major change in the retailer's business has occurred."

The bulletins state:

> "The percentage given on a Permanent Classified Permit which is established upon audit, is not subject to change *unless the nature of the business changes materially.*" (Emphasis supplied.) Bulletin # 11.
>
> "The permanent permit, - - - will protect the seller against an assessment upon audit, *unless there has been a substantial change in the character of the seller's business.*" (Emphasis supplied.) Bulletin #17.
>
> *"The question may be raised as to what constitutes a radical change in the nature of a business,* such as will result in a retroactive change under a classified permit. *As a rule of thumb, if the percentage of taxables upon audit differs from that used for the permit by more than 30%, a retroactive adjustment can be expected.*" (Emphasis supplied.) Bulletin #18.

At this point it is important to note that the increase in taxables was found, upon audit, to be over 30%. From the nature of the explanatory material in these bulletins it can be properly inferred that they contribute information and assist the retailer in the conduct of his business, tax-wise, when operating under classified permits issued by the tax assessor. These informative bulletins used various descriptive adjectives and phrases and when taken in context seem

to bear a similarity of description. The bulletins serve the purpose of interpretation and the establishment of policy under the provisions of Regulation #13 as to permanent classified permits. They are, in some respects, guides to the retailer informing him as to the assessor's interpretation and construction of Sec. 14 and the manner in which he intends to enforce it. They do not have the force of law but are interpretative of the application of the Act insofar as the retailer's legal responsibility is concerned under the permanent classified permit as provided by Regulation #13.

In the case of *Skidmore, et al.* v. *Swift & Co.,* 323 U. S. 134, the court deals, to some extent, with the rules and regulations promulgated by an administrator. The court said, on page 137:

> "But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. - - - - - He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."

In *Comptroller of Treasury* v. *M. E. Rockhill, Inc.,* 107 A. (2nd) 93 (Md.), the court, in considering administrative rules on page 98 said:

> "There are several different classes of administrative rules. Some are legislative rules, which receive statutory force upon going into effect. Others are interpretative rules, which only interpret the

> statute to guide the administrative agency in the performance of its duties until directed otherwise by decisions of the courts. Some rules are merely rules of procedure. Others implement the statute by stating the policy by which the agency will be governed in the exercise of its authority."

Again, on page 98:

> "There can be no question that an administrative official charged with the enforcement of a sales tax statute has no authority to promulgate a rule for the computation of a tax so as to impose the tax upon a transaction which is not taxable under the provisions of the statute. No tax can be lawfully imposed except upon express authority vested in the official who seeks to impose it. In interpreting a tax statute, the court must not extend its provisions by implication beyond the clear import of the language employed."

And on page 97:

> "The sales tax is an excise tax imposed by the Legislature in the exercise of the police power of the State. The Legislature, in Section 361 of the Retail Sales Tax Act, authorized the Comptroller to adopt such rules and regulations as he shall deem necessary to carry out the provisions of the Act and to define any terms used therein. It is universally recognized that it would be impossible for the Legislature to deal directly with the multitude of details in the complex conditions upon which it legislates, and so it has become customary for the Legislature to delegate to each administrative agency the power to make rules and regulations to carry legislation into effect. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost."

The assessor was clothed with the authority under Sec. 14 to determine whether the percentage of exempt sales was

inaccurate or not. He promulgated Regulation 13 and issued informative bulletins advising as to the method which he would use in determining inaccuracy. This appellant was fully informed as to the procedures the assessor would adopt and, in addition, was warned that it should notify the Bureau of Taxation promptly if it was adding other lines of taxable or nontaxable merchandise in order that an adjustment in the permit could be made. Despite the regulation and informative bulletins the appellant chose not to comply so, upon audit, it was charged with a deficiency assessment which under the powers given him under Sec. 14 the assessor had a legal right to do.

We are of the opinion insofar as the complaint of unconstitutional procedure on the part of the assessor is concerned that it is groundless. The procedures of which it complains are more beneficial to it than detrimental.

The justice below heard the appeal and denied the same. The record discloses sufficient credible evidence to support his findings. There were no errors of law.

