MAINE REPORTS

157

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 12, 1961 to DECEMBER 31, 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*
HON. ERSKINE L. DODGE, *Clerk*

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OF THE

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[1]Qualified Dec. 20, 1961

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

MILTON A. NIXON

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

EVELYN A. HORR
vs.
LEE H. JONES AND WINNIFRED L. JONES

JOSEPH A. HORR
vs.
LEE H. JONES AND WINNIFRED L. JONES

Cumberland. Opinion, January 12, 1961.

Landlords. Tenants.
Duty of Inspection. Common Passageways.
Defects. Notice. Constructive Notice.

As to common hallways and stairs under the control of the landlord, he has the duty of reasonable care to keep in safe repair.

A new trial will be denied where the jury were within permissive bounds in deciding that, in the exercise of reasonable care, the defendants could have and should have discovered by plain and simple inspection, the condition and risk involved and made the condition safe.

Webber, J. (Specially). One must reasonably anticipate that unprotected wood exposed to the weather may deteriorate and a duty to inspect, under such circumstances, will arise.

Webber, J. No enlargement of landlord's duty intended by the decision.

Webber, J. *quaere*, concealed defects.

Webber, J. It is not necessary that the defendant should anticipate the precise manner in which the defective condition would produce injury, if in fact it should have been apparent that injury was likely.

ON MOTION FOR NEW TRIAL.

This is a negligence action before the Law Court upon motion for new trial. Motion denied.

Francis Rocheleau, for plaintiffs.

Robinson, Richardson & Leddy, for defendants.

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

RESCRIPT.

SULLIVAN, J. In October, 1959 there were verdicts for the plaintiffs in these actions and the defendants prosecute here their responsive motions for new trials. The defendants were the landlords of the plaintiffs who are husband and wife and who occupied a tenement in a three family dwelling with a common rear entrance in the normal use of which the plaintiff wife sustained injuries. Mrs. Horr was awarded a verdict for her personal damages and her husband a recovery of his derivative losses.

Adjoined to the outside of the tenement house and serving its back door and common inside passageways was an uncovered landing with 3 steps descending therefrom to the ground level. The structure was of wood, 32 inches high, 60 inches long where parallel to the building's side and 45 inches wide. It was decked on top with planks. Its sides were boarded and in one was a hinged door, 25 inches high and 17 inches wide, which swung out to permit abbreviated

access to and a view of the under side of the deck above. The planks of the upper platform were laid vertically to the main building. At their terminals next to the building the planks were nailed to a 2 x 4 strip of wood which in turn had been affixed to the building underneath its back door threshold. At their other extremities the planks were affixed by nails to the top edge of the opposite side of the porch, 45 inches from the house siding. On their undersides the top planks were also medially supported at right angles by 2 separated and parallel timbers, 2 x 4, 60 inches long and each attached at its ends by nails to opposite sides of the porch. The planks were each nailed at 4 intervals — at both extremities and to each supporting timber. There were some 8 planks, painted on top only. They were not tongued or grooved but were laid ⅛ to ¼ of an inch apart, with more or less dirt tracked into the interstices.

The back porch was under the control of the defendants and constituted an appurtenance to the tenements of the tenants in the dwelling.

On the day of the accident the plaintiff wife purposed to do some shopping. She descended the common back stairs of the house, stepped out of the rear door and onto the porch deck. Some planks immediately gave way beneath her feet and she crashed below the platform amongst the collapsed boards. She suffered a serious fracture of her right humerus and a scraped leg. She became fast imprisoned in an upright position until extricated by some men who observed her plight. There had been no visible warning of the treacherous condition before the unfortunate event.

Before arguments parties plaintiff and defendant unified the controversy in the cases at bar to that of negligence on the part of the defendants and specifically to the issue whether the landlords prior to the accident had been afforded constructive notice that the porch deck was not in safe repair.

The motions for new trials assert that the plaintiff verdicts are against law, evidence and weight of evidence.

As for law the legal duty of landlords applicable in the cases at bar has been authoritatively announced by this court.

> " - - - he has a further duty in respect to halls, stairways and approaches which remain in his control subject to use by the tenant or ordinarily by several tenants.
>
> "He must exercise reasonable care to keep these in safe repair.
>
> " - - - - We conceive the true rule to be that the owner must exercise due care to keep in reasonably safe repair, stairways and passage ways which remain under his own control.
>
> *Miller* v. *Hooper,* 119 Me. 527, 528, 529.
>
> "It is almost universally held that a landlord who has retained control of common stairways owes to his tenants and their invitees the duty of exercising ordinary care to keep such stairways reasonably safe for their intended use. - - - -"
>
> *Thompson* v. *Frankus,* 151 Me. 54, 55.

As to the evidence and its weight in these cases our decisions are clear and uniform.

> "Under the familiar rule we take the evidence with all proper inferences drawn therefrom in the light most favorable to the jury's findings and the verdict stands unless manifestly wrong. - -"
>
> *Britton* v. *Dube,* 154 Me. 319, 320.
>
> "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 (are) 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."
>
> *Neal* v. *Linnell,* 156 Me. 1, 4.

The record contains the evidence submitted for jury consideration which we must examine appreciably with the decisions quoted, *supra.*

Several men including the plaintiff husband assisted Mrs. Horr in her plight. Planks were torn away and she was extricated. No planks had been broken by the accident and all of them appeared to be sound. Where the planks had been removed the husband saw a piece of 2 x 4 slanting down from the westerly side of the porch which seemingly would be that side to the right of one leaving the rear door of the tenement house. The husband wrenched the piece of wood and his hands thereupon became wet and soggy. Rotten and decayed timbers — two or three at least — were observed by a witness. After the woman was rescued a witness took 4 pieces of 2 x 4, wet, soggy, crumbly and in varying states of deterioration. They had been attached to the planks inside the hole caused by the mishap and were tipped downward. They were disengaged by the witness who stated the opinion that some portion of them at least was the center support of the planks. The 4 pieces of wood were admitted as exhibits at the trial.

A former carpenter now chief executive of a home construction firm was of the opinion that the 2 x 4's were hemlock or spruce, probably hemlock. He was permitted to testify as follows:

> "In porches that are not roofed over, if they are well ventilated underneath, it is reasonable to expect you could get — same as ordinary entrance

steps to a house, made out of wood — probably 5 to 10 years. If not well ventilated underneath, you can't expect that wood to be alive that length of time. What happens, where there is a great deal of dampness and no change of air, the wood, in our terminology, dozes and the life goes out of it and eventually has a tendency to deteriorate, fall apart, the strength is gone.

"Q. What would be the life expectancy of the same piece of wood in a damp area?

"A. I have seen a number of times wood, where there wasn't air, where it didn't get fresh air, where it was damp, and no change of air, I have seen new hemlock and spruce, both, deteriorate in 2 to 3 years.

"Q. What would be the average period for spruce or hemlock in a damp area?

"A. I should — if I had to give a guarantee, I would say most of them would deteriorate in 3 to 5 years, from 2 to 5 years.

"Q. Is there a standard amongst the carpenters for testing exposed porches in this area?

"A. Not that, there is no set rule that I know of. We have a usual practice, a number of things we do when we go to inspect anything like this.

- - - - - - - - - - - -

"A. We would go there, probably walk on the porch. If we knew it was in bad shape we would be careful about jumping on it, but if there was any question, we would jump on it, see if it would hold anyone's weight with pressure. We would also, if the boards were open enough, put a knife blade into the timbers, or drive nails into them. Sometimes we might take up one or two boards to see what we could see, and possibly, if we could get underneath, go underneath them to see what the condition of the timbers is.

"Q. What would you do if you could get underneath?

> "A. Test them, there again, with a knife blade or sharp instrument. Sound them out with a hammer."

The plaintiffs had been tenants of the defendants upon the second story of the house continuously from March 1955 until April 30, 1958, the day of the accident. The defendants had owned the property from a time prior to plaintiff's tenancy. The defendant husband had visited the premises upon an average of thrice monthly to collect the rents. He had habitually noticed the railing and floor of the back porch but not the understructure. He had deemed that there was no occasion to inspect the underside through a span of some four years. The rear porch had been in constant use by all the tenants both as an entrance and exit while the front entrance to the building had been seldom employed. The defendants' carpenter had never been instructed to inspect the back porch and had not.

After the accident and the freeing of Mrs. Horr defendant's carpenter was sent to the porch. He found one timber or stringer missing. Of the two supporting timbers beneath the platform it was that which had been placed nearer the main building. The 2 x 4 affixed to the house beneath the porch and the threshold of the back door was still in position but was a "little punky," "just like the others that were there."

> "When I say a little punky, I don't mean you could take hold of it in your hand and break it. I mean some dampness. I mean it had started to go."

The carpenter removed the 2 x 4 nailed to the house and substituted another in making the repairs.

Photographs were admitted in evidence. Two had been taken just after Mrs. Horr had been taken to the hospital. One had been taken from the ground level, showing the front, the south side and the top of the porch with its torn

up boards. The other had been taken from above the porch top and afforded a view into the gaping opening occasioned by the accident. Two more photographs taken after the repair of the porch pictured respectively the door in closed position in the westerly side of the porch and the door opened with some view of the area under the porch.

The jury upon the evidence submitted to it appears amply fortified in having concluded that the porch platform partially collapsed and thereby caused bodily injury to a tenant who was rightfully availing herself of it in a conventional way. The jurors had evidential warrant in deducing that the casualty was a result of decadent matter in the substructure of the porch. They were within permissive bounds in deciding that in the exercise of reasonable care the defendants could have and should have discovered by simple and plain inspection the condition and risk involved and made the condition safe.

Motion denied.

WEBBER, J. (CONCURRING)

In concurring in this opinion it is my understanding that there is intended no enlargement of the duty heretofore imposed upon landlords. It has been judicially recognized that one must reasonably anticipate that unprotected wood exposed to the weather may deteriorate. Under such circumstances the duty to inspect for evidence of such deterioration will arise. *Barre* v. *Epstein,* 299 Mass. 577, 13, N. E. (2nd) 422. On the peculiar facts of the instant case, even though the uncovered platform was outwardly sound and its floor boards strong, the jury was justified in requiring that the defendant in the exercise of ordinary care make some investigation for signs of such deterioration underneath the platform. It is apparent that the supporting stringer which was completely rotten had been defective for some time, long enough at least to charge the defendant with constructive knowledge of its condition. The loss of this support

would have been apparent, as the opinion of the court points out, upon ordinary inspection beneath the platform. I do not understand that we intimate or suggest what our opinion would be if a concealed defect would be disclosed only by an investigation necessitating the removal of walls or boards. Since none of the floor boards broke, it is apparent that the loss of the rotten stringer did not trigger this accident. Some other circumstance producing the separation of the floor boards from the stringer attached to the house was obviously the immediate producing cause of the caving in of the floor. The exact reason for this occurrence is not disclosed by the evidence. Yet the jury could properly infer from the nature of the supporting structure that if the rotten stringer had been sound and in place, the floor would have been adequately supported and the accident would not have occurred. It is not necessary that the defendant should have anticipated the precise manner in which the defective condition would produce injury if in fact it should have been apparent to him that injury was likely to ensue. In short, the defect which would have been disclosed upon inspection, although clearly not the sole or even the immediate cause of the accident, was properly considered by the jury to be one effective proximate cause of the accident without which it would not have occurred and for which the defendant could be held responsible. Thus limited, the opinion does not in my view make the landlord an insurer of the safety of his tenants, nor does it enlarge his duty to exercise ordinary care (and no more) to keep a common platform or stairway in reasonably safe repair.

COVAN N. SAMS
vs.
EZY-WAY FOODLINER CO.

Cumberland. Opinion, January 19, 1961.

Warranty. Food. Sealed Container.
Uniform Sales Act. Negligence.

Liability on implied warranty under Sec. 15 II of the Uniform Sales Act arises, if at all, by contract and is not dependent upon fault of the defendant.

A "hot dog" containing glass is not merchantable under Section 15 II of the Uniform Sales Act, and the test is whether they were so in fact.

Frankfurts in a sealed plastic bag were sold *by description* within the meaning of Clause II, and the fact that they were sold in a self-service market does not affect the result.

The Uniform Sales Act codified, extended, and liberalized the common law.

Under the Uniform Sales Act there is no "sealed container" exception and the Act in 1923 ended our "sealed container" rule at common law as set forth in the *Bigelow* case.

"Reasonably fit for such purpose" under Clause I, and "merchantable quality," under Clause II are equivalent with respect to food for human consumption. The test is whether the food is fit to eat.

ON EXCEPTIONS.

This is an action upon an implied warranty before the Law Court upon exceptions. Exceptions sustained.

Peter Rogers,
Douglas P. MacVane,
Edward Rogers, for plaintiff.

Mahoney, Desmond & Mahoney, 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 plaintiff seeks damages under Section 15 II of the Uniform Sales Act for breach of an implied warranty of merchantability of "hot dogs" purchased by him from the defendant. Taking the evidence with its inferences in the light most favorable to the plaintiff, we are of the opinion a jury could have found as follows:

The defendant operated a self-service supermarket in which the customers made their own selection of food products and paid for them at the check-out counter. The plaintiff purchased a plain sealed plastic bag containing frankfurts. There were signs on the store window and near like bags indicating a special sale of "Jordan's Hot Dogs." On the following day the plaintiff's wife removed the frankfurts from the bag and boiled and served them to the plaintiff in the evening meal with salad and mashed potatoes. The plaintiff testified that, "I bit down onto this hot dog and I crushed in my mouth, first I thought it was a bone but on examining I found it was glass." After a few days of discomfort from a sore throat and a sore tongue, he consulted a physician. Three small slivers of glass were removed from his mouth.

The frankfurts were made by a third party and not by the defendant. The good reputation of the maker was unquestioned. It is agreed that inspection would not have revealed the defect of which the plaintiff complains to either the plaintiff or defendant.

The defendant raises an issue that the evidence would not warrant a finding that the frankfurt contained glass. In the absence of such a finding there could, of course, be no verdict for the plaintiff whatever the extent of the warranty.

Under the familiar rule, a finding of fact may not be based on guess, conjecture, or a choice among possibilities. *Ross* v. *Porteous Mitchell & Braun Co.*, 136 Me. 118, 3 A. (2nd) 650. The defendant says in substance that the jury under the rule could not determine whether the glass was in the frankfurt, in the salad, in the mashed potato, or on the plaintiff's plate.

It does not seem unreasonable to us that a person in plaintiff's situation should know that the injury came in biting upon the frankfurt and not from some other source during the meal. Taking the evidence in its entirety, we are satisfied that a jury would be warranted in finding that glass in the frankfurt caused plaintiff's injury.

The controlling issue in this action of a plaintiff purchaser-consumer against a defendant retailer is whether there is a "sealed container exception" from the implied warranty of merchantability under our Sales Act. *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 and Annot., and *Botti* v. *Venice Grocery Co.*, 309 Mass. 450, 35 N. E. (2nd) 491, 135 A. L. R. 1387 and Annot. represent the position of the purchaser; *Bigelow* v. *M. C. R. R.*, 110 Me. 105, 85 A. 396, that of the seller.

Liability of the defendant in this action rests solely upon an implied warranty of merchantability under Section 15 II of the Uniform Sales Act. (R. S., c. 185, first enacted P. L., 1923, c. 191.) It arises, if at all, by contract and is not dependent in the slightest degree upon fault of the defendant. The pertinent portions of Section 15 read.

> "**Sec. 15. Implied warranties of quality.**—Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

> "**I.** Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> "**II.** Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.
>
> "**III.** If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
>
> "**IV.** In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

There is no suggestion in the record that the plaintiff relied upon the seller's judgment or skill within the meaning of Clause I in selecting the brand, i.e., "Jordan's Hot Dogs," or the particular bag of frankfurts. The seller did no more than offer "Jordan's Hot Dogs" for sale. The case is analogous insofar as reliance is concerned (and on other points as well) with *Ryan* v. *Progressive Grocery Stores, supra.* There the consumer asked for and purchased "Ward's bread" wrapped in a sealed package. The plaintiff was injured by a pin within the bread. The New York Court of Appeals, speaking through Judge Cardozo, held (1) that there was no reliance upon the seller on which to base an implied warranty of reasonable fitness under Clause I, and (2) that the consumer could recover on breach of an implied warranty of merchantability under Clause II.

The plaintiff does not contend that he relied upon the defendant in selecting the particular brand of frankfurts pur-

chased by him. He brings his case solely upon the warranty of merchantability.

A "hot dog" containing glass is, of course, not fit to eat and is therefore not of merchantable quality. The test under Clause II is not that buyer and seller treated the goods as merchantable, but whether they were so in fact. *Grant, Appt.* v. *Australian Knitting Mills, Ltd. et al.*, 1936 A. C. 85, 105 A. L. R. 1483 (deleterious substance in Golden Fleece underwear); *Ryan* v. *Progressive Grocery Stores, supra* (pin in Ward's bread); *Botti* v. *Venice Grocery Co., supra* (deleterious substance in LaRosa macaroni); *Henningsen* v. *Bloomfield Motors, Inc.* (N. J.), 161 A. (2nd) 69; *Mead* v. *Coca Cola Bottling Co.*, 329 Mass. 440, 108 N. E. (2nd) 757; 4 Williston on Contracts § 997 (rev. ed.) 1 Williston on Sales § 243 (rev. ed.).

The frankfurts in the sealed plastic bag were sold by description within the meaning of Clause II. Assuming (we need not decide) that "Jordan's Hot Dogs" was a trade or brand name under Clause IV, the warranty of merchantability under Clause II was not thereby destroyed. Indeed, the trade name of "Jordan's Hot Dogs" was fairly intended to describe the goods to the prospective customer. *Botti* v. *Venice Grocery Co., supra; Ryan* v. *Progressive Grocery Stores, supra; D'Onofrio* v. *First National Stores, Inc.* (R. I.), 26 A. (2nd) 758. See also *Adams* v. *Peter Tramontin Motor Sales* (N. J.), 126 A. (2nd) 358; *Brennan* v. *Shepherd Park Pharmacy* (D. C.), 138 A. (2nd) 494.

The fact that the frankfurts were sold in a self-service market does not affect the result. The sign, or label, effectively described the goods in the market and in the package. The printed word was the silent salesman. The vitality of Clause II does not rest upon the presence of a clerk. Compare *Mead* v. *Coca Cola Bottling Co., supra,* in which the Massachusetts Court in holding a warranty of merchantability under Clause II attached to the sale of coca cola in an automatic vending machine, said at p. 758:

> "The sale here was of a bottled beverage by description. It was a sale of goods by a trade-name generally known as a name describing a particular beverage. (Several citations omitted). Botti v. Venice Grocery Co., supra. . The sale was completed by the payment of the price and by the delivery of the goods although such delivery was made by means of a mechanical instrumentality... There seems to be no essential difference in the method adopted for delivery from that employed in self-service stores where the customer is authorized to take goods from the shelves and carry them away on payment of the stipulated price. See Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E. 2d 305, 163 A.L.R. 235."