The appeal section of the Sales and Use Tax Law reads in part:

> "Hearings may be had before the court in term time or any justice thereof in vacation and the decision of said court or justice upon all questions of fact shall be final."
>
> Chap. 17, Sec. 33, R. S., 1954.
>
> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> Rule 52 (a) Maine Rules of Civil Procedure.

See *Harriman* v. *Spaulding,* 156 Me. 440.

The entry will be,

Exceptions overruled.

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE AND MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following amendments to the rules adopted, prescribed and promulgated on June 1, 1959, as amended on September 1, 1959, November 2, 1959, and February 1, 1960 for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, are hereby adopted, prescribed and promulgated to become effective on the first day of September, 1960. Said rules as thus amended shall be recorded in the Maine Reports.

Dated the 22nd day of August, 1960.

ROBERT B. WILLIAMSON,
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

EFFECTIVE SEPTEMBER 1, 1960

1. Rule 13 (a) is amended by inserting after the word "statute" in line 2, the following language:

> "or unless the relief demanded in the opposing party's claim is for damage arising out of the ownership, maintenance or control of a motor vehicle by the pleader,"

so that Rule 13 (a) as so amended shall read in full as follows:

> "(a) *Compulsory Counterclaims.* Unless otherwise specifically provided by statute or unless the relief demanded in the opposing party's claim is for damage arising out of the ownership, maintenance or control of a motor vehicle by the pleader, a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

2. Form 1 and Alternate Form 1 are amended by striking from the last sentence of each the words "As provided in Rule 13 (a)," and substituting in lieu thereof the following:

> "Unless the relief demanded in the complaint is for damage arising out of your ownership, maintenance or control of a motor vehicle or unless otherwise provided in Rule 13 (a),"

A True Copy

ATTEST:

FREDERICK A. JOHNSON
Clerk of the Law Court

STATE OF MAINE

SUPREME JUDICIAL COURT

AMENDMENTS TO

MUNICIPAL COURT CIVIL RULES

All of the Justices concurring therein, the following amendments to the Municipal Court Civil Rules are hereby adopted, prescribed and promulgated to become effective on the first day of January, 1961. The rules as amended herein shall be recorded in the Maine Reports.

Dated the 6th day of December, 1960.

ROBERT B. WILLIAMSON,
Chief Justice
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

AMENDMENTS TO MUNICIPAL COURT CIVIL RULES EFFECTIVE JANUARY 1, 1961

1. Rule 8 is amended to change "Rules 7 to 12, inclusive" in the first line to read "Rule 7 to 11, inclusive." Also subparagraph (1) is deleted and the following is substituted in its place:

> "(1) No answer shall be required to be filed by the defendant. If the defendant shall file with the Court not later than 3 days after the return day a written statement that he wishes to appear and defend and that service of any papers may be made upon him by mailing a copy to him at a designated address, he may defend on any ground which might be raised in an answer pursuant to Rule 12 of the Maine Rules of Civil Procedure."

2. The Summons, Form 1 attached to the Municipal Court Civil Rules is amended by deleting everything in the Summons commencing with the second sentence starting, "You are hereby summoned," etc., and substituting therefor the following:

> "You are hereby summoned and required to sign and deliver the statement below by hand or by mail to the Waterville Municipal Court at (address of Court) not later than 3 days after the first Monday of (name month and year when the action is returnable). If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.
> (Seal of the Court)
>
> Dated .....
>
> Signed:
>
> _____
> Judge/of *said* Municipal Court
>
> (Tear along this line)

STATEMENT BY DEFENDANT

To: Municipal Court of Waterville

_____ Street

Waterville, Maine

Re: A.B., Plaintiff
v.
C.D., Defendant

I, the Defendant (name), wish to defend against this action brought by the Plaintiff (name), and I therefore appear in this action. All papers in this action may be served upon me by mailing the papers to me at (Address of Defendant or Defendant's Attorney).

_____
Defendant"

3. Rule 5 (1) is amended to read as follows:

"(1) The summons shall notify the defendant of the day when the action is returnable and that unless he not later than 3 days after the return day files with the court a statement that he wishes to defend against the action and that any papers in the action may be served upon him by mailing the same to him at a designated address, judgment by default will be rendered against him for the relief demanded in the complaint. The summons shall also have attached to it a form of such statement which may be detached by the defendant, completed and signed by him, and filed with the court."