In *Lasky* it was held that a sale in a self-service market is completed only by payment, and that prior to payment there was no implied warranty of merchantability under Clause II. The court gave no indication that such a sale was not a sale by description. We recognize that a U. S. Court of Appeals has held otherwise. *Torpey* v. *Red Owl Stores,* 228 F. (2nd) 117 (8th Cir.)

We come to the issue of whether the retailer of food in a sealed container is insulated from an implied warranty of merchantability under the Sales Act. We make no distinction between the can of asparagus *(Bigelow),* the package of macaroni *(Botti),* the bread wrapped in paper and sealed *(Ryan),* and the "hot dogs" in the sealed plastic bag. In each instance we have a sealed container or an original package effectively preventing inspection by the retailer at any time and by the purchaser until the container is opened. The basis of the "sealed container exception" is that the purchaser could not have placed reliance upon the retailer's skill or judgment in determining that the contents were fit to eat.

Our task is to determine the meaning of Clause II of our Act.

> "**Sec. 74. Interpretation shall give effect to purpose of uniformity.**—This chapter shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it." (R. S., c. 185.)

The Uniform Sales Act codified, extended, and liberalized the common law. Rules inconsistent with the Act were thereby abolished. *Rinaldi* v. *Mohican Co.*, 225 N. Y. 70, 121 N. E. 471; *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242 and annot; *Kurriss* v. *Conrad & Co., Inc.*, 312 Mass. 670, 46 N. E. (2nd) 12; *Henningsen* v. *Bloomfield Motors, Inc., supra; Ryan* v. *Progressive Grocery Stores, supra; Poulos* v. *Coca Cola Bottling Co. of Boston*, 322 Mass. 386, 77 N. E. (2nd) 405; Prosser on Torts § 83, p. 493 (2d ed.); Harper and James on Torts, *Implied warranties* § 28.30; 77 C. J. S., Sales § 383; 1 Williston on Sales §§ 241, 242, and 242a; 4 Williston on Contracts §§ 995, 996 (rev. ed.).

In *Bigelow* v. *M. C. R. R., supra,* decided in 1912 before the adoption of the Uniform Sales Act in Maine, the court held that a dining car operator was not liable for breach of an implied warranty of fitness to a diner for illness resulting from defective canned asparagus. The decision, although limited on its facts to the liability of a restaurant keeper to his guest, may fairly be said to state the common law of our state applicable, as here, in the case of the purchaser-consumer against the retailer.

In *Trafton* v. *Davis*, 110 Me. 318, 325, 86 A. 179, decided in 1913, the court, in a case involving the fitness of corn for canning purposes, stated the *Bigelow* rule as follows:

> "In order to give their brand of corn a legitimate status in the market, every can must be guaranteed under the Pure Food Act of Congress of 1906. Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under

> the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. *Bigelow v. Maine Central R.R. Co.*, 110 Maine 105, 85 Atl., 396. Whatever liability for damages there may be in such a case, must rest solely upon the packer who cans the goods."

Since the enactment of the Sales Act in 1923, the *Bigelow* case has been cited twice and the *Trafton* case once. In *Pelletier* v. *Dupont,* 124 Me. 269, 272, 128 A. 186, in 1924 a baker was held not liable on an implied warranty for damages resulting from a pin in his bread, wrapped in wax paper and sealed, and sold by a retailer to a purchaser-consumer. The court, in discussing in general terms the liability of a seller to a purchaser, said:

> ". . . where, however, the transaction is between a dealer and a consumer, unless the consumer assumes the risk by selecting the article himself, there is an implied warranty that it is wholesome and fit for consumption as food; Uniform Sales Act, Chap. 191, Sec. 15 (1); Public Laws, 1923; citations) though this court has made an exception in the case of canned or tinned goods, *Bigelow v. M.C.R.R.*, 110 Maine, 105; *Trafton v. Davis*, 110 Maine, 318, 325; an exception not recognized in Massachusetts as appears in the case last cited from that jurisdiction." (The *Ward* case, *supra.*)

It is to be noted that the application of an implied warranty under either Clause I or Clause II to a sale of food in a sealed container was not in issue. The court made the ground of its decision, namely, lack of privity, clear in saying, at p. 275:

> "After a careful review of the authorities, this court, while approving the doctrine recognized in *Bigelow*. . . and *Trafton*. . . that a manufacturer of

> food under modern conditions of preparing and dispensing such products owes a duty to every consumer purchasing his products in the open market, finds no good reason for repudiating or modifying, even in the case of food products, however prepared, the well-established rule that in order to recover on a warranty, there must be a privity of contractual relations between the parties, which is wholly lacking in the case at bar."

Lack of privity is not in issue in the instant case. The plaintiff himself is the purchaser-consumer in contractual relationship with the defendant retailer. There is no suggestion herein that recovery upon the warranty would be open to one not in privity with the defendant.

In discussing proof of negligence in an action by a consumer against a bottler arising from a deleterious substance in ginger ale, the court said, in *Lajoie* v. *Bilodeau,* 148 Me. 359, 363, 93 A. (2nd) 719:

> "See also regarding foods sold by retailer, *Bigelow v. MCRR Co.,* 110 Me. 105, and *Pelletier v. Dupont,* 124 Me. 269, 39 A.L.R. 972 where the actions were on contract, and not actions for negligence against the manufacturer."

Under the Sales Act, by the great weight of authority there is no "sealed container exception." *Jackson* v. *Watson & Sons* (1909), 2 K. B. 193, 16 Am. & Eng. Annot. cases 492; *Martin* v. *Great Atlantic & Pacific Tea Co.,* 301 Ky. 429, 192 S. W. (2nd) 201 (changing sealed container rule under Kentucky common law); *Ward* v. *Great Atlantic & Pacific Tea Co., supra; D'Onofrio* v. *First National Stores, Inc., supra; Burkhardt* v. *Armour & Co.,* 115 Conn. 249, 161 A. 385, 90 A. L. R. 1260 and Annot.; *Dow Drug Co.* v. *Nieman et al.,* 57 Ohio App. 190, 13 N. E. (2nd) 130; Prosser, "The Implied Warranty of Merchantable Quality" (1943), 27 Minn. L. Rev. 117; 4 Williston, Contracts §§ 995, 996; Prosser on Torts § 83, p. 495; 2 Harper and James on Torts,

Retailer's strict liability § 28.30; Dickerson, "Products Liability and the Food Consumer" (1951) § 1.3 (common law); § 1.15 (Under Sales Act); generally §§ 1.3 to 1.19; 22 Am. Jur. *Food* §§ 99, 100; 77 C. J. S., *Sales* § 331; Annot. 142 A. L. R. 1434; 1 Uniform Laws Annot. § 15, n. 74 and 149. *Contra, Kirkland* v. *Great Atlantic & Pacific Tea Co.*, 233 Ala. 404, 171 So. 735; *Bradford* v. *Moore Brothers Feed and Grocery* (Ala.), 105 So. (2nd) 825; *Wilkes* v. *Memphis Grocery Co.*, 23 Tenn. App. 550, 134 S. W. (2nd) 929; *Green* v. *Wilson* (Ark.), 105 S. W. (2nd) 1074 (apparently sealed container rule not altered by Sales Act).

"Reasonably fit for such purpose," under Clause I, and "merchantable quality," under Clause II, are equivalent with respect to food for human consumption. The test is whether the food is fit to eat. Compare *Ross* v. *Porteous Mitchell & Braun Co., supra* (dress shields), and *Keenan* v. *Cherry & Webb*, 47 R. I., 125, 131 A. 309 (fur coat). The difference between the two warranties lies in the factor of *reliance*, present in Clause I and not in Clause II, and the factor of *description*, present in Clause II, and not in Clause I.

The leading case in the country under Clause II is undoubtedly *Ryan, supra,* in which, as we have seen, the retailer was held liable on a warranty of merchantability in the sale of "Ward's bread" containing a pin. The court found no reliance on the retailer by the purchaser, who had requested and obtained "Ward's bread." There was, therefore, no liability under Clause I. Under Clause II, however, reliance was not a factor, and so the sale by description was made with an implied warranty of merchantability. In *Botti, supra,* the Massachusetts Court, citing *Ryan* with approval, applied like principles in holding the retailer of La-Rosa macaroni liable to a purchaser-consumer. Other illustrative cases are: *Taylor* v. *Jacobson*, 336 Mass. 709, 147 N. E. (2nd) 770 (hair dye); *Casagrande* v. *F. W. Woolworth Co.*, Mass. , 165 N. E. (2nd) 109 (deodor-

ant); *Vincent* v. *Nicholas E. Tsiknas Co.*, 337 Mass. 726, 151 N. E. (2nd) 263 (baby food); *D'Onofrio* v. *First National Stores, Inc., supra* (canned corn); *Wren* v. *Holt* (1903), 1 K. B. 610 (beer); *Morelli* v. *Fitch* (1928), 2 K. B. 636 (ginger ale).

Under the Sales Act, so interpreted, the purchaser-consumer has the benefit of a warranty of merchantability against the retailer. In turn the retailer may reach his seller, and so through the chain of distribution to the manufacturer.

In the instant case for the first time since the Sales Act we have the problem of the sealed container presented to us. The *Pelletier* and *Lajoie* cases, *supra,* since the Sales Act, did not touch the point in issue. They are not to be considered as authoritative statements of the liability of a retailer of food products on an implied warranty under Section 15.

Vast changes have taken place in the manufacture and distribution of food products since the dining car case of 1912. The purchase of food in a can, jar, package, or sealed bag under brand or trade name is commonplace. The pantry shelf, the refrigerator, and the "deep freeze" evidence the fact. Sales are made over the counter, at self-service markets, and by vending machines. Inspection of such products which will uncover the defect within the container, as the defective asparagus, or the pin in the bread, is impossible as a practical matter until at least the container is opened, or in many instances, as here, until the product is eaten.

There is as well the problem of the latent defect in the product not sold in a container. The pin in the unwrapped loaf of bread may be, and probably is, hidden from the retailer and buyer no less than the pin in the wrapped loaf of "Ward's bread" in the *Ryan* case.

If the frankfurts here had not been sold in a sealed bag, inspection would not have disclosed the glass within the edible casing. Indeed, the North Carolina Court, in holding there was no sealed container rule at common law, treated a sausage as an article within a sealed container. *Rabb* v. *Covington,* 215 N. C. 572, 2 S. E. (2nd) 705.

Without the sealed container exception the retailer's exposure to liability is without question increased. Obviously liability based on fault alone is less burdensome than liability without fault based on an implied warranty of fitness or merchantability.

The burden is, however, rendered the less by the ability of the retailer to reach out on his warranty against his seller, and so in turn to the manufacturer. See *Davis* v. *Radford,* 233 N. C. 283, 63 S. E. (2nd) 822, 24 A. L. R. (2nd) 906.

The Uniform Sales Act in establishing implied warranties under Section 15 ended our "sealed container" rule at common law. The rule of the *Bigelow* case is not, in our view, sound under the Sales Act.

The plaintiff was entitled to go to the jury on his claim for damages under an implied warranty of merchantability under Clause II. On the question of damages, see Sec. 69, VII, of Uniform Sales Act; *Henderson* v. *Berce,* 142 Me. 242, 252, 50 A. (2nd) 45.

As Judge Cardozo said in *Ryan* v. *Progressive Grocery Stores, supra,* at 74 A. L. R. 342:

> "Here the dealer had notice from the nature of the transaction that the bread was to be eaten. Knowledge that it was to be eaten was knowledge that the damage would be greater than the price. (Citations) For damages thus foreseen, the buyer has his remedy, whether the warranty is one of fitness or of merchantable quality."

The entry will be

Exceptions sustained.

INHABITANTS OF THE TOWN OF WINTHROP
vs.
LAWRENCE H. FOSTER, HIS ASSOCIATES,
HEIRS AND ASSIGNS

Kennebec. Opinion, January 23, 1961.

Equity. Injunction. Wharves.
M.R.C.P. 52. Great Ponds.

The word "land" in P. and S. L., 1959, Chap. 150, includes lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein. R. S., 1954, Chap. 10, Sec. 22.

Findings of fact shall not be set aside unless clearly erroneous. M.R.C.P. 52.

ON APPEAL.

This is a Bill in Equity for a mandatory injunction before the Law Court upon appeal. Appeal dismissed.

Howard H. Slosberg,
Sanborn & Sanborn, for plaintiff.

Alton Lessard,
Herbert E. Foster, for defendants.

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

RESCRIPT.

SULLIVAN, J. This is equity process instituted in September, 1959 by the Town of Winthrop and its selectmen against the defendant to acquire a mandatory injunction.

The Legislature had enacted a private and special law, effective September 12, A. D. 1959, authorizing the defendant to construct, maintain and control at a delimited location a

wharf in the waters of Lake Maranacook at and adjacent to Bowdoin Street in Winthrop. The wharf had been restricted to an extension of 18 feet into the lake from the low water mark and was not to be built upon town land until the defendant had first obtained from the town voters their approval granted at a town meeting. P. & S., 1959, c. 150. No such vote has ever been sought or had by the defendant.

Although warned in writing by the Selectmen to desist the defendant subsequent to September 12, 1959 built his wharf within prescribed dimension and area from a position under the bank at Bowdoin Street and projecting into the lake.

The wrought and traveled portion of Bowdoin Street at the emplacement of the wharf skirts the edge of the lake leaving on the lakeside a narrow shoulder buttressed by a stone wall against erosion from water and storms. Bowdoin Street is a public way laid out originally in 1797 and successfully realigned in 1873 and in 1902.

The lake is concededly a "great pond" of more than 10 acres. (118 Me. @ 503). The Town asserts that it owns the fee in the land and in the lake bottom where the defendant's wharf is positioned or that it has at least an easement or right of way thereon. The Town contends that since 1873 as Bowdoin Street has become demarcated the public right of way extends into the area of the lake some 33 feet from present high water mark which is the stone wall supporting the street shoulder at the shore. The Town insists that whether it is the proprietor in fee by eventualities with the passage of time or only the owner of a public easement, nevertheless the location of the defendant's wharf is "town land" within the intendment of the private legislative act and that the defendant had no authority to construct his wharf at its situs without the sanction of a town vote.

"The following rules shall be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment.

\- - - - - - - - - - - -

X. The word 'land' or 'lands' and the words 'real estate' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein."

R. S., c. 10, § 22.

The Town requests the imposition of a mandatory injunction obligating the defendant to remove his wharf from its assumed position.

The defendant admits his acts and doings which he justifies by the authority of his legislative prerogative.

A hearing has been had and the presiding justice has formally found and decreed as follows:

"There is no clear allegation in the bill that the Town of Winthrop is a littoral land owner and that its rights as such have been impeded, impaired or encroached upon by any act of the defendant pursuant to presumed Legislative authority. I, therefore, make no finding as to whether or not the town is a littoral land owner.

This leaves only one issue to be resolved, and that is, whether or not the wharf is built on town land.

\- - - - - - - - - - - -

It is my opinion, and I so find as a fact, that the evidence does not support a finding that the wharf is built on town land.

It is, therefore, Ordered, Adjudged and Decreed, that the plaintiff's bill be dismissed without costs."

The plaintiff's appeal.

"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, M. R. C. P.

The presiding justice has concluded that the plaintiffs were unsuccessful in demonstrating that the Town of Winthrop was either owner in fee or holder of an easement in the land or lake bottom beneath the defendant's wharf. In becoming deference to R. S., c. 10, § 22, *supra,* we must deduce that the justice by finding that defendant's wharf is not upon town land incidentally and necessarily had determined that the evidence had been deficient to substantiate the containment by the public right of way of any ground lakeward from the banking.

We have reviewed and examined the testimony and exhibits to test the compatibility of the judicial findings with the evidence and with legal principle. Much probative detail and rationalization incidental to the fixation of bounds and *termini* as they exist on the face of the earth are wanting. No data are afforded for ascertaining the natural low water mark of the lake as it subsisted in past years when Bowdoin Street was defined. For 50 years a presumptive mill privilege has controlled the level of the lake water but by what authority does not appear. Commenting upon the spot where defendant's wharf lies a witness said:

> "Q. The situation there today is not any different than it was fifty years ago?
> "A. No, sir.
>
> "The Court: Is there any difference in the water level?
> "A. Yes, there is.
>
> "(Defense Counsel): What is the difference?
> "A. Of course the mill, when the mill was running they used this lake for power entirely. In the last period of years ten or twelve years, they don't use the water for the water wheels any more. They

use the water for washing purposes but the water don't get down so low as it used to.

"Q. The low water mark has changed?

"A. It isn't as low as it used to be.

"Q. You know something about Foster's new wharf?

"A. Yes. When this was torn down I used some of the lumber to keep mine from tumbling down.

"Q. Are his posts below low water mark?

"A. That would vary. We had high water all summer; the mill don't draw it down much now.

"Q. It would be your statement then his posts have been driven in the ground well beyond the average low-water mark?

"A. I would say, yes, the average. There used to be the electric line along in here (indicating). I own property back here."

Some 40 years ago one Harry Stanley owned a wharf where the defendant's now stands. Stanley's wharf eventually rotted and disintegrated. Six years ago the defendant built a wharf replacing Stanley's and in 1959 substituted the wharf now in controversy for his former one. A privately owned wharf adjacent to the defendant's is only the latest in a succession of wharves to occupy its station through a span of 50 years.

The water height remains fairly uniform save for September and October when it is lower for one month to six weeks and for the spring flood when the water is higher. The water extends completely under the defendant's wharf except for the fall ebb when one-half of the wharf rests upon uninundated ground.

Years ago, how many we are not told, an electric, street railway, now presumedly extinct, had its steel tracks in or adjacent to Bowdoin Street which was then a dirt road and such tracks lay on the lake side or lakeward of the street.

The record is silent as to whether or not the street railway at or by the locus of defendant's wharf enjoyed a land fee or easement or license and the state of the title to the roadbed is not revealed for the time subsequent to dissolution of the railway.

An engineer-surveyor testified and supplied plans. The gist of his testimony was that he had made research in the town records, had ascertained metes, bounds and description and had with such and with additional resources reproduced the officially constituted limits of Green and Bowdoin Streets in the area in controversy as those limits were laid out by the selectmen in 1873 and in 1902. Unfortunately some of the important testimony was neutralized by the witness' fingered references to his plans without any accompanying explanation in the record of what he was specifying. He concluded that Bowdoin Street originally 66 feet in width now extends 33 feet into the lake from the edge of the existing road and includes the terrain where the defendant's wharf is located. When asked if there has been any changes in the road since it had been laid, he answered: "I do not find any." In the 1902 laying out of Bowdoin Street an important monument had been "the northwesterly corner of the underpinning of the main house of Mrs. Christina E. McEdwards." The witness in cross examination acknowledged that the house is no longer there and that he had to "establish it working back to the development from Green Street."

The following are excerpts from the record of the engineer's testimony:

> "Q. Would you tell us what you have done with reference to this plan in showing the location of Bowdoin Street?
>
> "A. Yes. I checked the records of the town and find Bowdoin Street was drawn up in 1873, and at that time they gave a bearing with metes and bounds, a description of it. I also checked the land

between Bowdoin and Green Streets and *this is where Bowdoin Street came in my opinion* (indicating on plan). I also laid out Bowdoin Street on this, which took it out here in the water, *which gave me some concern.* At the time Bowdoin Street was laid out, this was dry land in here (indicating)." (Italics supplied.)

In response to court inquiry the witness said:

"Q. Do you have any knowledge that the low water mark was changed along that location?

"A. I don't know. Bowdoin Street I laid out from the description. It begins here (sic) and works right down through here (sic) to Maine Street. *There is reason to believe it came down this way.*" (Italics supplied.)

Continuing upon questioning by plaintiffs' counsel the witness added:

"Q. What was the year of the first lay out?

"A. 1797.

"Q. The first Bowdoin Street was laid out in 1797?

"A. It began here (sic) and went out here (sic), which I *assume was dry land in those days.* (Italics supplied.)

(Defense Counsel) "Q. Just a moment, That is only an assumption on your part.

"A. No.

"Q. You don't know of your own knowledge?

"A. It is not an assumption.

"Q. You are assuming it was dry.

"A. That part, I am assuming it was dry.

"Q. You couldn't establish a line from the description anywhere.

"A. *The only one I could establish was the subsequent purchase of the town of some additional land on the east side.* (Italics supplied.)

"Q. Thence west to a stake.

"A. It has all been dug up.

"Q. You couldn't establish anything from that. It had to be on something further.

"A. The town owns five rods, not four rods.

- - - - - - - - - - - -

"The Court: I have a question. I have in my hand Plaintiff's Exhibit No. 3 (photo). Is that the wharf in question?

"A. Yes.

"Q. Who owns the property across the road at that point?

"A. I don't know who owns it. Until recently, Frank Tuttle owned it.

"Q. Do you know where the line of that land is? Can you find the line?

"A. In his description it begins two hundred fifty-one feet from a point fifteen feet in back of a barn. Going back to this one, to the barn in question, going back fifteen feet from there, it takes us 251 feet to this point right here. (sic)

"Q. Where does five rods take you measuring north?

"A. Out here (sic).

"Q. That was extended in 1902.

"A. In 1902 it was widened.

"Q. I am talking about how the land lies on the face of the earth today, this line which was the Tuttle line —

"A. It is Childs now.

"Q. Measuring north eighty feet or five rods, this brings you out in the lake.

"A. Yes.

"Q. Do you think that is realistic?

"A. Yes, when you bear in mind we have surveyed all this (sic) and this (sic) is shallow water. It isn't deep water."

The engineer-surveyor did not recite and was not interrogated concerning the precise particulars of his research and his restoration of Bowdoin or Green Street as laid out. Pins, lines, property bounds, surviving monuments utilized to localize obliterated monuments, etc. are not enumerated in detail by him. Some of his testimony is more conclusive than didactic. Some of it upon review fails of purpose from lack of understandable references to exhibits. One plan introduced contains courses, distances, angles and the family names of one grantor and grantee but not specific allocation to the face of the earth.

Other testimony and exhibits depict Bowdoin Street very graphically at defendant's wharf location as an established and well wrought public way with a considerable shoulder and a sturdy stone wall of some long and weathered duration supporting that shoulder. Water laps that stone wall during all but a month or a month and a half of each year. There is a visual history of water having covered the lake bottom for some fifty years save for an annual period of six to eight weeks when a fringe has been bared. A mill has continuously asserted a control flooding the lake shore for fifty years. Wharves have stood at and near the defendant's assumed position during forty or fifty years. The street railway formerly operated between traveled Bowdoin Street and the lake.

The plaintiffs were laden with the burden of proving that the Town held an easement in or around the lake beneath the defendant's wharf. The presiding justice enjoyed the advantage of viewing the witnesses. He found that the Town had not sustained its onus. The record does not sustain the position that the justice in his negative conclusion was clearly erroneous.

Appeal denied.

LAURA LEBLANC
vs.
ALFRED J. GALLANT
AND
LAURA LEBLANC
vs.
ELSIE GALLANT

York. Opinion, February 1, 1961.

Trespass. Title.
Estoppel. Rule 52 (a)

An estoppel which might be indicated against defendant's predecessor in title should be invoked where the rights of innocent third parties have intervened.

Where a plaintiff has not demonstrated that the findings of the presiding justice relating to the location of the dividing line are clearly erroneous, exceptions thereto must be overruled. Rule 52 (a) M.R.C.P.

ON EXCEPTIONS.

This is an action of trespass and entry before the Law Court upon exceptions. Exceptions overruled.

J. Armand Gendron, for plaintiff.

Titcomb, Fenderson & Titcomb, for defendant.

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

DUBORD, J. These two actions were instituted before the promulgation of the New Maine Rules of Civil Procedure.

The first action is one of trespass *quare clausum fregit* to recover damages for the destruction of a line fence. The defendant pleaded the general issue.

The other action is a writ of entry to try the title to a certain triangular piece of land. The defendant pleaded the general issue and title in herself.

The two cases were tried together before the presiding justice without the intervention of a jury and are argued together in this court. The actions are before us on exceptions of the plaintiff to judgments for the defendant entered by the presiding justice.

The case involves the dividing line between property owned by the parties and located on the northerly side of Cottage Street in the Town of Sanford. Both parties trace their title through conveyances from one Emile L. Bernier.

Prior to June 16, 1933, the two parcels of land, now owned by the parties to this action, were part of a larger tract owned by one William Batchelder. On that day Batchelder conveyed the entire tract to Emile L. Bernier. A plan of the Batchelder land, made in 1925, shows that there was a frontage on Cottage Street of 307 feet, and that the rear or northerly line, bounded on the north by lands of one Harding and one Bamfield, extends a distance of 292 feet, or a difference between the front and the rear footage of 15 feet. From this discrepancy undoubtedly arises the controversy between the parties to these actions.

On the same day when Bernier acquired title from Batchelder viz., on June 16, 1933, Bernier conveyed the most easterly part of the property to one Ernest O. Proulx. Because of the contour of the land, the conveyance to Proulx was in the form of a parallelogram with a front boundary on Cottage Street of 67 feet and a rear boundary of the same length. This land conveyed to Proulx, subsequently became known or described as Lot No. 6 according to a plan of lots subsequently made for Bernier.

A plan of the tract in question was made by a civil engineer in 1957 and is included in this opinion as Appendix A.

It is to be noted that the lines running generally north and south are not perpendicular to Cottage Street and Lots 2, 3, and 4, which abut on Cottage Street are not rectangles but necessarily parallelograms.

On August 13, 1934, Emile L. Bernier, his wife joining in the usual final clause in which she "relinquished and conveyed her right by descent and all other right in the above described premises" mortgaged the entire tract of land, excluding the land previously conveyed to Proulx, and also excluding his homestead lot, which later became known as Lot No. 1, to one Alfred Gagne. The description used in this conveyance becomes of importance when we reach a point which is marked "D" on the plan shown as Appendix A, which point "D" marks the corner of the Bamfield land as shown on Appendix A. The description from that point reads as follows:

> "Thence northeasterly by land of the within grantor (Emile L. Bernier) forty-one feet; thence south-easterly ninety-seven feet to said Cottage Street; thence by said Cottage Street in a north-easterly direction one hundred fifty feet to the point of beginning."

Thus was the description of the Bernier homestead lot, later to be known as Lot No. 1 initiated, this homestead lot being the most westerly portion of the original Batchelder tract.

On August 14, 1934, Emile L. Bernier conveyed the homestead lot to his wife, Anna Bernier, and he used this description:

> "Commencing at the northly side of said street (Cottage Street) at land now or formerly of one Henry Pickles; thence running northwesterly along said Pickles' land and land now or formerly of one Brushie ninety-seven feet more or less to a concrete post set for a corner; thence northeasterly by land now or formerly of one Bamfield and other

> land of the within grantor ninety feet to other land of the said grantor; thence southeasterly by land of the said grantor ninety-seven feet to said Cottage Street; thence southwesterly along the said Cottage Street ninety feet and to point of beginning;"

Thus it will be seen that the homestead lot was described in the form of a rectangle with front and rear lines 90 feet in length and side lines of 97 feet, running generally north and south. At this point it is well to note that because of the contour of the land it would be impossible to lay out a rectangle, and neither would it be possible to lay out a parallelogram. See Appendix A.

Neither party questions the location of the northeasterly corner of the Brushie land, indicated by the letter "F" on Appendix A and neither is there any dispute as to the proper location of the bound marking the southeasterly corner of the Bamfield land, indicated by the letter "D" on Appendix A.

By deed dated November 15, 1934, Emile L. Bernier conveyed to Telesphore Richard and Catherine Richard, in joint tenancy, the land which was by then known as Lot No. 2 according to the so-called Bradford Plan, included as Appendix B in this opinion. In this deed the land is described as follows:

> "A certain lot or parcel of land being lot number 2 on a plan of land owned by Emile L. Bernier on the Northerly side of Cottage Street Extension in said Sanford, said plan being recorded in the York County Registry of Deeds, said lot # 2 being bounded and described as follows: Beginning on the Southwesterly corner where said lot #2 joins lot # 1, one hundred (100) feet; (presumably this means running in a general northerly direction 100 feet) thence turning and running Easterly along lot #5 on said plan, fifty (50) feet; thence turning and running Southerly along lot # 3 on said plan

> one hundred (100) feet; thence turning and running Westerly along Cottage Street fifty (50) feet back to point of beginning."

Then further reference is made to the plan as being recorded in Plan Book 11, Page 34 (the Bradford Plan).

This is the deed through which the plaintiffs claim and it is to be noted that there is conveyed to the Richards a lot described in the form of a rectangle which is 100 feet deep and 50 feet in the front and in the rear. It should be pointed out, at this juncture, that due to the contour of the land it was impossible to make a conveyance in the shape of a rectangle, because the lines running generally northerly and southerly are not perpendicular to Cottage Street. Had there been land enough, a point which will be discussed later in this opinion, it would have been possible to create a parallelogram 100 feet deep and 50 feet wide. See Appendix A.

Subsequently, Bernier conveyed all of the remaining land, and eventually title to the westerly halves of Lot No. 3 and Lot No. 5 passed to the LeBlancs.

On September 16, 1937, approximately three years after the deed from Bernier to the Richards, Anna Bernier conveyed the homestead property, later known as Lot No. 1, to the defendant Elsie Gallant. In this deed Anna Bernier used the following description:

> "A certain lot or parcel of land with buildings thereon beginning on the southeasterly corner of the land of Henry Pickels and Cottage Street; Northwesterly ninety-seven (97) feet to a concrete post set in the ground; thence turning and running along land of Bamfield Northeasterly forty-nine (49) feet to a wooden post set in the ground; thence running along said Northeasterly direction along land of Emile L. Bernier from the said wooden post forty-one (41) feet; thence turning Southeasterly along land of said Bernier ninety-

> seven (97) feet; thence turning Southwesterly ninety (90) feet along said Cottage Street back to place of beginning. Being a part of the same premises conveyed to Emile L. Bernier by William Batchelder, recorded in the York Registry of Deeds Book 838, Page 403, being lot # 1 and recorded in plan in said Registry of Deeds Plan Book 11, Page 34, drawn by P. W. Bradford, also being the same premises conveyed by Emile L. Bernier to Anna Bernier and recorded in said Registry of Deeds, Book 846, Page 470."

It will be seen that this description of the homestead property is substantially that set forth in the mortgage deed from Emile Bernier to Gagne and in the deed from Bernier to his wife, Anna.

In the mortgage from Bernier to Gagne, previously referred to, a right of way 15 feet in width and lying on the easterly side of the homestead lot, originally conveyed by Bernier to his wife, was included. Presumably this right of way was for the benefit of Lot No. 5. After the conveyance of Lot No. 1 to Elsie Gallant, this right of way was released.

By deed dated May 29, 1943, Telesphore and Catherine Richard conveyed the land which is now known as Lot No. 2 to Alfred LeBlanc and his wife, Laura LeBlanc. This conveyance was in joint tenancy with right of survivorship. Title has now vested in Laura LeBlanc by virtue of the death of her husband.

In this conveyance the land is described as follows:

> "Beginning on the northerly side of said Cottage Street at the southwesterly corner of the lot herein conveyed; thence running northerly by lot one, being land of one Fred Gallant one hundred (100) feet to a corner of the lot herein conveyed; thence running easterly by lot five on said plan fifty (50) feet to another corner thereof; thence running southerly along lot three one hundred (100) feet to said Cottage Street Extension; thence running

> westerly along said Cottage Street Extension fifty (50) feet to land of said Fred Gallant and point of beginning. Being lot two on a plan of land owned by Emile L. Bernier and recorded in York County Registry of Deeds, Plan Book 11, Page 34. *(The Bradford Plan)* Being also the same premises conveyed to the said Telesphore and Catherine Richard by deed of Emile L. Bernier dated November 15, 1934."

Again it will be seen an attempt is made to create a rectangle, a physical impossibility because of the contour of the land.

At this point it should be noted that the deed or deeds through which the defendants claim antedate those through which the plaintiff claims. To briefly recapitulate, the defendant, Elsie Gallant, holds her title by deed from Anna Bernier dated September 16, 1937 and Anna Bernier acquired her title from Emile L. Bernier by deed dated August 14, 1934. The plaintiff acquired her title by deed from the Richards dated May 29, 1943 and the Richards acquired their title from Bernier on November 14, 1934.

The difficulty arises from the uncertainty resulting from the calls creating the northerly and easterly lines of what is now the Gallant property. It will be seen that the area in controversy is a triangle with its apex at point "B" on Appendix A and its base towards the rear or northerly side.

In the mortgage from Bernier to Gagne, in which the Bernier homestead lot (now the Gallant property) was excluded, the description, after reaching point "D" on Appendix A, reads as follows:

> "Thence northeasterly by land of the within grantor forty-one feet; thence south-easterly ninety-seven feet to said Cottage Street."

Then when Bernier conveyed what is now the Gallant property to his wife he used this call beginning at point "F" on Appendix A:

> "Thence northeasterly by land now or formerly of one Bamfield and other land of the within grantor ninety feet to other land of the said grantor; thence southeasterly by land of the said grantor ninety-seven feet to said Cottage Street."

Then when Anna Bernier conveyed the homestead property to Elsie Gallant, she used this description after having reached point "D" on Appendix A:

> "Thence running along said Northeasterly direction along land of Emile L. Bernier from said wooden post forty-one (41) feet; thence turning Southeasterly along land of said Bernier ninety-seven (97) feet."

Nowhere in these deeds is there any reference to Lot No. 2 which became the LeBlanc property. As previously stated, an attempt was made to create a rectangle or parallelogram 90 feet wide and 97 feet deep; but, because of the contour of the land, neither could a rectangle nor parallelogram be created. However, it seems clear that the parties intended that the easterly line should be 97 feet deep, running in a general northerly direction from Cottage Street.

It will be seen by a study of Appendix A that if the northerly line of the Gallant property beginning at point "D" runs as a continuation of the line from "F" to "D", a larger portion of the LeBlanc property would be taken and still there would not be 97 feet between point "E" and point "B." Since these calls seeking to create the northerly and easterly lines of the Gallant property did not give any monument to mark their point of intersection on the face of the earth, it became necessary for a surveyor of the land to find that point of intersection, and this he did, by running the 41 feet from point "D" to a point which would be 97 feet northerly of point "B." This point was located as "A" and the learned justice below decided that the dividing line between the Gallant and LeBlanc property was the line shown as "A-B" on Appendix A.

Counsel for the defendant contends that Anna Bernier would be estopped from claiming any land which would impinge on the LeBlanc property now known as Lot No. 2 and also that the successors in title to Anna Bernier are also estopped.

The presiding justice ruled that there was no estoppel.

It is from these findings of the location of the dividing line and upon the question of estoppel, to which the plaintiff took exceptions.

Counsel for the plaintiff argues that in view of all the circumstances, the Berniers must be found to have had in mind the integrity of the shape and size of the LeBlanc property. This may well be true, and if the Berniers were now parties to this action, an estoppel against them might be indicated. However, the rights of innocent third parties have intervened and the question before us for determination is which one is to suffer.

It has already been pointed out that the deed or deeds through which the defendants claim antedate those through which the plaintiff claims. It is conceded that the Bradford Plan which was recorded on November 14, 1934 does not truly represent the land as it stands on the face of the earth. It will be seen by an examination of this plan, included herein as Appendix B, that the lots are laid out as perpendicular rectangles, an erroneous representation.

It will be recalled that when Anna Bernier conveyed the homestead property to Elsie Gallant, the lot was described by metes and bounds and after this description there is this recital:

> "Being a part of the same premises conveyed to Emile L. Bernier by William Batchelder, recorded in the York Registry of Deeds Book 838, Page 403, being lot # 1 and recorded in plan in said Registry of Deeds Plan Book 11, Page 34, drawn by P. W. Bradford."

If the grantee in that deed had looked at the Bradford Plan, she would have seen the lot of land which was being conveyed to her, depicted as a rectangle 97 feet deep and 90 feet wide. The plan would have shown that there was sufficient land to cover Lot No. 2, now the LeBlanc property, as a lot 100 feet deep and 50 feet wide. Moreover, the descriptions in the mortgage from Bernier to Gagne and the deed from Bernier to his wife, indicated that the original homestead lot was 97 feet in depth and 90 feet in width. The equities favor the defendants.