4. Rule 6 is amended to read as follows:

"Rule 5 of the Maine Rules of Civil Procedure governs the service and filing of pleadings and other papers, except that a defendant not represented by counsel may deliver by hand or by mail any such

paper to the court without serving it in accordance with said Rule 5."

5. Rule 25 is amended to read as follows:

"Rule 64 of the Maine Rules of Civil Procedure governs actions of replevin, subject to exception (1) of Rule 8 of these Municipal Court Civil Rules."

Frederick A. Johnson, Clerk
Law Court

INDEX

ESCAPE

Where manifest errors of law exist and injustice will result, such errors may be examined upon motion for a new trial.

An indictment which recites that the "escape occurred while the respondent was *lawfully detained* in the county jail at said Alfred" is but a statement of a legal conclusion, and such allegation is inadequate unless sufficient facts are alleged to show the lawfulness of the detention.

One who has been convicted and sentenced to imprisonment should not be unreasonably detained. The reasonableness of detention prior to delivering the prisoner depends upon circumstances. The issue of the reasonableness of the detention is a matter of law for the court—not a jury question.

One charged with crime is guaranteed a speedy trial by the Constitution. The issue of speedy trial may be raised by motion. Motion to quash or plea in abatement. This right may be waived.

Whether respondent waived his constitutional rights to speedy trial are questions of law to be decided by the court within its discretion —not questions of fact for a jury.

State v. *Couture*, 231.

ESTATE TAXES

Maine Inheritance Taxes are neither "debts" nor "charges of settlement" within the meaning of R. S., 1954, Chap. 170, Sec. 20.

A widow who waives her husband's will receives no benefit from a "tax clause" neither may she receive equitable relief from the burdens of state inheritance taxes even though credit therefor is allowed in the computation of Federal Estate Taxes.

Federal Estate Taxes are not "debts" within the meaning of R. S., 1954, Chap. 170, Sec. 20. "Debts" are obligations created by decedent and founded upon contract express or implied.

"Charges of settlement" under R. S., 1954, Chap. 170, Sec. 20, embrace all ordinary costs and expenses of administration of an estate and such concept is broad enough to include Federal Estate Taxes.

Federal Estate Taxes are not taxes on succession or on receipt of a benefit; they deplete the estate instantly and are death duties on the interest which ceased by reason of death.

The "distributable assets" from which a widow's statutory share is taken is computed only after deduction of the Federal Estate Tax and the consequential tax burden upon the widow of a portion of such tax is not to be relieved because that portion of the estate which descends to her qualifies for marital deduction. In a sense the marital deduction belongs to the estate not the widow.

Maine has no apportionment statute.

Apportionment of the burdens of taxation involves public policy and should be left to the legislature.

Federal taxes upon non-testamentary insurance items is governed by Federal law (USCA Sec. 2206) and no contribution to such tax is required.

State law governs the duty of contribution by a widow as to Building and Loan shares and such non-testamentary items must share the burden of Federal taxation.

The words "total estate" in the instant case were intended by the testator to mean "total residuary estate" since such interpretation is consistent with testator's testamentary pattern.

The impact of a widow's waiver, in the absence of governing language in the will, should fall upon all beneficiaries proportionately.

Acceleration of a trust will be denied where such would defeat testator's intent or violate governing rules of law.

Old Colony Trust v. *McGowan*, 138.

ESTOPPEL

See Adverse Possession, *Hibbard* v. *Fromkin Woolen Corp.*, 433.

EVIDENCE

See *Res Ipsa Loquitur*, *Fontaine* v. *Jones*, 384.
See Sales and Use Taxes, *Scott Paper* v. *Johnson*, 19.
See *Cole's Express* v. *O'Donnell's Express*, 211.

EXECUTORS AND ADMINISTRATORS

See *Old Colony Trust* v. *McGowan*, 138 (Accounts).

EXCEPTIONS

See Rules of Court, *Hughes* v. *Black*, 69.

FISH AND GAME

See Taxation (Quahog Tax Law), *State* v. *Lasky*, 419.