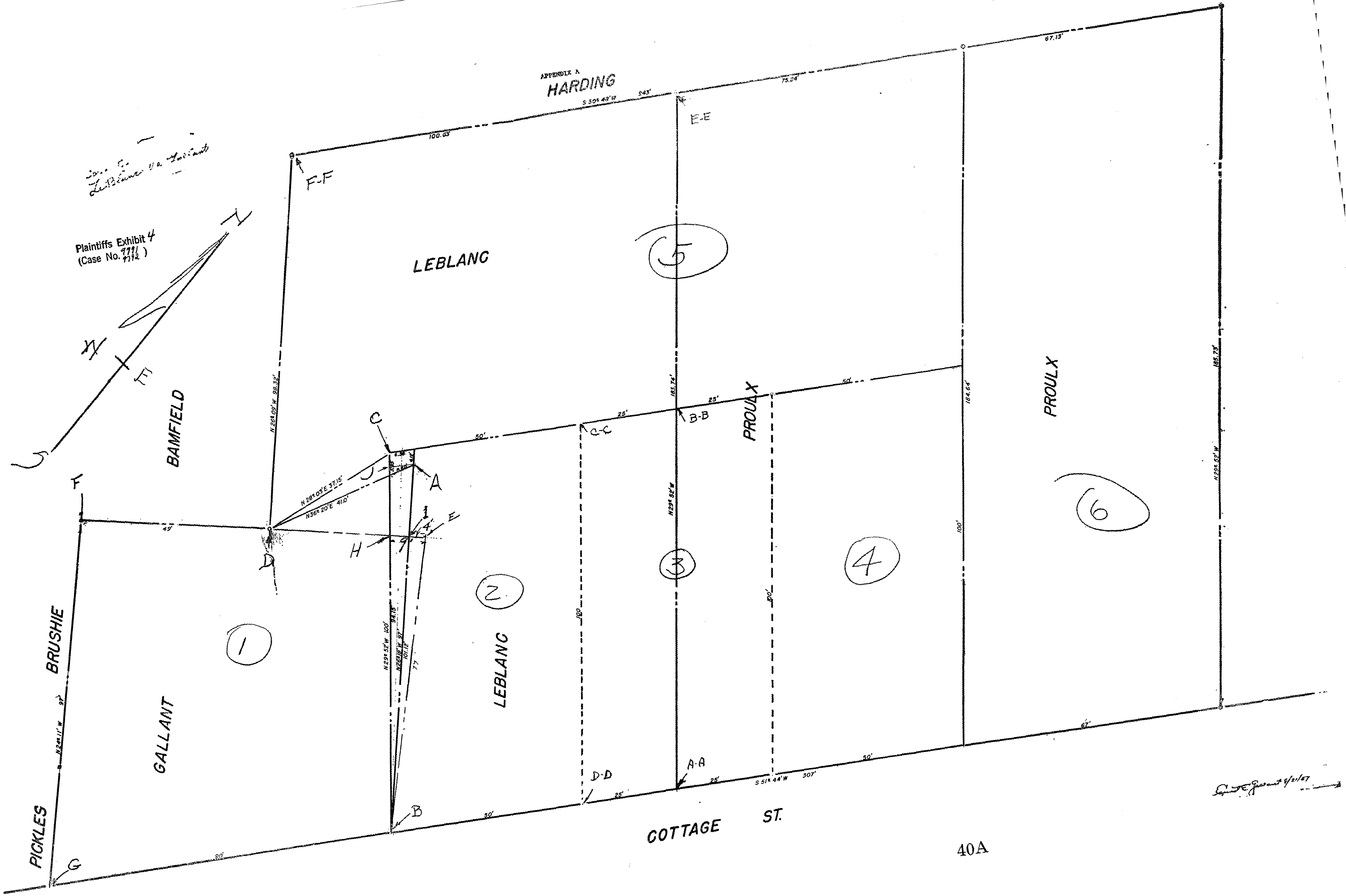
We are of the opinion that the presiding justice has properly construed the law relating to estoppel.

The finding as to the location of the dividing line by the presiding justice is also strengthened by the fact that there was some evidence to the effect that at some period there was some sort of a hedge set out on the line "A-B."

Bearing in mind the procedure spelled out in Rule 52 (a) M. R. C. P. relating to findings in actions tried without a jury, we hold that the plaintiff has not demonstrated that the findings of the presiding justice relating to the location of the dividing line are clearly erroneous. We, therefore, confirm the findings of the presiding justice that the northerly line of the Gallant property is that as indicated from point "D" to point "A" on Appendix A and the easterly line from point "A" to point "B" as shown on Appendix A.

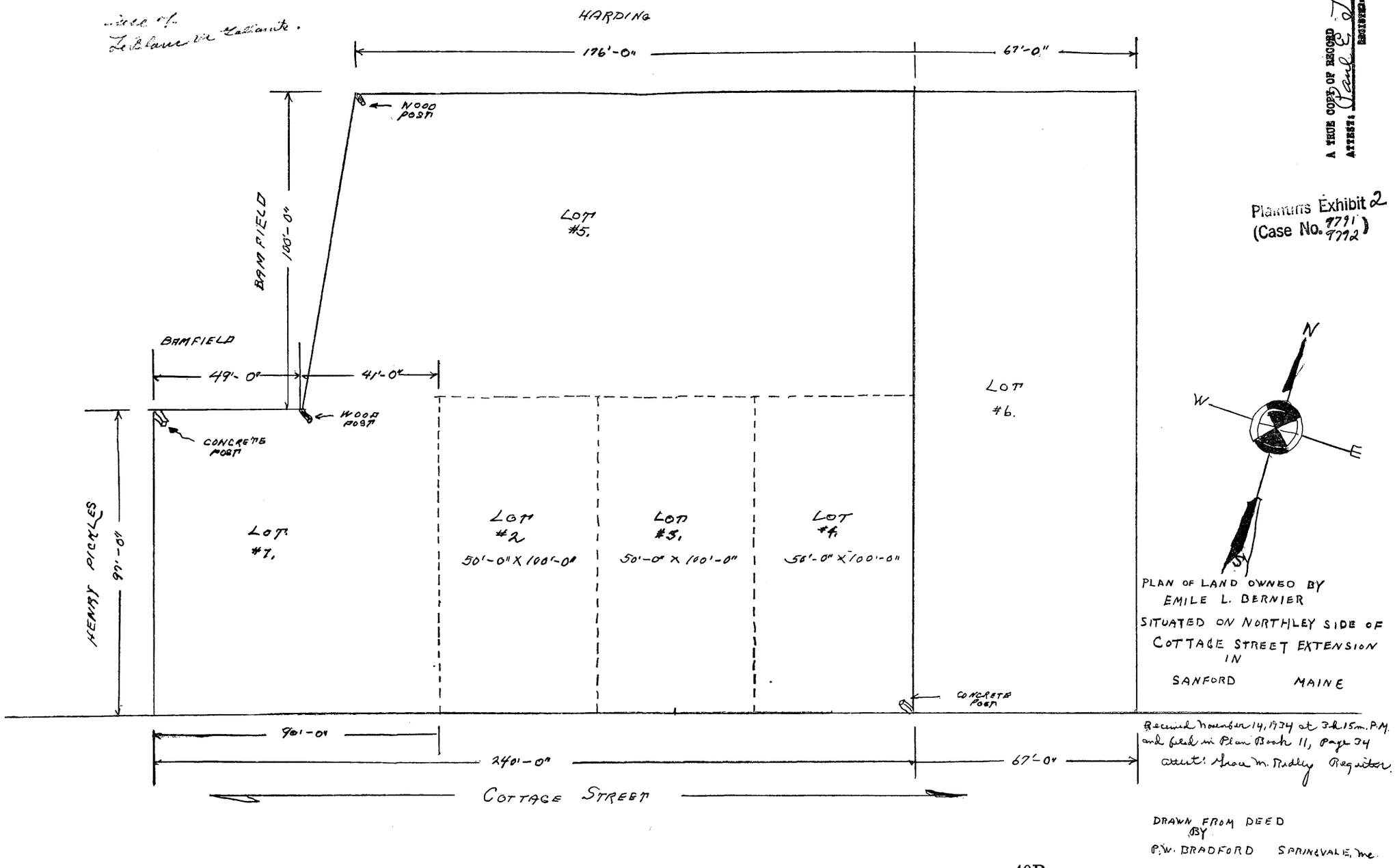
The entry in both cases will be:

Exceptions overruled.



APPENDIX A
HARDING
Plaintiffs Exhibit 4
(Case No. 7771/7772)
LEBLANC
BAMFIELD
BRUSHIE
PICKLES
GALLANT
LEBLANC
PROULX
PROULX
COTTAGE ST.
100.03
75.24'
67.13'
N 28° 03' E 37.15'
N36° 20' E 41.0'
N 29° 52' W
185.74'
185.75'
184.64'
S 51° 44' W 307'
F-F
E-E
C-C
B-B
D-D
A-A
A
B
C
D
E
F
G
H
1
2
3
4
5
6

APPENDIX B



A TRUE COPY OF RECORD
ATTEST: Paul E. Lowe
REGISTER

Plaintiffs Exhibit 2
(Case No. 7791 7792)

PLAN OF LAND OWNED BY
EMILE L. BERNIER
SITUATED ON NORTHLEY SIDE OF
COTTAGE STREET EXTENSION
IN
SANFORD MAINE

Recorded November 14, 1934 at 3h. 15m. P.M.
and filed in Plan Book 11, Page 34
Attest: Alice M. Ridley Register

DRAWN FROM DEED
BY
P.W. BRADFORD SPRINGVALE, Me.

ANDREW E. BOUCHARD D/B/A ROLAND & ANDY'S RESTAURANT

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

STANLEY E. SCRIBNER D/B/A AVIE'S CAFE

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

STATE CAFE, INC.

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, February 6, 1961.

Sales Taxes. Exemptions. Beer. Records.

Taxation is the rule, exemption the exception. The claimant has the burden of proving his exemption.

Finding of fact shall not be set aside unless clearly erroneous. Rule 52 (a) M.R.C.P.

Records must be kept in such a manner that the assessor may determine whether the taxpayer is primarily engaged in making sales of ten cents or less, and the tax due, if any. R. S., 1954, Chap. 17, Sec. 29.

ON APPEAL.

This is an appeal to the Law Court from a ruling of the Superior Court sustaining taxpayer's appeal. Case remanded to the Superior Court for a decree denying the appeal to the court and sustaining the assessment.

It is only when the taxpayer is primarily engaged in the retail sales of articles of ten cents or less, *and keeps adequate records,* that he is not obliged to collect a tax on multiple sales insofar as such sales are made up of items of ten cents or less. R. S., 1954, Chap. 17, Sec. 3.

If a taxpayer wishes items to be considered as sales of ten cents or less, he must be able to demonstrate by his records that a sale which appears on the face of the record to require collection of a tax is actually made up of sales of ten cents or less. R. S., 1954, Chap. 17, Sec. 29 of the tax penalty, and interest.

Jacobson & Jacobson,
Henry Steinfeld, for plaintiffs.

Ralph Farris,
Richard Foley, Asst. Atty. Generals, for defendant.

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

SIDDALL, J. Each of these cases involves a deficiency assessment of sales tax, interest and penalties by the State Tax Assessor acting under the provisions of R. S., 1954, Chap. 17, Sec. 20, as amended by P. L., 1957, Chap. 80. The tax assessed in the State Cafe case covered the period from October 1, 1957, to January 31, 1959, and in the other cases from October 1, 1957, to February 28, 1959. The deficiency assessment against Andrew E. Bouchard amounted to $1040.40, that against Stanley E. Scribner to $598.29, and that against State Cafe, Inc. to $856.65. In each case the taxpayer sought a reconsideration of the assessment and after reconsideration the original assessment was upheld. An appeal to the Superior Court was made in each case based upon the grounds that the taxpayer was a retailer primarily engaged in making sales for ten cents or less and kept satisfactory records thereof; that the tax assessed covered such sales, and that under the provisions of R. S., 1954, Chap. 17, Sec. 3, the tax assessor was without authority to tax these sales. Stipulations were entered into in each case specifying that Ernest H. Johnson during the entire period in question, and at the time of hearing, was the duly ap-

pointed and qualified State Tax Assessor, and that he purported to levy the alleged deficiency assessments in the amounts heretofore stated. It was further stipulated that the taxpayer in each case was a retailer of tangible personal property within this state during the period covered by the assessment, and did not have a permanent classified permit issued by the State Tax Assessor during that period. It was also stipulated that all statutory requirements necessary for the perfection of the appeal of the taxpayers had been taken. After hearing, the presiding justice sustained the appeal and ordered the tax abated in each case. The State Tax Collector appealed to this court from the decision and order of the presiding justice.

Although the cases were heard separately in the court below, they come here on one record and were argued together before this court. The same principles of law are involved in all of the cases. There is no conflict in the testimony in any case, although the State Tax Assessor and the taxpayer draw different conclusions therefrom. We are aware of no reason why the issues in all cases cannot be determined in one opinion.

The pertinent portions of the applicable statutes and regulations thereunder are as follows:

> "A tax is imposed at the rate of 3% on the value of all tangible personal property, sold at retail in this state on and after July 1, 1957, measured by the sale price, except as in this chapter provided." R. S., 1954, Chap. 17, Sec. 3, as amended by P. L., 1957, Chap. 402, Sec. 1.
>
> "No tax shall be imposed upon such property sold at retail for 10c or less, *provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the state tax assessor.*"
>
> R. S., 1954, Chap. 17, Sec. 3. (Emphasis ours.)
>
> "Adding tax to sale price.—Every retailer shall add the sales tax imposed by this chapter, or the aver-

age equivalent of said tax, to his sale price, except as otherwise provided, and when added the tax shall constitute a part of the price, shall be a debt of the purchaser to the retailer until paid and shall be recoverable at law in the same manner as the purchase price. When the sale price shall involve a fraction of a dollar, the tax shall be added to the sale price upon the following schedules:

Amount of Sale Price	Amount of Tax
$0.01 to $0.14, inclusive	0c
.15 to .39, inclusive	1c
.40 to .74, inclusive	2c
.75 to .99, inclusive	3c

When the sale price exceeds 99c, the tax to be added to the price shall be 3c for each whole dollar, plus the amount indicated above for each fractional part of a dollar.

When several articles are purchased together and at the same time, the tax shall be computed on the total amount of the several items.

Breakage under this section shall be retained by the retailer as compensation for the collection."

R. S., 1954, Chap. 17, Sec. 5, as amended.

"Records of retailers.—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."

R. S., 1954, Chap. 17, Sec. 29.

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

R. S., 1954, Chap. 17, Sec. 9.

"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."

R. S., 1954, Chap. 17, Sec. 23.

Pursuant to the foregoing provision the following regulation was issued on June 5, 1951, and was in effect during the period in question:

"Each registered seller, and each retailer as defined in the Sales and Use Tax Law, shall keep adequate and complete records of his business in this State showing:

(1) The total amount of the sale price of all sales of tangible personal property including both taxable and nontaxable items and any services that are a part of a sale.

* * * * * * *

These records must include, the normal books of account ordinarily maintained by the average prudent business man engaged in the activity in question, together with all bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account as well as all schedules or working papers used in connection with the preparation of tax returns.

All such records must be maintained for State Bureau of Taxation audits for a period of at least three years unless the destruction or other disposal of the same shall be authorized by the State Tax Assessor, or his authorized representative, in writing."

Regulation #5 issued by State Tax Assessor.

In construing statutes relating to the assessment of taxes, taxation is the general rule and exemption from taxation is the exception. The burden of proving an exemption rests upon the party claiming it, and he must bring his case clear-

ly within the spirit and intent of the act creating the exception. *Bangor* v. *Masonic Lodge,* 73 Me. 428, 433, 40 Am. Rep. 369. See also *Calais Hospital* v. *City of Calais,* 138 Me. 234, 241; 24 A. (2nd) 489; *Camp Enoh Associates* v. *Inhabitants of Lyman,* 132 Me. 67, 70. The taxpayers in these cases claim that they are not taxable on articles sold for 10c or less for the reason that they were primarily engaged in such sales and kept records satisfactory to the State Tax Assessor. The rule set forth above applies with no less force to those claiming an exemption from the payment of a sales tax on tangible personal property sold at retail in this state. The burden is upon the taxpayer in each of these cases to clearly show that he was primarily engaged in the retail sales of articles for ten cents or less and that he kept records satisfactory to the State Tax Assessor.

The presiding justice in ordering a tax abatement in each case found that the taxpayer had carried his burden of proof; that he was a retailer primarily engaged in making sales of property at retail for ten cents, and that he kept records satisfactory to the State Tax Assessor within the meaning of R. S., 1954, Chap. 17, Sec. 3.

> "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 also *Harriman* v. *Spaulding,* 156 Me. 440, 443, 165 A. (2nd) 47.

Where only one inference can reasonably be drawn from undisputed facts, the question is one of law and not of fact. *Maine Water Company* v. *Towage Company,* 99 Me. 473, 485, 59 A. 953. Only when a justice finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law. *State* v.

Harnden, Applts., 154 Me. 76, 77, 143 A. (2nd) 750; *Dingley et al.* v. *Dostie*, 146 Me. 195, 196, 79 A. (2nd) 169.

We now turn to the question of whether the taxpayer kept requisite records under the provisions of R. S., 1954, Chap. 17, Secs. 3 and 29, and under Regulation #5. The interpretation of these provisions is a question of law. That portion of Sec. 3 which sets forth that no tax shall be imposed upon property sold at retail for ten cents or less provided the taxpayer keeps records satisfactory to the State Tax Assessor must be considered in conjunction with Sec. 29 which requires retailers to keep records of their sales, the kind and form of which shall be adequate to enable the assessor to determine the tax liability. These provisions are a part of a revenue act known as the Sales and Use Tax Law, which imposes a tax on the value of all tangible personal property sold at retail in this state, with certain exceptions specified therein. Any person claiming non-liability for the payment of a tax on property sold at retail for ten cents or less must bring his case clearly within the provisions of Sec. 3. The necessity of requiring the keeping of proper records in order to do so is obvious. Without such a requirement the legislation would be ineffective to accomplish its purpose. Whatever may be considered adequate records under the other provisions of the act, it was without doubt the intention of the legislature that in cases in which the taxpayer claims he is primarily engaged in making sales for ten cents or less, his records must be kept in such a manner that an agent from the tax assessor's office be able to determine from those records whether the taxpayer is primarily engaged in making such sales, and after making that determination to ascertain the tax, if any, due to the state. If the taxpayer claims that an item entered on his records at over ten cents is composed of one or more items of ten cents or less, he must be able to establish the breakdown by his records.

The assessor cannot exercise an arbitrary judgment in relation to the sufficiency of a taxpayer's records, and if the records are kept in such a manner that the agent who makes the examination can determine from an inspection thereof whether or not the taxpayer is primarily engaged in making sales for ten cents or less, and to determine therefrom any tax due, then the records are necessarily "satisfactory to the state tax assessor." If the records do not meet this requirement, then they are not sufficient within the meaning of the statute.

Having these requirements in mind we now examine the nature of the business conducted in each case and the type of records kept by the taxpayer. None of the taxpayers held a permanent classified permit establishing the percentage of exempt sales, and no case presented a conflict in evidence.

The taxpayer Bouchard operated a combination restaurant and beer parlor, so called, in Brunswick, under the style of Roland and Andy's Restaurant. He sold beer and ale and miscellaneous articles in addition to some food. The beer and ale were sold for ten and fifteen cents per glass, cigarettes were sold for twenty-eight cents, and cigars from five to fifteen cents. The taxpayer registered his sales on a cash register. The taxpayer testified that nontaxable sales were indicated on the register tape by a Roman numeral two (II) preceding the amount of the sale, and that taxable sales were indicated by the amount of the sale without any legend on the tape. If the taxpayer or his waitresses were aware that one customer paid for several ten cent glasses of beer, the transaction was treated as a taxable sale. The tape also showed amounts paid out by the taxpayer and indicated by the letter "P." Each night the tape covering the business of the day was taken from the cash register and the aggregate amount of the taxable items as indicated on the tape was entered in a book under the date of sale. The total tax thereon was also entered therein. This book also contained

a column marked "tobacco" which apparently was designed to cover all sales claimed to be nontaxable, and in this column the aggregate amount of such sales was entered each day. This book also contained a record of items of expense.

This taxpayer presented in evidence a tape reflecting the business of the restaurant on March 11, 1958. This tape was apparently a typical tape record showing the daily business of the taxpayer. Tapes covering the business during the taxable period in question were available at the time of hearing but were not introduced in evidence. An examination of this tape indicates the total business of that date as $59.39. Of this amount $22.46 was listed as taxable sales, and the balance of $36.93 as nontaxable. An examination of the tape for March 11 discloses that of the sixty-four entries of items designated by a Roman numeral two as nontaxable and aggregating $36.93, only seventeen items totaling $1.60 were for sales registered on the tape in the amount of ten cents or less. The sales totaling $22.46, and indicated on the tape as taxable, consisted of items of more than ten cents each.

The book mentioned above and the register tapes constitute the only records of sales kept by the taxpayer. These records do not indicate that the taxpayer was primarily engaged in making sales for ten cents or less. On the contrary, the records on their face indicate that a small part of the taxpayer's business was of sales of that nature. The taxpayer claims, however, that money paid for ten cent drinks was allowed to accumulate on the top of the cash register and the total accumulation was from time to time rung up as one nontaxable item. No slips showing the items served and paid for, as are often used in restaurants, or any other records, were used by the proprietor or his waitresses to substantiate the claim that the items of over ten cents, listed on the tape as nontaxable, were in fact totals of one or more sales of ten cents or less. A person making an inspection of the records kept in this case could not determine

therefrom the percentage of sales at ten cents or less. We therefore hold as a matter of law that the records kept by the taxpayer were not adequate within the meaning of R. S., 1954, Chap. 17, Secs. 3 and 29.

The taxpayer Stanley E. Scribner conducted a restaurant business in Portland under the style of Avie's Cafe, employing three persons therein. He sold draught beer, bottled beer, cigars, cigarettes, popcorn, potato chips and miscellaneous merchandise. He testified that all sales were registered on a cash register tape; that draught beer sales were registered on the tape by using a key number one, and that miscellaneous items were registered by using a key number two. He testified that he did not sell beer for more than ten cents, except bottled beer, and that he collected a penny tax on bottled beer and rang the sale up on key number two. Each day he took the total of sales indicated by key number one and entered that total on a daily sheet, and he likewise entered on that sheet the total sales indicated by key number two. At the end of each week, weekly totals were obtained from these daily sheets. From these sheets he filed monthly reports to the sales tax division.

The following is a complete copy of the weekly summary of total sales covering the period from July 14th to July 19th inc. 1958. The original, written on a plain sheet of paper 8 x 5½" in size, was admitted in evidence.

July 14 - 19 — 1958	
3680	280
3800	390
4340	170
4750	411
6680	466
5910	347
291.60	20.64
20 64	
311.24	
29 29	
281.95	

The taxpayer testified that his records were kept in this manner for years and that the figures were taken from the daily tapes. The sheet contained no explanation of the meaning of the figures thereon, but the taxpayer testified that the first column represented the total ten cent draught beer sales, and that the second column represented the total miscellaneous sales during the week. The item of $29.29 represented sums paid out. Sheets in similar form, covering the period from March 3, 1958 to Feb. 28, 1959, were also admitted in evidence.

The taxpayer described the method employed in handling the sales in the restaurant. The waitresses registered on the cash register sales made by them, not necessarily immediately after the completion of the sale. At times they accumulated a dollar or two in their pockets before placing it in the cash register. At times change accumulated on top of the cash register before being registered. If a waitress ordered four or five glasses of beer to serve four or five persons, the aggregate amount of the sales, forty or fifty cents, would ordinarily be registered, and not four or five ten cent items. On the other hand if the bartender collected thirty cents for three glasses of beer from three individuals seated at the bar, the amount collected would be registered as three items of ten cents each.

R. S., 1954, Chap. 17, Sec. 29 requires the taxpayer to preserve his records for three years, and Regulation #5 requires the preservation of records, including cash register tapes, for the same period of time. The tapes upon which the sales were registered in this case, however, were kept by the taxpayer for a month or two and were then thrown out. The assessor's office was thus unable to make an examination of the tapes to determine whether the extent of the ten cent sales could be ascertained therefrom. At the time of inspection the only records of sales then available for examination were the weekly sheets mentioned above. We

hold as a matter of law that these sheets were not adequate to enable the agent of the assessor to determine whether or not the taxpayer was primarily engaged in making sales at retail for ten cents or less.

State Street Cafe, Inc. operates a restaurant on High Street in Portland. David Cremonese, President and Treasurer of the taxpayer testified that his establishment sold little food. The business consisted largely of sales of beer. The sale prices of the beer were ten, fifteen, and thirty-five cents. Two cash registers were operated side by side. One was used for ten cent sales and the other for sales over ten cents. Neither register was equipped with a tape. The registers were aptly described as operating on the principle of a speedometer. A reading of each register was taken each morning and evening. The totals on each register were taken each day and were turned over to the taxpayer's bookkeeper, together with paid bills. From these totals and paid bills a record was made in the regular bookkeeping system. The daily readings were added up once a week. He also testified that if he sold more than one glass of beer at the same time, he would register the total amount of the sale, and that seventy-five per cent of his total sales was of ten cent glasses of beer. The witness did not understand that the so-called multiple sales provisions of the sales tax law applied to the sale of beer. Taxpayer's bookkeeper and accountant testified that he made a regular monthly visit to the taxpayer's place of business and that he also made one or two other calls during the month. The daily slips were picked up by him during these calls. He testified that he segregated the paid outs so that he could keep statistics on the type of purchases, whether of beer, food, or other taxable or nontaxable purchases. The cash receipts were prepared on a daily basis, totaled by the week as taxable or nontaxable, and then entered in taxpayer's book kept by the accountant. The daily slips turned over to the bookkeeper were not offered in evidence, and the only record offered was

the book which contained the entries by the accountant from the daily totals on the slips turned over to him. This book covered the entire period included in the deficiency assessment, and shows receipts and disbursements for each month during that period. The book contains a separate column for disbursements for beer, payroll, food, supplies, fuel, lights, rent, etc. One column was used to enter the record of sales.

The following is a copy of the entries of sales for the month of November, 1957, appearing in one vertical column in the original book but arranged for convenience in this opinion in two columns:

	SALES		TAXABLE	
Nov.	1-2	305.10	11-2	119.20
	4-9	647.75	9	260.50
	11-16	630.40	16	251.25
	18-23	646.35	23	256.35
	25-30	655.80	30	266.90
		2885.40		1154.20
		1731.20		
		1154.20		
	3%	34.63		

Entries in this column were in substantially the same form throughout the entire taxable period, with the exception of the months of October, 1957, the months of July, September, October, November, and December, 1958, and the month of January. In October, 1957, weekly totals making up the item corresponding to the unidentified and unitemized total of $1731.20 in the copy set forth above were listed under the words "10 cent register." In July and September, 1958, these weekly totals were labeled "nontaxable." In months of October and November the word "beer" was added to the

word "taxable" as it appears in the copy above set forth, and in November and December, 1958, the word "ten cent" preceded the figures corresponding to the figures 1731.20 as set forth above. In the final month of the tax period, January, 1959, the method of entry of sales was changed. In this month the weekly total of sales was carried in three columns marked as follows: "non tax," "tax," and "total."

The entries made by the accountant in the book of record are no more than ledger entries taken from daily slips furnished by the taxpayer. These slips, although not in evidence in the case, were taken from machine made unitemized totals on two registers. No sales slips, or other records except those mentioned herein, were used or kept by the taxpayer to substantiate his claim that it was primarily engaged in making sales of personal property at retail for ten cents or less. However sufficient the records in this case may be for other purposes, they are not adequate to establish the fact that the taxpayer was engaged in making such sales.

Under the provisions of R. S., 1954, Sec. 5 as amended by P. L., 1957, Chap. 402, Sec. 3, a retailer must add a sales tax on the price of all articles sold for fifteen cents or more. Although a taxpayer is not authorized to add the tax to sale prices of fourteen cents or less, nevertheless he is liable to pay a tax on such items. *W. S. Libbey Co.* v. *Johnson,* 148 Me. 410, 94 A. (2nd) 907. However, if he brings his case within the provisions of that part of Sec. 3 relating to sales of personal property at retail for ten cents or less, no tax may be imposed on the sale of articles within that category. No claim is made by any taxpayer that the assessment of the sales or use tax, penalty, or interest was improperly computed if his case did not come within those provisions. Having determined that the taxpayer in each of these cases has not kept adequate records in accordance with the requirements of law, we therefore conclude that the deficiency

assessment of the tax, penalty, and interest was proper in each case.

In view of our conclusions it is unnecessary to examine any other issue in these cases. However, some considerable disagreement arose in the argument of the cases as to whether or not the sale of beer comes within the meaning of the so-called multiple sale provision of Sec. 5. R. S., 1954, Chap. 17, Sec. 5, and amendments thereto, provide that when several articles are purchased together at the same time, the tax shall be computed on the total amount of the several items. Such a transaction is commonly known as a multiple sale. Under the rules and regulations of the State Liquor Commission, licensees may serve only one drink or one bottle to a person at one time. This rule does not, however, preclude one person from paying the entire price charged for several drinks when but one of those drinks is served at the same time to each of several persons. A novel question then arises as to whether or not the taxpayer must add a tax to the amount of the entire price paid if such price is within the brackets requiring the collection of a tax by the retailer.

During the period covered by the tax assessment in these cases, a retailer was obliged to collect the designated tax in the event that a sale exceeded fourteen cents. A retailer not primarily engaged in the sale of articles at retail for ten cents or less was obliged to collect the necessary tax upon the sale of one or more items sold at the same time when the aggregate price exceeded fourteen cents, whether the sale was of beer or other articles. It is only when the taxpayer is primarily engaged in the retail sales of articles of ten cents or less, and keeps adequate records, that he is not obliged to collect a tax on multiple sales insofar as such sales are made up of items of ten cents or less. When an inspection of the taxpayer's book is being made to determine whether he is primarily engaged in the sale of articles

of ten cents or less, multiple sales broken down into items of ten cents or less are to be considered as sales at the price appearing in the breakdown. However, in such a situation, if the taxpayer wishes such items to be considered as sales of ten cents or less, he must be able to demonstrate by his records that a sale which appears on the face of the record to require the collection of a tax is actually made up of sales of ten cents or less.

The entry in each case will be:

Appeal from Superior Court sustained, without costs.

Case remanded to the Superior Court for a decree denying the appeal to that Court and sustaining the assessment of the tax, penalty, and interest.

LOUISE O'CONNELL, EX'X. OF ESTATE
OF JOHN J. O'CONNELL
vs.
EDMUND W. HILL

Androscoggin. Opinion, February 6, 1961.

Wrongful Death. R. S., 1954, Chap. 165, Sec. 9 and 10.
R. S., 1954, Chap. 113, Sec. 50.
M.R.C.P. 8 (c) Contributory Negligence.

The burden of proving a decedent's contributory negligence is upon the defendant.

An $8,000.00 damage award for the widow of an 81 year old retired police captain employed as a contractor's traffic officer is excessive, where decedent's annual pension was $1,234.00 and his employment intermittent and seasonal.

Pecuniary loss to the widow in excess of $5,000.00 is unreasonable under facts of the instant case.

ON MOTION FOR NEW TRIAL.

This is a wrongful death case before the Law Court upon motion for a new trial. Motion for new trial sustained unless within thirty days from filing mandate plaintiff remits all of verdict in excess of $5975.00.

Alton Lessard,
Herbert Bennett, for plaintiff.

Robinson, Richardson & Leddy, for defendant.

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

WILLIAMSON, C. J. John J. O'Connell was struck and killed by an automobile driven by the defendant. This action was brought by his executrix to recover damages under the

death statute. R. S., c. 165, §§ 9, 10. The decedent was survived by his widow and two adult sons.

The jury assessed damages for his death at $8,000 and for funeral expenses at $975. The case was tried in 1958 and is before us on motion for new trial under the rules then in force in which the defendant contends, first, that the decedent was negligent, and second, the damages for his death were excessive. The defendant properly agrees that negligence of the defendant was a question for the jury.

There is no disagreement on the applicable rules of law. We take the evidence with its reasonable inferences in the light most favorable to the plaintiff. Under the statute the decedent was presumed to have been in the exercise of due care and the burden of proof of contributory negligence rested upon the defendant. R. S., c. 113, § 50. We note that the statute was repealed in 1959, c. 317, § 176, and is now covered by Maine Rules of Civil Procedure 8(c). See also Field & McKusick, Maine Civil Practice, §§ 8.7 and 8.11.

In brief, the jury could have found as follows:

The decedent, a retired police captain of the City of Lewiston nearly 81 years of age, was a traffic officer employed by a contractor engaged in construction work on Route 202, a main highway leading from Winthrop to Lewiston. On October 15, 1957, at about 6:30 P.M. Daylight Saving Time, in clear and dry weather, the decedent, who had finished work for the day, was standing on the gravel shoulder on the right hand side of the highway as one travels from Winthrop southerly toward Lewiston opposite a roller. The "black top" highway was 24 feet in width. Oncoming traffic from the north was plainly visible for over 1,000 feet. A roller engaged in rolling the top surface upon the highway during the day was at the time of the accident in the southbound traffic lane. There was a single bright light on the north end of the roller.

The defendant traveling southerly from the direction of Winthrop turned right to avoid the roller, struck the front end of the roller damaging the left side of his car, and struck and killed the decedent. His car came to a stop between 60 to 70 feet from the roller, and the decedent was found about 15 feet from the front of the car. There was evidence that the defendant was traveling at about 50 miles per hour when first seen by the employee seated on the roller and that he reduced his speed prior to the accident.

There was evidence that a few minutes before the accident a driver proceeding southerly stopped to warn the decedent that he was in a dangerous position, that he should flash his light, and that the decedent replied in substance that his flashlight was worn out.

The hard core of defendant's argument on liability is that the decedent was negligent as a matter of law in standing on the gravel shoulder behind a wall of light. As we have seen, the defendant agrees that his actions presented a jury question on the issue of his negligence. Why, we may ask, was there not likewise a jury question of negligence on the part of the plaintiff?

The defendant urges that the case is analogous to *Binette, Admr.* v. *LePage,* 152 Me. 98, 123 A. (2nd) 771. There the decedent placed himself between the rear of a car and the rear of a wrecker on the wrecker's left side of a much-traveled highway in the evening. An oncoming car crashed into the wrecker and the decedent was killed. In overruling plaintiff's exceptions to a nonsuit, the court said, at p. 100:

> "The deceased was familiar with this highway and knew, or should have known, that the position he assumed, under the conditions which then existed, was extremely dangerous and hazardous."

The instant case may be readily distinguished from *Binette.* Here we have a person standing on the gravel

shoulder outside of the traffic lane with a roller carrying a light between himself and traffic approaching from the north.

We are unable to say that on all the evidence a jury could not reasonably find that the decedent was in the exercise of due care under the circumstances. Indeed, it may be more accurately stated that we cannot find that the defendant has sustained the burden of proof that the decedent was negligent. The jury verdict on liability stands.

On the issue of damages, we are convinced the jury erred. There is no question of the item for funeral expenses of $975. The difficulty comes with the $8,000 damages for the widow. The two adult sons did not seek damages.

The decedent at the time of his death was 80 years and 10 months of age, with a life expectancy of approximately six years. He was entitled as a retired police officer to an annual pension of $1,234.92. From 1953 it appears that his employment was intermittent and seasonal. During the two and one-half months preceding his death he earned between $500 and $600. There is no other evidence of earnings.

What then was the pecuniary loss from the widow from her husband's death? The jury of necessity was dealing with probabilities for the future and not evaluating known losses in the past. It surely would be reasonable to expect that the decedent's earnings would grow less and less and could not be counted upon to continue during his lifetime. Further, his wants, needs, and living expenses were a charge upon his income.

We cannot, nor do we, attempt to reach a mathematical nicety in establishing a pecuniary loss to the widow resulting from this unfortunate accident. We do no more than say that beyond a given sum damages would be unreasonable and not justified. We place this amount at $5,000.

The entry will be

Motion for new trial sustained unless within thirty days from filing of mandate plaintiff remits all of verdict in excess of $5,975.

WILLARD NISBET
vs.
ROBERT A. LINBERG

Cumberland. Opinion, February 7, 1961.

Brokers. Commissions.
Effective Cause of Sale. Abandonment.
M.R.C.P. 50 (b) (c).

A broker with an open listing who has informed a prospect that a property is for sale and has furnished his seller with the name of the prospect is not entitled to a commission on a later sale produced entirely by the efforts of the owner.

The effect of an abandonment has been universally regarded as defeating the broker's claim to a commission upon a subsequent sale by the owner to the person who was abandoned as a prospect by the broker.

ON APPEAL.

This is an action for a brokers commission before the Law Court upon appeal from the denial of a motion N. O. V. (or alternatively for a new trial). M. R. C. P. 50 (b) appeal sustained. Judgment for the defendant notwithstanding the verdict.

Richard Chapman, for plaintiff.

Ralph I. Lancaster,
Horace Hildreth, Jr., for defendant.

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

WEBBER, J. This was an action seeking recovery of commissions claimed by plaintiff broker to have been earned as a result of the sale of real estate by defendant owner. At the close of the evidence the defendant moved for a directed verdict. Upon denial of this motion and after a verdict for the plaintiff, the defendant seasonably filed his motion for judgment notwithstanding the verdict (or alternatively for a new trial), as provided in M. R. C. P. Rule 50 (b). Appeal from a decision adverse to the defendant raises the decisive issue here.

On October 25, 1958 the owner gave to the broker an agreement in writing by the terms of which the latter was to have the exclusive opportunity for a period of 90 days to sell the defendant's home at a price of $75,000. In addition the broker would have his commission upon any sale made during an additional 90 day period to a prospect who had been solicited by the broker. Other terms of this "exclusive" listing are not material here since no "sale" occurred during this 180 day period; nor did the broker present any customer during this period. *Labbe* v. *Cyr*, 150 Me. 342, 347.

On December 12, 1958 the plaintiff called upon one Porteous, a neighbor of the owner, and attempted to interest him in the purchase of defendant's home. Mr. Porteous explained that he was engaged in carrying out plans to "revamp" his own home and had no interest in any purchase. The broker reported this conversation to the owner and never thereafter made any contact with Mr. Porteous.

In January, 1959, when only a few days of the original "exclusive" listing remained, the broker attempted to obtain an extension of his contract. The owner, however, would agree, and this orally, only to an "open" listing which both seem to have understood would permit the owner to

sell the property either by his own efforts or through another broker competing with the plaintiff. The latter was successful also in obtaining from defendant a variation in his proffered terms of sale and the price was then reduced to $70,000 upon an added condition that the owner would retain some land on which to build a new home. It is not contended that after January 23, 1959 the plaintiff had any more than his "open" listing upon the revised offer of terms. In any event, nothing of consequence occurred during the period of 180 days which expired in April, 1959.