HUSBAND - WIFE

See *Negligence*, *Johnson* v. *Rhuda*, 370.
Neal et al. v. *Linnell*, 1.

INDECENT LIBERTIES

The touching of the private parts of a nine year old child through her clothing without her consent constitutes an assault and battery indecent in character. R. S., 1954, Chap. 130, Sec. 21.

The guilty intention in assault cases may be inferred from the act.

There is no age of consent in the assault statute.

Where the defense is not "consent" it is not error for the court to fail to instruct on consent.

There is no separate and distinct crime of indecent assault at Common Law.

Exceptions to the denial of a directed verdict and appeal from the denial of a new trial present like questions.

State v. *Rand*, 81.

INDICTMENTS

It is a fundamental principle of criminal procedure that an indictment must contain a direct allegation of every essential element of the crime alleged.

An indictment charging breaking, entering and larceny must charge that the property alleged to have been stolen was the property of one other than the respondent. The owner, if known, must be set forth. These elements must be alleged and proved.

MANSLAUGHTER

Involuntary manslaughter under R. S., 1954, Chap. 130, Sec. 8, prior to the criminal homicide Act. P. L., 1957 as applied to death caused by operation of a motor vehicle occurs (1) when the operator is guilty of criminal negligence, or (2) when the homicide occurs in the performance of an unlawful act *malum in se* or (3) when the homicide occurs in the performance of an unlawful act *malum prohibitum* if the act proximately causes the death.

P. L., 1957, Chap. 333, Sec. 2 repeals by implication and supersedes R. S., 1954, Chap. 130, Sec. 8 so far as it relates prosecutions for criminal negligence but it does not effect the law of manslaughter as it has heretofore been applied in a homicide involving the operation of an automobile, where the basic element of the crime lies in the commission of an unlawful act *malum in se* or *malum prohibitum* unless the proof of the particular unlawful act relied upon as the basis for the manslaughter charge necessarily requires evidence essential to establish the crime of reckless homicide. In such event the offenses are idential and the later statute governs.

A misdemeanor and a felony may be included in separate counts of the same indictment although, if justice requires a prosecutor may be required to elect.

Legislative intent governs statutory construction.

Repeals by implication are not favored; they exist (1) where a later statute covers the whole subject and (2) where the later statute is repugnant or inconsistent.

Repeal by implication for repugnancy is ordinarily limited to the extent of the repugnancy.

Criminal negligence is that degree of negligence or carelessness which is denominated as gross or culpable, involving a disregard for the life or safety of others.

State v. *London*, 123.

Exception taken to the testimony of a doctor who performed a post-mortem examination that there was insufficient evidence of identity of the corpse must be overruled where there has been a sufficient description of the body to lay a foundation for the testimony.

A justice in a criminal case, after the state has rested and after respondent has asked for a directed verdict for failure to prove cause of death, may permit the state to reopen its case and prove cause of death through medical opinion. A trial judge has a wide latitude to the end that justice is not thwarted through a mistake or inadvertence.

A principal of the second degree to a felony is one who is present lending his countenance, encouragement or other mental aid while another does the act. A principal must be present actual or constructive.

A verdict of guilty of manslaughter is proper where a jury could properly find that a mother of a new born infant gave the directions to kill and the verbal aiding and abetting on her part were not the results of a cool and calculating mind but came from one influenced by passion provoked by birth under circumstances fraught with depression.

State v. *Burbank*, 269.

The powers and liabilities of municipal corporations, as political agencies of the State, are only such as are conferred and created by the legislature.

The minimum Wage Law withheld members of the municipal fire departments from its purview, R. S., 1954, Chap. 30, Sec. 132-A. The law refers to "any occupation" . . . (meaning) "an industry, trade or business or branch thereof or class of work therein."

State v. *Westbrook*, 542.

See Public Utilities, *Bangor* v. *P. U. C.*, 455.
See Schools (Sinclair Act), *McGary* v. *Barrows*, 250.

MUNICIPAL RULES

See Rules of Court.

NEGLIGENCE

A verdict will not be set aside unless it is so erroneous as to make it appear that it was produced by prejudice, bias, mistake of law or fact.

The Law Court will not substitute its judgment for that of the jury on questions of fact concerning which conscientious and intelligent men may differ.

A husband can not recover for loss of consortium of his wife or for moneys expended in his wife's behalf where his own negligence contributes to such injuries.

A verdict of $15,000 can not be said to be excessive for services and permanent head injuries affected with past concussional syndrome with symptoms of dizziness, headaches, difficulty arising upon sudden exertion, pain, and spots before her eyes.

$2300.00 for loss of consortium for severe and lasting injuries to a wife is not excessive.

Neal et al. v. *Linnell*, 1.

In an action for injuries suffered by a child from an alleged fall into a newly constructed cellar, the court properly directed a defendant's verdict where the quality of the evidence was insufficient to support a finding that the child fell.

Cf. Special concurrence — no duty under the circumstances.

Lawrence v. *Larsen*, 168.

A cavity in the black top of a sidewalk with a submerged gasoline filler cap for the use of an adjacent gasoline filling station, constitutes a common and public nuisance.

Contributory negligence precludes recovery from injuries arising from the maintenance of a nuisance.

Daniel v. *Morency*, 355.

Children are under an obligation to exercise that degree of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances (11 yr. old).

The failure of a pedestrian to see an approaching car when vision is unobstructed is not contributory negligence as a matter of law when other factual questions remain for determination.

One is entitled to assume and believe that others will obey the law until the contrary is obvious and should be apparent to a person in the exercise of due care.

findings are not based upon substantial evidence, the exceptions must be sustained.

Re: Richer, 178.

The Commission upon consideration of a tariff rate schedule is fully authorized and empowered to investigate, on its own motion, the matter of lawful operations and practices. (R. S., 1954, Chap. 48).

A respondent upon the filing of a rate schedule asserts inferentially that it is authorized to perform the transportation and may be required to prove such facts. (R. S., Chap. 44, Sec. 71.)

It is proper for the Commission to refuse to admit evidence of subsequent operations where no evidence of operations has been produced covering the "grandfather clause" test period.

"Liquid Petroleum" is not a compressed gas as are oxygen and acetylene.

Cole's Express v. *O'Donnell's Express*, 211.

The Legislature must be deemed to have understood and intended by R. S., 1954, Chap. 44, Secs. 69, 71, and 72 that the court may nonetheless exercise "independent judgment" as to facts and yet in that very process be "informed and aided" by the findings of the Public Utilities Commission (14th Amend. U. S. Const.) (Const. of Me. Art. 1, Secs. 1, 6, 19, 21).

In the rate making controversy the company bears the burden of proof and there is a strong presumption in favor of the P. U. C. conclusions. And in the confiscation controversy, the court will not interfere with the rate making power unless confiscation is clearly established.

Exceptions to the Commission's findings of rate of return cannot prevail where the findings are supported by substantial evidence.

In determining rates the Commission has the duty to fix a reasonable value upon company property used or required to be used in service.

A formalistic value judgment by the P. U. C. which excludes from "reasonable value" a 45 year old "write up" by predecessor companies concerning which the C. M. P. was a stranger and concerning which the Commission later assented is not fair compliance with the P. U. C. Law (Androscoggin Electric Co.).

It is error for the Commission to dispense with prudent acquisition costs of utility property purchased as authoritatively prudent pursuant to a merger under the Public Utility Holding Company Act as being at reasonable value and in the public interest, 15 U. S. C. A. 79 a (b) (1). (Cumberland County Power and Light.)

The P. U. C. may reject an item of property value where the company, after fair and timely notice, has failed to clarify either original cost or reasonable value (Robinson Land Co.).

The rejection by the P. U. C. of an item of property value for the acquisition by C. M. P. of 12 miles of riparian lands on the Kennebec River in connection with its upstream power plant is legal error. The company would have been less than prudent if it had not preempted down stream rights because of the state of the common law and the Mill act. (Harris Station.)

Materials and supply items of the working capital account are allowable as part of the base rate if "used or required to be used" in the public service; and where such items for repairs and minor replace-

ments are commingled with construction inventory the commission has the duty and the correlative right to study such property to determine the average needs of the company (working capital).