Some time in May, 1959 the defendant called upon Mr. Porteous, told him his house was for sale and asked if he would be interested in buying. Mr. Porteous informed him he was awaiting plans from his architect for an addition to his own home and that he would wish to see these plans and estimates of building costs before he could determine whether or not he would be interested. When he subsequently received these plans and the estimates as to probable cost, he abandoned any idea of remodeling his own home. Shortly thereafter, Mr. Porteous and his wife inspected the defendant's home, received an offer of sale for $60,000 conditioned upon the exclusion of about an acre of land, and determined to accept it. Their willingness to purchase was further dependent upon their ability to find a customer for their own home, but in this they were immediately successful. A survey of the excluded lot was promptly completed and on May 28, 1959 a written agreement of purchase and sale was executed. This agreement reflects a meeting of minds of purchaser and seller not only as to the real estate and its price, but also as to such related matters as items of personal property included in the sale, the seller's occupancy for a period of three months, the prorating of taxes and the allocation of cost and coverage of insurance.

On this posture of the evidence the plaintiff contends that he produced Mr. Porteous as a customer ready, willing and

able to purchase the defendant's property on terms satisfactory to the latter so as to entitle him to a commission on the completed sale. These facts present the interesting question whether or not a broker with an "open" listing who has informed a prospect that a property is for sale and has furnished his seller with the name of the prospect is entitled to a commission on a later sale produced entirely by the efforts of the owner. We think not. More can reasonably be required of one who would claim compensation for services performed. In *MacNeill* v. *Madore,* 153 Me. 46, 47, we said:

> "A commission on a sale is earned only where the broker is the *effective and producing cause* of the sale, unless the broker is otherwise protected by the specific terms of his contract with the seller." (Emphasis supplied.)

In *Gerstian* v. *Tibbetts,* 142 Me. 215, 218, the phrase employed was

> "and that the broker *produced* to the seller a ready, willing and able buyer upon the authorized terms." (Emphasis supplied.)

The word "produce" or its equivalent is one commonly employed by courts in expressing what is expected of a broker who claims a commission. In the ordinary situation the broker finds the prospect and awakens his interest in the client's property. If he finds such an interest already existing, he attempts to increase it. His efforts bring about a meeting of owner and prospect and an inspection of the premises to be sold. He stimulates negotiation as to price and terms and often accepts for his client a payment to bind the bargain and a memorandum evidencing the customer's commitment to the sale. We do not suggest that all such efforts and accomplishments must be shown in order that a broker might prove himself entitled to compensation. We are satisfied, however, that it would be most unusual for a broker to be able to demonstrate himself to be the "effective and producing cause" of a sale when it appeared

that he had never done any of these things or anything reasonably equivalent thereto. In the instant case the plaintiff saw the prospect but once and on that occasion failed to awaken in him any interest whatever. Mr. Porteous first developed an interest in the property many months later and then only as a result of overtures made to him by the owner at a time when his own circumstances had suddenly and completely changed. The defendant sold his property to Mr. Porteous entirely unaided by the plaintiff. When the plaintiff called upon Mr. Porteous and thereafter mentioned his name to the defendant as a person completely disinterested in purchasing property, he was not "producing" a customer ready and willing to purchase. When Mr. Porteous later became ready and willing to purchase, that transition had occurred entirely as a result of the defendant's efforts and he alone must be deemed the "effective and producing cause of the sale." In short, to paraphrase the language of *Gerstian* v. *Tibbetts, supra,* at page 219, the sale resulted entirely through efforts of the owner, and with no intimation of bad faith on his part.

The plaintiff relies almost exclusively on *Swan Co., Inc.* v. *Cook,* 143 Me. 109. The case is readily distinguishable. In that case the broker found the prospect, awakened the latter's interest in the property and brought his client and the prospective customer into contact and negotiation. These negotiations failed to culminate in an immediate sale only because the seller refused to vary his terms to meet the price the customer was then ready, willing and able to pay and which ultimately he did pay. When later the owner dropped his price to the level satisfactory to the customer, the broker was entitled to commission on the resulting sale. In effect the court held that when an owner sees fit to vary the terms he has given the broker, the broker is entitled to the benefit of that variance if a sale to the broker's interested prospect results. In short, the broker had fulfilled his contract by producing a customer ready, willing and able to

purchase on terms satisfactory to the owner. In *Swan* the sale hinged upon price and nothing else. In the instant case the plaintiff failed to interest the buyer at any price or on any terms. He was unable to stimulate an inspection of the property or any negotiation between the parties. He had nothing to do with working out the many details which made possible a meeting of the minds. In the instant case price was only one of many factors on which the ultimate sale depended. We are satisfied that the court would have reached a different result in *Swan* if in that case the broker had not awakened a lively interest on the part of the buyer and in a very real sense brought the parties together.

There is a further reason for our conclusion that the plaintiff cannot recover in such a case as this. We think a sound and applicable rule of law was well and correctly stated in 8 Am. Jur. 1069, Sec. 144, in these words:

> "If a broker, after introducing a prospective customer to his employer to no purpose, abandons his employment entirely, or if, after procuring a person who proves to be unwilling to accept the terms of his principal, he merely ceases to make further endeavors to negotiate a deal with that particular individual and all negotiations in that direction are completely broken off and terminated, he will not be entitled to a commission if his employer subsequently renews negotiations with the same person, either directly or through the medium of another agent, and thus effects a sale without further effort on the part of the broker first employed. If, however, upon the resumption of the negotiations, the principal recognizes the broker's agency as continuing, by employing him as the medium for such reopening, his right to commission on the consummation of the sale is complete."

The effect of abandonment has been universally regarded as defeating the broker's claim to a commission upon a subsequent sale by the owner to the person who was abandoned

as a prospect by the broker. See cases cited in Annotations in 9 A. L. R. 1194 and 27 A. L. R. (2nd) 1402. In *Dawson* v. *Norris* (1954), 108 A. (2nd) (D. C.) 538, the court applied the recognized rule of abandonment to facts bearing a striking similarity to those of the instant case. In *Dawson* the broker saw the prospect but once. The latter expressed a complete lack of interest in purchase. The broker never again made any effort to interest the prospect. Later the owner commenced negotiations directly with the prospect and by persuading him that the cost of repairing a roof would be substantially less than the buyer had assumed, he aroused an interest in purchasing the property which culminated in a sale. With respect to abandonment the court said at page 540: "Here the record does not show that the broker ever interested Williams in the property. Even if it could be said that Norris first interested Williams in the property as a prospective purchaser, his failure to communicate with him or attempt to further induce him in any way was a clear abandonment of Williams as a purchaser." So in the instant case the plaintiff acknowledged that he saw the buyer but once. Of that occasion and his subsequent attitude and conduct he testified on cross-examination:

> "I went to see Mr. Porteous once, and Mr. Porteous was so emphatic he wasn't going to buy another house, he had plans, was proceeding with revamping of his home, I felt it was a *waste of time. He had made his decision; that was it.*" (Emphasis ours.)

This evidence permits of only one interpretation. The plaintiff abandoned Mr. Porteous as a prospective purchaser. His subsequent conduct is entirely consistent with the concept of abandonment. When later the plaintiff received an authorization from the defendant to offer the property at a reduced price, it did not occur to the broker to communicate this new offer to Mr. Porteous. When after a lapse of over five months the defendant sold the property by his

own efforts to Mr. Porteous, he was under no obligation to pay a commission to the broker.

In view of our decision, it becomes unnecessary to consider or discuss alleged errors in rulings by the presiding justice below.

In accordance with the provisions of M. R. C. P. Rule 50(c), the entry will be

Appeal sustained. Judgment for the defendant notwithstanding the verdict.

YORK CORPORATION

vs.

E. PERRY IRON & METAL CO., INC.

Cumberland. Opinion, February 10, 1961.

Conversion. Purchaser.
Stolen Property. Punitive Damages.
M.R.C.P. 9

The facts, not the pleadings, determine whether punitive damages are recoverable. M.R.C.P. 9.

A jury award of punitive damages is proper where the evidence supports a finding that the purchaser of property knew of the unlawful taking by the seller and that seller was not the owner.

ON APPEAL.

This is an action for conversion before the Law Court upon appeal. Appeal denied. Judgment to be entered on the verdict.

Alan Levenson, for plaintiff.

Woodman, Skelton, Thompson & Chapman, for defendant.

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

WILLIAMSON, C. J. On appeal. This is an action to recover damages for the conversion of copper wire. The jury returned a verdict of $1701 for the value of the wire, and assessed punitive damages at $500.

The evidence viewed most favorably for the plaintiff discloses the following:

The plaintiff York Corporation is a utility generating and selling electricity. From July 1958 to November 1959 there was a series of thefts of high tension copper wire from the plaintiff's pole lines totaling 15,540 pounds. Six men pleaded guilty and were convicted of the thefts.

Two of the men convicted sold 3,000 pounds of the wire to the defendant corporation at Portland. The number of pounds sold was obtained by dividing the amount received by the maximum price of 20 cents per pound. The value of the wire was established at 56.7 cents a pound, or $1701.

The jury was fully justified on the evidence in finding that the plaintiff had title to certain wire; that the wire was stolen from it; that it came into possession of the defendant; that it was converted by the defendant to its uses; that the wire so converted was of a certain quantity and value; and that the worth of the wire at the time of the taking by the defendant was properly established. The plaintiff is entitled to recover $1701 for the value of the wire so converted.

The question remains whether the jury could lawfully assess punitive damages. The defendant makes two points: first, that the issue was not properly in the case, and secondly, that punitive damages are not recoverable in an action for conversion.

Punitive damages may be assessed by a jury where there has been a conversion, as here charged, "in reckless and wanton disregard of the rights of the owner; and that the Defendant, knowing the property to be stolen goods, did convert same to its own use, wilfully and with malice, all to the damage of the Plaintiff herein to the punitive damage value of Five Hundred Dollars ($500.00)." See Annot. 54 A. L. R. (2nd) 1361 and 1395.

The facts, not the pleadings, determine whether punitive damages are recoverable. *Wilkinson* v. *Drew,* 75 Me. 360. See Maine Rules Civil Procedure, Rule 9, and Maine Civil Practice, Field & McKusick, § 9.6.

The defendant could hardly have been surprised at the claim for punitive damages in light of the evidence of plaintiff's witness who sold the wire to the defendant. The witness made it plain beyond doubt that the assistant treasurer of the defendant corporation knew the wire was taken unlawfully from a pole line in Sanford, and that it was not owned by the seller. He testified in part:

> "A. He (the assistant treasurer) says: 'You better watch your step because if we get caught with it, it will be an awful jam.' I told him I took it by night.
>
> Q. You told him you took it by night?
>
> A. Yes.
>
> Q. Did he say he would buy it?
>
> A. Oh, yes, he bought it."

The assistant treasurer denied the conversation. The jury chose to believe the witness.

We find no error on the part of the court in refusing to direct a verdict for defendant or to grant a new trial, or in giving the instructions relating to punitive damages, or in allowing an amendment to the complaint, or in the rulings on several points relating to evidence. The plaintiff is entitled to judgment on the verdict.

The entry will be

Appeal denied.

Judgment to be entered on the verdict.

STATE OF MAINE
vs.
ROBERT FIELD

Cumberland. Opinion, February 14, 1961.

Rape. Force. Evidence.
New Trial.

The elements of the crime of rape which the state must prove beyond a reasonable doubt are, (1) carnal knowledge of a female, (2) by force, and (3) against her will.

R. S. Chap. 1954, Chap. 130, Sec. 10.

In the absence of corroboration the testimony of the prosecutrix must be scrutinized and analyzed with great care. If the testimony is contradictory, or incredible, or unreasonable, it does not form sufficient support for a verdict of guilty.

Where there are no physical facts to testify to force or resistance and testimony as to fear (as a compelling reason for submission) is meager, there remains doubt and uncertainty.

ON APPEAL.

This is a charge of rape before the Law Court upon appeal. Appeal sustained.

Arthur Chapman and *Clement Richardson,* for State.

John Hanscom, for defendant.

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

WILLIAMSON, C. J. On appeal. The respondent was found guilty of rape and appeals from denial of a motion for a new trial.

The witnesses for the State were the prosecutrix and a deputy sheriff to whom she complained of the rape. The only witness for the respondent was the physician who examined the prosecutrix at the request of the deputy sheriff.

The respondent did not take the stand. ". . . the fact that he does not testify in his own behalf shall not be taken as evidence of his guilt." R. S., c. 148, § 22.

In brief, the prosecutrix testified as follows:

As the prosecutrix was walking home on a Portland street at about twelve o'clock on a September night, a car with two men "pulled up next to me . . . I looked to see who it was, and it was nobody I knew, so I kept on walking." The respondent "spoke to me again. I didn't answer him, so he got out and started walking next to me."

"Q. What happened when you reached your home?
"A. Well, I started to go up the stairs and Field walked halfway up the stairs with me.

* * * * * * * * *

"Q. What did Field say to you at your home?
"A. He wanted to talk to me, and I didn't want to bother with him, because he had been drinking and he was quite drunk at the time. And where I didn't know him, I didn't want to have anything to do with him.

"Q. What did he say to you?
"A. Well, he just said he wanted to talk to me, I still didn't know about what.

"Q. What did you then do?
"A. I told him, I said, 'I'm going in the house.' 'Well,' he says, 'I'm going to cause a disturbance; I want to talk to you.' So I told him finally, I says, 'All right, if you want to talk without any trouble.'

I says, 'you can sit in the car and I'll sit next to the door and we'll talk.'

"Q. Did you get in the car?
"A. I did."

During the ten or fifteen minutes in which she was seated in the car the conversation was general, and no one molested her. Finally the respondent said, "Well, we'd better get going." Horne, the other man, was unable to start the car. At his request the prosecutrix steered the car while Horne and the respondent pushed. When the car started both men jumped in.

"Q. Did you have any talk to Field at this time?
"A. I asked him, I says, 'Now will you please take me home?'

"Q. What did he say?
"A. 'You're here whether you want to be or not.'

* * * * * * * * *

"Q. Will you tell what happened when you reached Cook's quarry?
"A. I made up the excuse that I had to go to the bathroom, so Horne stopped the car. I got out and Field came with me. I told him I was quite capable of going by myself, but he seemed to want to go with me. So when we got to the end of the sandpit, I started running up the road. I got away from him and started running. I got about 100 yards, and he made a football tackle and down I went.

"Q. Then what did he say to you and what happened?
"A. He says, 'You get back in the car,' and he started dragging and pulling at me.

"Q. Did you get back into the car?
"A. Yes, with his help.

"Q. Now where did you go from Cook's gravel quarry?
"A. Out around the area of Forest Lake.

"Q. How do you know you were in the area of Forest Lake?

"A. Because I've been there millions of times during the summer.

"Q. What happened when you were out in Forest Lake?

"A. Well, Horne continued to drive the car. Field forced me into the back seat. There he had intercourse with me.

"Q. Did you resist Robert Field's advances?

"A. Yes, I did, but it didn't do any good.

"Q. Did he tear any of your clothing?

"A. No, he didn't.

"Q. Did he remove any of your clothing?

"A. Yes, he did.

"Q. What did he remove?

"A. My underpants.

"Q. Are you certain that he had intercourse with you?

"A. Yes, sir.

"Q. Now after this happened in regard to respondent Field, what happened?

"A. Then after he got through, I told him, I says, 'I want to go home; I want to go in the front seat,' I says, 'and I want you to take me home and please don't let Horne near me.' No, he couldn't see it that way, so they stopped the car just long enough to stop drivers. Field drove and Horne forced me in the back seat again where he took my pants off, too."

The men drove her to her home at about 12:40 A.M. On the respondent saying he would return the following Friday evening, she said, "If you want to come back you certainly can." She awoke her "girl friend." Within ten minutes they were at a police station where she talked with the

officer. Two hours later she made the complaint to the deputy sheriff. In the morning she identified the respondent, who denied knowing her. Her clothing was not torn or disarranged, except for a bent hook in her brassiere. She suffered no bruises.

The deputy sheriff testified that on making the complaint the prosecutrix "appeared very upset, mad, in fact fighting mad," that he arranged for her examination by a physician, and that on examination of the respondent the next morning he found no scratches or injuries.

The physician, testifying for the respondent, examined the prosecutrix at the Maine Medical Center at four o'clock in the morning, less than four hours from the time of the attack as stated by the prosecutrix. His testimony in part reads:

"Q. Now you made a physical examination of her outside body, the surface —

"A. Yes, sir.

"Q. (Continuing) — for marks of violence —

"A. Yes, sir.

"Q. (Continuing) - - scratches, bruises, and so forth, is that right?

"A. Yes, sir.....

"Q. You made a complete examination?

"A. Yes, sir.

"Q. Her whole body?

"A. Yes, sir.

"Q. What did you find?

"A. Nothing, sir.

"Q. Found no marks of violence whatsoever?

"A. No, sir.

"Q. You made an examination of her vagina?

"A. Yes, sir.

"Q. Did you find any tearing?
"A. No, sir. She admitted that she had had a child, and, therefore, there would be no evidence of bruising there, certainly.

"Q. No irritation that you could see?
"A. No, sir.

"Q. No inflammation?
"A. No, sir."

The elements of the crime of rape which the State must prove beyond a reasonable doubt are (1) carnal knowledge of a female, (2) by force, and (3) against her will. *State* v. *Dipietrantonio,* 152 Me. 41, 122 A. (2nd) 414. "Whoever ravishes and carnally knows any female of 14 or more years of age, by force and against her will . . . shall be punished . . ." R. S., c. 130, § 10.

Corroboration beyond the testimony of the prosecutrix is not required under our law to prove the crime of rape. In the absence of corroboration, the testimony of the prosecutrix must be scrutinized and analyzed with great care. If the testimony is contradictory, or unreasonable, or incredible, it does not form sufficient support for a verdict of guilty. *State* v. *Wheeler,* 150 Me. 332, 110 A. (2nd) 578; *State* v. *Newcomb,* 146 Me. 173, 78 A. (2nd) 787.

There is no evidence of actual force to overcome actual resistance by the prosecutrix. Resistance to meet force would have been disclosed in the physical condition of the prosecutrix, or in the condition of her clothing. There are no physical facts to testify to force or resistance.

The question remains, however, whether the prosecutrix submitted under the compulsion of fear. In such case the force may be said to be constructive. In *State* v. *Dipietrantonio, supra,* at p. 51, the following instruction was held to be proper:

"You have in your deliberations the right to consider as to whether or not. . . . was put under fear.

> There has been some testimony that she feared the respondent. It is for you to decide, and it is further for you to give such weight as to whether or not that fear prevented her from offering any greater resistance than she did offer, as you may find it. I again say to you that in order for you to find the respondent guilty, the act, that is admitted, must have been committed with force and without consent."