The use by the Commission of the "average" rather than the "minimum balance" deduction of accrual for Federal Income Tax purposes is justified.

If there is some over-all calculable annual average of extraordinary repairs, the company has the burden of proving such pattern to the Commission for test year normalization.

Where, according to company accounting practice a small percentage of General Administration expenses is allocated to construction thus reducing the general operating expense account during periods of increased construction, it is error for the Commission to regulate for a delayed futurity rather than for a test year actuality when construction was low. The increase, therefore, of the company's *pro forma* net operating income is error.

There is no legal error where the Commission is supported by evidence and statutory principle in normalizing the test year net income because of the economic recession in 1957-58.

Central Maine Power v. *P. U. C.*, 295.

The burden of proof is upon the party seeking to set aside any direction or order of the P. U. C. complained of as unreasonable, unjust or unlawful.

R. S., 1954, Chap. 44, Sec. 17, prohibits unjust discrimination in the allocation of the burden of rates and charges between general water users and public fire protection.

If a factual finding, as a basis of an order of the P. U. C. is supported by substantial evidence, the finding is final.

Substantial evidence is such evidence as taken alone would justify an inference of fact.

The refusal of the P. U. C. to give consideration to "tax exempt" property of a municipality (due to military installations) is not legal error where the city was prosperous, financially sound, and no claim was made that the tax rate was abnormally high.

The refusal of the P. U. C. in applying the "Wisconsin method," so-called, to consider the "tax equivalent" of exempt property was not legal error where such refusal did not result in unjust or unreasonable allocation of rates.

Evidence of rates in other communities is properly excluded where substantially all of the physical and economic factors are not shown to be similar in both communities.

Bangor v. *P. U. C.*, 455.

See Municipal Corporations, *Auburn Water District* v. *P. U. C.*, 222.
See Railroads, *P. U. C.* v. *Maine Central R. R.*, 284.

QUO WARRANTO

The Attorney General may, after commencement of an information in the nature of *quo warranto* by relation of private citizens, dismiss or discontinue the information as of right, in his discretion, without the assent of the relators; and if he does withdraw the action is subject to dismissal.

The Rules of Civil Procedure do not alter the practice prescribed for proceedings in quo warranto. Rule 81 (b).

of 2nd cousins inclusive except by written consent of the parties, will disqualify."

Where there is interest or relationship the disqualification is conclusively presumed, in other cases it must be shown.

The true test on qualification, is whether the relative has an interest *as a party* to the cause or proceeding, or stands in the condition of a party.

The fact of relationship between a judge and attorney is not ground for disqualification except in matters where the court fixes counsel fees in which latter event the attorney becomes a party.

Objections on the ground of disqualifications should be timely and seasonably made upon discovery or such objections may be waived or the party making them may become estopped.

Hughes v. *Black*, 69.

RULES CONSTRUED

CIVIL RULES

Rule 24(a), M. R. C. P., *Gould* v. *Johnson*, 446.
Rule 43(E), M. R. C. P., *Hughes* v. *Black*, 69.
Rule 52(a), M. R. C. P., *Harriman* v. *Spaulding*, 440.
Rule 73, M. R. C. P., *Harriman* v. *Spaulding*, 440.
Rule 73, M. R. C. P., *Elwell* v. *Elwell*, 503.
Rule 81(b), M. R. C. P., *State* v. *Elwell*, 193.
Rule 86, M. R. C. P., *Hughes* v. *Black*, 69.

CRIMINAL RULES

Rule 15, Maine Criminal Rules, *State* v. *Couture*, 231.

SALES AND USE TAX

The limitations of the Sales and Use Tax Law that "Sale Price" (shall not) include the price received for labor and services used in installing or applying or repairing the property sold, *if separately charged or stated* (emphasis supplied) does not preclude a vendee taxpayer under Regulation 8 from showing through records of the vendor or other competent evidence that such items of labor and service were in fact "separately charged or stated" even though such charges did not appear in the vendee's invoices.

It is error for the Tax Assessor to refuse to admit competent and material evidence at a reconsideration hearing.

Scott Paper v. *Johnson*, 19.