The testimony of fear as the compelling reason for submission is meager. On cross-examination the prosecutrix stated that at Forest Lake she was "panic stricken." We find little more in the record.

The words of Lord Chief Justice Hale in 1680 ring true after nearly three centuries:

> "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent." Pleas of the Crown, I, 633, 635. (Quoted in 7 Wigmore on Evidence, 3rd ed. § 2061.)

Rape was punishable by death when Maine became a State. In 1829 the penalty was reduced to life imprisonment. This most detestable crime now carries imprisonment for any term of years. Few crimes in our law are punished with like severity. See Laws 1821, c. 3, § 1; Laws 1829, c. 430, § 5; R. S., c. 130, § 10.

On careful review of the record, we have grave doubts of the sufficiency of the evidence to warrant a verdict of guilty. There remains doubt and uncertainty that can be cured only by a new trial.

The entry will be

Appeal sustained.

E. A. THOMPSON LUMBER CO.
vs.
ROBERT A. HEALD
BEVERLY K. HEALD
AND
JOHN MACMULLEN

Kennebec. Opinion, February 23, 1961.

Liens. Evidence. Presumptions.
Judgments. Decrees.

If a presumption were to arise that materials furnished by a supplier did in fact enter into the construction of a building and thus become lienable, it could only have the effect of placing upon the defendant owner the burden of going forward with the evidence sufficient to satisfy the fact finder that the non-existence of the presumed fact is as probable as its existence. The burden of proof does not shift.

The fact of delivery of suitable materials to a building site *merely permit or justify* a finding that the materials were incorporated into the structure; they do not compel such a finding.

R. S., Chap. 178, Sec. 43, does not prevent the inclusion in a deficiency lien judgment of non-lienable items found to be due from the contractor.

The ascertainment of a debt underlying the lien is an essential part of the proceeding and equity should resolve all issues which are inextricably related in the controversy.

ON APPEAL.

This is an appeal from a decree to enforce a lien. Appeal denied. Case remanded for alteration of orders and decrees in accordance with this opinion.

Richard B. Sanborn, for plaintiff.

Louis I. Naiman, for defendant.

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

WEBBER, J. This was a bill in equity brought under the rules of practice in effect prior to December 1, 1959 to enforce a lien claimed under the provisions of Sections 34 and 38 of R. S., Chap. 178. Plaintiff furnished materials to the contractor MacMullen who was engaged to erect a garage building for defendants Heald. The justice below found evidence supporting a lien in the amount of $532.58 but disallowed as non-lienable an amount of $1354.45, the value of materials not adequately shown to have been incorporated into the building. A personal judgment for the latter amount was ordered as against the defendant contractor. As a basis for appeal the plaintiff contends (1) that the evidence compelled a finding that plaintiff was entitled to a lien for the full amount of labor and materials alleged to have been furnished, and (2) that in any event the personal judgment ordered against the contractor should have been for the full amount of the claim inclusive of both lienable and non-lienable items.

Plaintiff recognizes the well established rule that one claiming a lien has the burden of proving that the materials furnished were incorporated into the building. *Fletcher, Crowell Co.* v. *Chevalier,* 108 Me. 435; *Andrew* v. *Dubeau et al.,* 154 Me. 254. Plaintiff urges upon this court, however, that the supplier of labor and materials should be aided by a presumption in such a case as this. The contention is that when a supplier has shown (1) that all the materials for which a lien is claimed were delivered to the construction site and charged to the designated job; (2) that construction emerges composed of materials of the type furnished; (3) that some of the materials furnished are specifically identified as having been incorporated into the construction; and (4) that all the materials furnished are necessary for and suitable to the completion of the building,

a *presumption* arises that all the materials furnished did in fact enter into the construction and thus became lienable. The effect of such a presumption, according to the plaintiff, would be to shift to the owner the burden of proving that some part of the materials was diverted and did not become incorporated into the construction.

It may be said at the outset that such a presumption, if it were to be recognized by this court, could only have the effect of placing upon the defendant owner the burden of *going forward with evidence* sufficient to satisfy the fact-finder that the non-existence of the presumed fact is as probable as its existence. The burden of proof does not shift. *Hinds* v. *John Hancock Ins. Co.*, 155 Me. 349.

Should such a presumption be recognized? Of the several reasons which prompt the raising of presumptions (discussed at page 363 in *Hinds*), the plaintiff adopts that which is there stated as "(b) to require the litigant to whom information as to the facts is the more easily accessible to make them known." Plaintiff has directed our attention to a number of cases collected in Annotations in 71 A. L. R. 110 and 39 A. L. R. (2nd) 427 which recognize a rule of evidence tending to lighten the burden of proof required of materialmen in such cases. Many of these cases reached the appellate level after a finding by the factfinder favorable to the lien claimant and tend to leave unanswered the question whether the fact of delivery of suitable materials to the site should, in the absence of contrary evidence, *compel* the finding that all such materials were incorporated into the structure, or whether that fact should merely *permit or justify* such a finding if it is made. It is true that a number of these cases seem to use the word "presumption" in its full technical sense. Others use the word more loosely. We are not persuaded, however, that a technical presumption with its compulsive aspect should be recognized. It is true that in the ordinary case the materials supplied to a con-

tractor at a construction site are used in the building, but it is likewise true that in the ordinary case they are fully paid for by the contractor to whom the supplier extends credit in the first instance and no lien problem arises. In those more infrequent cases where lien claims become necessary it is often found that the contractor has proved unreliable either financially or otherwise. It is by no means uncommon for such contractors to manipulate materials in order to inflate credit or keep work in progress on several jobs at once. The average owner under present day conditions is not possessed of sufficient knowledge and skill to appraise accurately what is actually incorporated into a structure or what may have been diverted without his knowledge. Most materialmen are knowledgeable in such matters. Although proof of the four basic facts enumerated above should be deemed adequate to warrant a reasonable inference upon which an ultimate finding of incorporation might properly be based, we are not persuaded that any presumption exists which would *compel* the finding in the absence of any contrary evidence. We note that although the requirements of proof in lien cases have often been discussed, no prior opinion of this court has intimated or suggested that such a presumption might exist.

In the instant case the justice below did not see fit to find the ultimate and essential fact of incorporation as to the items disallowed. For that matter it is not clear that he was wholly satisfied that the four basic facts which might warrant an inference were proven by a fair preponderance of the evidence. The testimony given by plaintiff's witnesses was tinged with uncertainty. Defendant Heald on cross-examination without objection voiced the suspicion that material was diverted from his job. Admittedly he was only at the site an hour or two at a time and was in no position to observe all that took place. The weight to be given to the testimony of the witnesses was for the factfinder and

upon this evidence it cannot be said that his determination that only a part of the items are lienable is clearly wrong.

The contention of the plaintiff that in any event it should have been awarded personal judgment against the defendant contractor for all the materials furnished, whether lienable or non-lienable, presents an issue which has not heretofore been precisely determined. In *Fletcher, Crowell Co.* v. *Chevalier, supra,* the mandate provided for a "personal judgment" against the contractor for the amount of the non-lienable items and a "judgment" against the same defendant for the amount of the lienable items, "and a lien therefor on the land and building" of the defendant owner. We have reason to believe that the practice has varied from case to case with the practical results obviating the necessity of obtaining clarification by judicial review. We look in the first instance to the terms of the applicable statute. R. S., Chap. 178, Sec. 43 provides: "If the proceeds of the sale after payment of costs and expenses of sale are insufficient to pay the lien claims and costs in full, the court may render judgment against the debtor in favor of each individual lienor for the balance of his claim and costs remaining unpaid, and may issue executions therefor. If the proceeds of sale, after the payment of costs and expenses of sale, are more than sufficient to pay the lien claims and all costs in full, the balance remaining shall be paid to the person or persons legally or equitably entitled thereto." In *Maxim* v. *Thibault,* 124 Me. 201 at 206, our court, construing the statute, seemed to deny the authority of the court to issue any personal judgment except for a deficiency established by a sale ordered by the court. The court said: "The plaintiff (supplier) is only entitled to judgment against his debtor (contractor) for any deficiency in the proceeds of sale. If his *judgment against the building* is satisfied from the proceeds of sale, or is paid by the owners to prevent the sale of their property, *judgment against the debtor is not authorized.* * * * If the lien judgment is satisfied by the

payment thereof by (the owners) within a time to be fixed in the decree, the cause proceeds no further; otherwise the cause is to be retained upon the docket for sale of the property and further proceedings, in accordance with (the statute) and said decree. The costs should be taxed and stated in the decree." (Emphasis supplied.) It is not entirely clear from the opinion whether or not the court had the matter of personal judgment *for non-lienable items* in mind in announcing this construction of the statute. The opinion is in terms broad enough to include such a prohibition. We can only say that if such has been the effect of a statute in force and unchanged for many years, it has been honored mainly in the breach. We do not think the statute which provides affirmatively for the judgment for any deficiency was intended by the legislature to prevent the inclusion in such a judgment of the non-lienable items found to be due from the contractor. The latter is always under such circumstances a necessary party and is before the court. *Andrew* v. *Bishop,* 132 Me. 447. The ascertainment of the debt which underlies the lien is an essential part of the proceeding. *Cole* v. *Clark,* 85 Me. 336, 338. Equity should finally resolve all of the issues which are inextricably related in the controversy. The procedure outlined by *Maxim* will procure this result if we but include in the final judgment against the defendant contractor the amount of the non-lienable items. It should be noted that no judgment is awarded against the owner where, as in the instant case, he never contracted with the plaintiff supplier but dealt only with his contractor. Judgment for the amount of the lien is in rem and runs against the land and buildings on which the lien is imposed. To implement the foregoing rules of law, the justice who has the matter for disposition should first make his findings determining the total amount of the materials furnished to the defendant contractor for the owner's job as well as the amount thereof secured by lien on the owner's property. He should then award judgment

against the land and buildings for the amount of the lien and costs (R. S., Chap. 178, Sec. 42) and should order the property sold, in event of non-payment within the time prescribed, on the terms and in the manner provided by the statute. The case, however, should remain on the docket. If a deficiency is established by the sale, the amount thereof should be determined by the court. Judgment should then be awarded against the defendant contractor for the amount of such deficiency as provided by statute and the amount of any non-lienable items together with such interest and costs as the court may determine. It is obvious that where, as in the more usual case, the lien is fully discharged either by payment before sale or by the proceeds of a sale, judgment against the defendant contractor will be limited to the non-lienable items, interest and costs.

In the instant case, the plaintiff has not shown itself aggrieved or prejudiced by any error below. It is obvious that the property subject to lien has a value substantially in excess of the lien obligations and that no party anticipates any deficiency. The justice below awarded to the plaintiff judgment against the defendant contractor for all to which it will under these circumstances ever become entitled, that is, the amount of the non-lienable items. Plaintiff offers no complaint upon this appeal merely because the award of judgment may have been premature. In fact it may be presumed that the decree below was prepared by counsel in accordance with usual equity practice, and we note that it was seen and agreed to as to form by both counsel. There is no merit in the plaintiff's sole contention that judgment against defendant contractor should have been for *all* the materials furnished. Such a result would render meaningless the statute quoted above. We therefore see no occasion for sustaining the appeal. We note, however, that judgment was erroneously awarded against the defendant owners for the amount of the lien. The pertinent orders and decrees should

be altered to conform with the procedure suggested in this opinion.

Appeal denied. Case remanded for alteration of orders and decrees in accordance with this opinion.

CARROLL F. BLACKSTONE, ET AL.
vs.
EDMUND ROLLINS, ET AL.

Aroostook. Opinion, February 27, 1961.

Education. Sinclair Act. Schools.
Rules of Court 8 (a) (f), 10 (b), 12 (b) (e).

The rules contemplate that the pleader shall set forth plainly and concisely in numbered paragraphs, facts showing that the pleader is entitled to relief; and after these facts have been pleaded, the petition or complaint should end with a prayer, specifying the relief which is sought. Rule 8 (a), 10 (b).

A certificate of organization issued by the School District Commission shall be conclusive evidence of its lawful organization. cf. P. and S. L., 1959, Chap. 220.

A complaint alleging failure to comply with Sec. 111T of Chap. 41 (which sets forth the requirements for calling a district meeting) would be insufficient and demurrable under old practice because no specific allegation was made as to manner of non-compliance, yet under the M.R.C.P. Rule 12 (b) and Rule 8 (f), the defendant could have had more specific allegations under Rule 12 (e) and because of his failure to seek more specific allegations, plaintiff was entitled to be heard on the allegations as stated.

ON APPEAL.

This is an appeal under M. R. C. P. 73 from a dismissal of a complaint. The complaint seeks declaratory relief,

R. S., 1954, Chap. 107, Secs. 38-50. Appeal sustained as to certain paragraphs of the complaint. So ordered.

Solman & Solman, for plaintiff.

Philips & Olore,
George A. Wathen, for defendant.

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

DUBORD, J. This case is before us on appeal of the plaintiffs, filed in accordance with M. R. C. P. 73, from a decision of a single justice granting motions to dismiss plaintiffs' complaint.

The plaintiffs are ten in number and describe themselves as residents and taxpayers of the Town of Perham, Maine, which town is one of six towns composing School Administrative District No. 2, hereinafter referred to as SAD No. 2, organized under the provisions of the Sinclair Act, so-called. The complainants seek declaratory relief under the provisions of Sections 38 to 50, inclusive, R. S., 1954, Chap. 107.

The defendants are the Directors of SAD No. 2, the Maine School District Commission, Inhabitants of the Town of Perham, the Treasurer of the Town of Perham, Inhabitants of the Town of Washburn, the Superintendent of Schools of SAD No. 2, who is also sued in his capacity as Treasurer of SAD No. 2, Inhabitants of the Towns of Castle Hill, Mapleton, Wade, and Chapman, the Attorney General of the State of Maine, the Treasurer of the State of Maine and the acting Commissioner of Education.

SAD No. 2 is not joined as a defendant.

The complaint consists of twenty-two paragraphs together with a final prayer for declaratory and injunctive relief.

Without specifying in detail the contents of the numbered paragraphs, with the exception of four paragraphs to which subsequent reference will be made, plaintiffs' contention is that SAD No. 2 was not properly organized and the conclusiveness of the certificate of the Maine School District Commission provided for by 111-G of the Sinclair Act, is attacked. All of these allegations, with the exception of the four paragraphs hereinabove referred to, relate to matters which took place before the date of the certificate of organization.

In these paragraphs are to be found allegations of failure to strictly comply with the provisions of the statute, among which allegations, without attempting to enumerate all of them, are averments that the Town of Perham was not a member of SAD No. 2, because the School Administrative District was not in existence at the time when the Town of Perham voted to withdraw from the District; that the Town of Perham had failed to elect a school director; that the vacancy created by the town's failure to elect a director was not legally filled; that the oath of office was not properly administered to some of the directors; that the directors did not properly organize; that the vote in the Town of Washburn to assume its proportionate share of the indebtedness of the School Administrative District was not in conformity with the law and invalid; and, in short, that the School Administrative District, not having been properly organized, the acts of the directors thereof are null and void.

Most of the paragraphs purport to allege a certain set of facts and contain a prayer for relief. This manner of pleading is not in accordance with the Maine Rules of Civil Procedure and is not to be commended.

The rules contemplate that the pleader shall set forth plainly and concisely in numbered paragraphs, facts showing that the pleader is entitled to relief; and after these

facts have been pleaded, the petition or complaint should end with a prayer specifying the relief which is sought.

See M. R. C. P. 8 (a) to the effect that:

> "A pleading which sets forth a claim for relief - - shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled."

See also M. R. C. P. 10 (b) to the effect that:

> "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances."

The mode of pleading and request for relief adopted in the instant petition or complaint is one than can lead only to confusion.

In their final prayer, the plaintiffs ask for the following relief:

(1) That it be determined that the Town of Perham is not a part of SAD No. 2.

(2) That any assessment rendered against the Inhabitants of the Town of Perham for school operational expenses and capital outlay and debt service for the operation of the schools within SAD No. 2, be declared void, unconstitutional and ineffective.

(3) That the Inhabitants of the Town of Perham be not required to pay any such assessment, and that all defendants be enjoined from enforcing the collection of such assessment against the Inhabitants of the Town of Perham.

(4) That the defendants who are the Directors of SAD No. 2, be enjoined from raising money by taxation.

(5) That the Treasurer of the State of Maine be enjoined from paying out further tax monies to SAD No. 2.

(6) That the Town Treasurer of Perham be enjoined from paying to SAD No. 2, the assessment made by the Directors of SAD No. 2.

(7) That the Treasurer of SAD No. 2, be enjoined from issuing a warrant for the collection of such assessment against the Inhabitants of the Town of Perham and from otherwise enforcing any of the provisions relating to the collection of such assessment.

Then there is a prayer for general relief.

The defendants, the Maine School District Commission, the Attorney General, the State Treasurer and the Commissioner of Education, filed a motion to dismiss the complaint on the ground that there is failure to allege a claim upon which relief can be granted because the certificate of organization provided for in Section 111-G, Chapter 41, R. S., 1954 is conclusive evidence of the lawful organization of SAD No. 2.

The defendants who are the elected Directors of SAD No. 2, its Superintendent of School and its Treasurer, together with the Inhabitants of the Towns of Washburn, Castle Hill, Mapleton, Wade, and Chapman, filed a motion that the complaint be dismissed for the same reason alleged in the motion made by the other four defendants previously referred to, but the motion of these defendants is broader in that it contains a general allegation that the complaint fails to allege a claim upon which relief can be granted.

The Town of Perham and its Treasurer filed no pleadings and, insofar as the record discloses, no appearance.

The presiding justice, ruling that the certificate of organization of SAD No. 2 was conclusive, dismissed the complaint.

Thereupon, the plaintiffs appealed and set forth in their statement of points to be relied upon the following procedures in which they allege the presiding justice erred:

"1) In dismissing the complaint.

"2) In dismissing the plaintiffs' petition for a declaratory judgment.

"3) In holding and deciding that the issuance of the certificate of organization by the School District Commission forecloses any investigation into the regularity of the organization of the District.

"4) In holding and deciding that the legality of a School Administrative District cannot be challenged after the issuance of the certificate by the School District Commission under the provisions of Section 111-G of the Act.

"5) In holding and deciding to dismiss plaintiffs' petition for a declaratory judgment without giving plaintiffs an opportunity to be heard on the question as to whether or not the assessment levied against the Inhabitants of the Town of Perham is a valid assessment.

"6) In dismissing the petition for declaratory judgment without giving plaintiffs an opportunity to be heard on the various questions and matters set forth in said petition and on which said court was asked to render an opinion, the court having refused to decide or to permit plaintiffs to be heard on the matters and questions set forth in paragraphs 5 to 22, inclusive."