The Sales and Use Tax Law which by its 1959 Amendment enlarged the scope of its coverage to include "any rental of living quarters in any hotel, rooming house, tourist or trailer camp" does not authorize the imposition of a tax against boys and girls summer camps where an entire lump sum admission fee is charged and living quarters are only incidental to a bona fide, organized, and disciplined program of instruction and recreation. (R. S., 1954, Chap. 17, Sec. 2 as amended by P. L., 1959, Chap. 350.)

Tax statutes are construed against the government and may not be extended by implication.

The term "tourist camps," "overnight cabin," "overnight camp" have been used interchangeably by the public and their main purpose is to provide temporary sleeping or housing accommodations with

other services rendered as incidental. In a boys and girls summer camp the housing accommodations are incidental.

Camp Walden v. *Johnson*, 160.

R. S., 1954, Chap. 17, Secs. 14 and 20 authorize a retroactive deficiency assessment based upon an amended permanent classified permit.

The establishment of a formula or standard by the assessor to determine the inaccuracy of exempt sales of a classified permit is not legislative but explanatory and interpretive.

Regulation 13(b) of the Sales and Use Tax Law was issued by the assessor for the purpose of administering R. S., Chap. 17, Sec. 14 and the rule is not repugnant to, nor does it exceed the legislative intent.

Sampson-Sawyer Co. v. *Johnson*, 544.

SCHOOLS

Article VIII of the Maine Constitution that "the Legislature is authorized, and it shall be their duty to require the several towns to make suitable provisions, at their own expense, for the support . . . of public schools; . . ." is mandatory not prohibitory and is not a limitation on Legislative power in the field of education.

Section 111-G of the Sinclair Act does not contain an improper delegation of legislative power. The School District Commission does not make law; it administers established law.

To inspect returns and declare the result of an election is a task administrative and not judicial in nature.

There is no constitutional obligation to submitting the question of the formation of a School Administrative District to popular vote of the municipalities involved; and it follows that there can be no valid objection to the act of the Legislature in providing that the determination of the outcome of the referendum be made by the Commission finally and without appeal.

Where there is no objection to the sufficiency of criteria or standards for the establishment of School Administrative Districts, the empowering of the Commission to find "that all other steps in the formation of the proposed School Administrative District are in order and in conformity with law," is not objectionable.

There is no valid constitutional objection either State or Federal to the action of the Legislature in making a certificate of the Commission conclusive evidence of the fact of incorporation (U. S. Const. 14th Amendment).

The interest of taxpaying inhabitants in the creation and establishment of a school district is not a property interest.

Sec. 111-H of the Sinclair Act is not objectionable as impairing the obligations on contract, where no given situation is presented for the court's consideration. The court cannot, however, anticipate issues, constitutional or otherwise, which might arise in the application of Sec. 111-H.

McGary v. *Barrows*, 250.

The issuance of a certificate of organization under Chap. 41, Secs. 111A-111U, R. S., 1954 of the Sinclair Act is not void because made without notice and hearing, since the certificate by legislative man-

PUBLIC LAWS

PRIVATE AND SPECIAL LAWS

UNITED STATES STATUTES

STATUTORY CONSTRUCTION

See Manslaughter, *State* v. *London*, 123.
See Taxation (Quahog Tax Law), *State* v. *Lasky*, 419.

TAXATION

The legislature by its "Act to correct Errors and Inconsistencies" does not enact a "revenue" measure within the meaning of the constitutional provisions, Art. IV, part Third, Sec. 9 (calling for all bills for raising revenue to originate in the house) merely because it repeals the "Quahog Tax Law" by Sec. 21 and reenacts it by Sec. 22 with new section numbers, since sections Sec. 21 (the repeal) and Sec. 22 (the reenactment as corrected) of the "correction Act" accomplish neither more nor less than the amendment of the original tax law.

A finding by the Legislature that quahogs "constitute a renewable natural resource of great value to the Casco Bay Coastal Region and the State" is entitled to the greatest respect as a finding by a coordinate branch of state government.

The purpose of a tax to benefit the public through benefit to the industry is not to be denied for the reason that the numbers engaged in the industry may be relatively small.

Cf. *State* v. *Vahlsing*, 147 Me. 417.

State v. *Lasky*, 419.