The record indicates that the Maine School District Commission issued a certificate of organization to SAD No. 2 on July 17, 1958. The date of this certificate is subsequent to a date of a meeting held in the Town of Perham on July 1, 1958, at which time it was voted in the affirmative by the Inhabitants of the Town of Perham to join the District.

A new certificate of organization was issued by the Maine School District Commission on October 31, 1958. The record does not indicate the reason for the issuance of this second certificate. However, by force of the first certificate of

organization, SAD No. 2, with Perham included, was already in existence at the time the Inhabitants of the Town of Perham, on October 4, 1958, voted to rescind its prior action to join the District, and this subsequent action on the part of the Inhabitants of the Town of Perham, in no manner affects the issue of organization now before us.

This court decided in the very recent case of *McGary* v. *Barrows,* 156 Me. 250, 163 A. (2nd) 747, that the Legislature was within its prerogative when it provided that a certificate of organization issued by the School District Commission shall be conclusive evidence of its lawful organization. This formal expression of applicable law was reiterated in the recent opinion of this court in *Elwell* v. *Elwell,* 156 Me. 503; 167 A. (2nd) 18.

Moreover, the Legislature by the provisions of Chapter 220, Private and Special Laws of 1959 reconstituted, established and validated SAD No. 2.

It having been decided in the *McGary* case, as well as in several other decisions of this court that the Legislature may create school districts without even referring the matter to the people of the communities involved, it inevitably follows that the Legislature may validate, reconstitute and establish a school district, the original organization of which may be clouded with failure of strict compliance with statutory provisions relating to procedure. In the case of a school administrative district, organized under the Sinclair Act, such legislative act of validation precludes successful attack against all acts relating to organization occurring prior to the date of the certificate of organization issued by the Maine School District Commission.

The plaintiffs, recognizing the barrier created by the decision in the *McGary* case, insofar as most of their allegations are concerned, now advance the argument that while the court below did not err in respect to allegations em-

braced within the *McGary* opinion, they nevertheless, should have been given an opportunity to be heard on other allegations in the petition or complaint.

These other allegations relate to the validity of the assessment levied against the Inhabitants of the Town of Perham and to other matters set forth in the petition, and specifically these matters are set forth in paragraphs 15 to 18, inclusive, of the complaint.

These points are saved in behalf of the plaintiffs by paragraphs 5 and 6 in plaintiffs' statement of points to be relied upon on appeal.

We give our attention first to the point preserved as No. 5, which relates to the assessment levied against the Inhabitants of the Town of Perham which the plaintiffs say is invalid.

The allegations concerning the assessment about which the plaintiffs now complain are contained in paragraph 1 of the complaint.

A careful study of the allegations in this paragraph clearly shows that the alleged invalidity of the assessment was based upon the theory that SAD No. 2, was not legally organized. This being true, the *McGary* opinion answers any issue raised by this paragraph and the presiding justice was correct in dismissing the complaint insofar as this paragraph was concerned.

Giving consideration now to the sixth paragraph of plaintiffs' statement of points to be relied upon on appeal, without the necessity of detailing the contents of the numbered paragraphs therein, it is not difficult to determine that the matters set forth in all of these paragraphs of the complaint, with the exception of paragraphs 15 to 18, inclusive, are all answered by the decision in the *McGary* case, as well as by the validation statute, viz., Chapter 220, Private and Special Laws of 1959.

Our attention is now directed to paragraphs 15, 16, 17, and 18, of the complaint, listed in plaintiffs' point No. 6. Allegations in these paragraphs relate to matters occurring after the date of the certificate of organization and are particularly applicable to actions taken on the school operating budget and on a proposed bond issue.

Paragraph 15 alleges failure to comply with the provisions of Section 111-S (V) which specifies that the school directors shall appoint a resident of the district to make and keep a voting list of all residents in the district eligible to vote; that this person shall be known as the registration clerk; that the registration clerk shall compile his voting list from the voting list of all the municipalities lying within the school administrative district. It is further provided that at least fourteen days before any budget meeting, the registration clerk shall bring his voting list up to date by comparing his list with those voting lists found in the municipalities within the school administrative district and by making such additions and deletions as he finds necessary.

There are no allegations in this paragraph that any persons voted at the district meetings who had no right to vote; or that any person was deprived of voting. Neither are there any allegations of irregularities or fraud arising from the alleged failure to comply with this section of the statute.

We will revert to paragraph 15.

In paragraph 16 of the complaint, it is averred that a budget meeting was called to be held on February 16, 1959, at which time the budget submitted by the school directors for operational expenses was approved by a majority vote. It is further alleged that no voting list was used and that as a consequence, the budget was not properly voted upon. The last sentence in this paragraph to the effect that the directors were not authorized to call the meeting because

they were not a legally constituted board of directors would seem to indicate that the basic contention of the plaintiffs is that no lawfully organized district was in existence, by reason of the unconstitutionality of Section 111-G which provides that the certificate of organization issued by the School District Commission is conclusive evidence of lawful organization.

This last contention is, of course, taken care of by the *McGary* opinion. Moreover, this issue is resolved by the provisions of Section 111-L to the effect that:

> "If a budget for the operation of the school administrative district is not approved prior to April 1st in any given year, the budget as submitted by the school directors for operational expenses, reserve fund and capital outlay purposes shall be automatically considered the budget approved for operational expenses in the ensuing year, - - -."

This being true, even though there might have been a failure to comply strictly with the provisions of Section 111-S (V), the budget submitted by the school directors, in any event, automatically became the budget for the ensuing year, by force of the provisions of Section 111-L.

The plaintiffs take nothing under their paragraph 16, and the order of dismissal in relation thereto was properly entered.

Paragraph 17 of plaintiffs' complaint alleges in substance that a district meeting, called under the provisions of Section 111-T, held on the second Tuesday of February 1959, for the purpose of voting upon the approval of a bond issue, resulting in an aggregate negative vote, was not legally called. It is further alleged that improper notices of the proposed district meeting were given to the towns comprising SAD No. 2. There is no allegation as to the nature of this alleged improper notice.

In any event, in view of the fact that the vote resulted in a negative total, it would appear that this paragraph is superfluous and requires no consideration.

In paragraph 18, allegations similar to those in paragraph 17, are set forth in relation to another district meeting held on the fourth Thursday of February, 1959, at which time a majority of those present and voting, cast their ballots in the affirmative, in respect to the proposed bond issue. In this paragraph it is also alleged that improper notices for the calling of the district meeting were given to all towns composing SAD No. 2. Allegation is further made that because of failure to comply with Section 111-T of Chapter 41, any action taken at the meeting was void and the court was asked to nullify the action of the voters.

Section 111-T, Chapter 41 sets forth in detail the steps which are to be taken in relation to the calling of a district meeting. The complaint alleges failure of compliance without specific allegation of the nature of such failure.

We have disposed of paragraphs 16 and 17. Now, what of paragraphs 15 and 18?

We have already pointed out that the allegations in paragraph 15 are merely to the effect that there was failure to appoint a registration clerk as provided by statute, with no specific allegations of fraud or irregularity arising by reason of such failure.

Before the promulgation of the new rules, the allegations in this paragraph might well be considered insufficient and liable to successful attack on demurrer, now supplanted by a motion to dismiss.

The same thing can be said for paragraph 18 where no specific allegation is made as to the manner in which plaintiffs claim the provisions of Section 111-T were violated or not complied with.

If we regard the motion to dismiss in respect to paragraphs 15 and 18 in the nature of a demurrer, under the procedure which existed prior to the new rules the presiding justice would have been justified in ordering dismissal on the theory that the allegations contained therein were inadequate, albeit perhaps subject to amendment.

In the light of the new rules of pleading, a question now arises as to whether or not the motion to dismiss, as to these two paragraphs, was properly sustained.

While a motion to dismiss for failure to state a claim upon which relief can be granted is now equivalent to a general demurrer under prior practice, as pointed out in Maine Civil Practice by Field and McKusick, Section 12.11, Page 167, the approach in a motion to dismiss is markedly different from an approach to a demurrer.

> "Rule 12 (b) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. This serves the function of the general demurrer under prior practice and tests the legal sufficiency of the complaint. All well-pleaded material allegations are taken as admitted for the purposes of the motion, but not conclusions of law from the facts alleged.
>
> "The approach is markedly different, however, from the approach to a demurrer. 'All pleadings shall be so construed as to do substantial justice.' Rule 8 (f). On a motion to dismiss, pleadings are construed in favor of the pleader. It is not necessary, as in the past, to state all the facts necessary to constitute a good cause of action. The Supreme Court has gone so far as to say that the motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' This statement and like ones in the cases cited should not, however, be wrested from their context. The complaint must 'contain . . . a statement . . . *showing* that the pleader is

> entitled to relief.' This can scarcely mean that dismissal will result only if there is an affirmative showing in his complaint that he cannot recover. What is intended, as demonstrated by the cases cited, is that if fair notice of the claim is given, the complaint is not fatally defective because of the failure to allege in nonconclusory form every fact essential to recovery. The 'showing' that the pleader is entitled to relief must be made, but it may be in general terms which would not have survived a demurrer under prior practice. The objective is to avoid wasting time fighting over mere deficiencies of statement, easily corrected in any event by amendment, which do not go to the real merits of the claim. See Section 8.2 above."

It would, therefore, seem that while the pleadings of the plaintiffs in the instant case in paragraphs 15 and 18 might be considered inadequate prior to the new rules, that under the new rules the allegations may well be deemed sufficient; and if the defendants had desired more specific allegations, the provisions of Rule 12 (e) M. R. C. P. were available to them.

We are of the opinion that the plaintiffs were entitled to be heard on the allegations contained in paragraphs 15 and 18, and that in respect to these two paragraphs, the motion to dismiss was improperly allowed. Our judgment is that the appeal in respect to all allegations in plaintiffs' complaint, with the exception of those in paragraphs 15 and 18, should be denied, but as to the allegations in paragraphs 15 and 18, the appeal should be sustained, and the cause remanded to the Superior Court for further proceedings. No costs to be awarded to either side.

So Ordered.

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT
GIVEN UNDER THE PROVISIONS OF SECTION 3
OF ARTICLE VI OF THE CONSTITUTION
* * * * * *
QUESTIONS PROPOUNDED BY THE HOUSE IN AN ORDER
DATED JANUARY 17, 1961
ANSWERED JANUARY 24, 1961

HOUSE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In House, January 17, 1961.

WHEREAS, in connection with the proposed examination by the House Committee on Elections into the ballots cast in the general election of November 8, 1960 for the House seat from the Class towns of Durham and Lisbon, certain questions have arisen with regard to the contest by Andrew Karkos of Lisbon, Maine of the seat certified to Frank M. Bowie of Durham, Maine; and

WHEREAS, Hearing was held in this matter on Wednesday, January 11, 1961, at which time Mr. Bowie appeared specially in order to contest the jurisdiction of the Committee to hear the merits of this dispute; and

WHEREAS, The Committee decided that it should hear all the available evidence, while at the same time reserving to Mr. Bowie his right to a determination of Committee jurisdiction; and

WHEREAS, Evidence showing the following sequence of events was received and acknowledged as accurate by both parties to this contest;

(1) Mr. Karkos sent the notice of contest to Mr. Bowie by registered mail, return receipt requested.

(2) Mr. Karkos placed the said notice in the United States Mails on December 19, 1960.

(3) This notice was addressed to Mr. Bowie at Durham, Maine, whereas Mr. Bowie's mailing address was Auburn, RFD #1.

(4) The return receipt indicated that Mr. Bowie received this said notice December 27, 1960, less than ten days before the organization of the House of Representatives;

and

WHEREAS, The Committee on Elections may be without jurisdiction to inquire into the certified results; and

WHEREAS, It is Mr. Bowie's contention that Mr. Karkos has failed to comply with the provisions of Chapter 5, Section 89 of the Revised Statutes, relating to the service of said notice, which section is as follows:

> "When any person intends to contest before the house of representatives the right of any other person to his seat therein, he shall serve notice thereof upon such person which notice may be served at any time after the election and shall be served at least 10 days prior to the organization of the house of representatives. He shall present his petition to the house of representatives within 3 days after its organization, stating the grounds upon which he proposes to contest such seat, and all testimony on either side shall be by depositions taken in the manner authorized by chapter 117 in cases of contested senatorial elections, or by parol evidence, and shall be presented to the house of representatives within 3 days from the commencement of the session. If this law is not strictly complied with, except in extreme cases where injustice would be done if a continuance were not allowed, the party neglecting shall be denied a postponement, and the committee on elections shall proceed to determine the case by the testimony before them."; and

WHEREAS, It appears to the members of the House of Representatives of the One Hundredth Legislature that questions of law have arisen which make this occasion a solemn one;

NOW THEREFORE, *be it ordered,* that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this legislature their opinion on the following questions:

I

In an election contest such as the one outlined above, has the contestant complied with the provisons of Chapter 5, Section 89, of the Revised Statutes when he deposits the notice of contest in the United States Mails within the prescribed time limit, but the notice is not received until after the expiration of that limit?

II

If the answer to question number I above is in the negative, does the Committee on Elections have any jurisdiction to entertain the contestant's petition?

III

In what way, if any, would the answers to either of the above questions be affected if it is shown that Mr. Bowie was informed orally, before the expiration of the time limit, that Mr. Karkos intended to contest his election to the House of Representatives?

House of Representatives
Read and Passed
Under Suspension of Rules
Jan. 17, 1961

HARVEY R. PEASE,
Clerk

Name: John L. Knight
Town: Rockland

A True Copy
Attest: HARVEY R. PEASE, Clerk of the House

ANSWERS OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on January 17, 1961.

QUESTION (I): In an election contest such as the one outlined above, has the contestant complied with the provisions of Chapter 5, Section 89, of the Revised Statutes when he deposits the notice of contest in the United States Mails within the prescribed time limit, but the notice is not received until after the expiration of that limit?

ANSWER: We answer in the negative.

> "In general, where a notice, as distinguished from an acceptance, is required by contract or statute, it is a question of interpretation, but usually it must reach the person to be notified within the period stipulated; *Haldane v. United States*, 69 F. 819, 16 C.C.A. 447; *Conway v. First Nat. Bank*, 256 F. 277, 281; *Wheeler v. McStay*, 160 Ia. 745, 141 N.W. 404, L.R.A. 1915 B 181; *Fritz v. Penna Fire Ins. Co.*, 85 N.J.L. 171, 88 A. 1065, 50 L.R.A. (N.S.) 35; *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N.Y. 608, 28 N.E. 653, 14 L.R.A. 147; . . ."

Williston on Contracts, Rev. Ed. Vol. I, Page 248, § 87 note (3rd Ed. Jaeger, Vol. I, Page 281, § 87 note.)

QUESTION (II): If the answer to question number I above is in the negative, does the Committee on Elections have any jurisdiction to entertain the contestant's petition?

ANSWER: We answer in the affirmative.

The Constitution of Maine, Art. IV, Part Third, Sec. 3, provides:

> "Each house shall be the judge of the elections and qualifications of its own members * * * ."

The Constitution thus clothes each house of the Legislature with exclusive and plenary jurisdiction. The Legislature may prescribe reasonable rules of conduct and procedure in resolving election contests involving its own membership, but its jurisdiction continues to rest upon the authority vested in it by the Constitution and may not be made to depend upon any technical compliance or failure to comply with such procedural requirements. We have no official knowledge of the specific authority vested by the House in its Committee on Elections either under its rules or by any special action, but for our purposes we will assume that the Committee on Elections was established to hear and determine contested cases under the provisions of R. S., Chapter 5, Section 89 as amended by P. L., 1959, Chapter 204, Section 26. In so acting the Committee on Elections stands in the place of the House in the first instance and derives its jurisdiction from that of the parent body. Final decision rests in the House to which the Committee reports. It follows therefore that the Committee on Elections, like the House for which it acts, may in an appropriate case disregard technical non-compliance with the statutory notice and determine a case upon its merits. The test would be whether substantial justice would be established by hearing and determining the case. In short, non-compliance with the statutory notice requirement does not negate the jurisdiction of either the House or its designated committee of reference. The foregoing principle has been applied with respect to the jurisdiction of the Congress and federal statutes imposing notice requirements. As stated in Paine on Elections (1888), Sec. 1003, Page 833:

> "The statutory provision, prescribing the time within which the notice of contest is to be served,

> is not obligatory upon the house of representatives. A mere failure to serve this notice, within the period limited by the statute, will not always result in the dismissal of the contest, without a trial of the case on its merits. The federal constitution does not permit the house to be fettered by this statute. Since the enactment of the statute of 1851 no contest has been dismissed, without a trial on the merits, upon the sole ground that the notice was not served within the period of thirty days limited in the statute."

QUESTION (III): In what way, if any, would the answers to either of the above questions be affected if it is shown that Mr. Bowie was informed orally, before the expiration of the time limit, that Mr. Karkos intended to contest his election to the House of Representatives?

ANSWER: We answer that the fact stated would not affect or alter our answers to questions I and II above.

Dated at Augusta, Maine, this 24th day of January, 1961.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

* * * * * *

QUESTIONS PROPOUNDED BY THE HOUSE IN AN ORDER DATED FEBRUARY 9, 1961 ANSWERED FEBRUARY 28, 1961

HOUSE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In House, February 8, 1961.

WHEREAS, It appears to the House of the One-Hundredth Legislature that the following are important questions of law and the occasion is a solemn one; and

WHEREAS, It is important that the Legislature be informed as to the constitutionality of the proposed bill; and

WHEREAS, The statutory law of the State is silent as to any general right of recovery for deprivation of enjoyment of property and financial loss resulting from state government action or inaction; and

WHEREAS, During and after the construction of the Bangor-Brewer Bridge and its approaches, the State Highway Department, its employees and supervised contractors allegedly, needlessly interfered with the normal use of the property of claimant by allegedly doing what it should not have done and failing to do what it should have done in the exercise of its police power, i.e., allegedly unnecessarily blockading and isolating the business property from the general public through phases of the construction itself, through parking heavy equipment when not in use on and about the property, and erecting and refusing for a con-

siderable period of time to remove erroneous and misleading traffic signs; and

WHEREAS, There is pending before the 100th Legislature H. P. 464, L. D. 664, Resolve in Favor of Jim Adams, Inc., of Bangor

ORDERED, that in accordance with Section 3 of Article VI of the Constitution of Maine the Justices of the Supreme Judicial Court are hereby respectfully requested to give the House their opinion on the following questions:

QUESTION No. 1

Can the Legislature in the exercise of its powers and judgment of what the facts actually are, constitutionally make a monetary award to the claimant as provided in L. D. 664 if the Legislature concludes damage to the claimant has been done justifying compensation?

QUESTION No. 2

Would payment from the General Highway Fund as provided by L. D. 664 violate Article IX of the Maine Constitution?

House of Representatives
On motion of
Mr. Hughes of St. Albans
Read and Tabled
Under Rule 46
Feb. 8, 1961
Ordered reproduced
Tomorrow assigned
HARVEY R. PEASE,
Clerk

Name: Hughes
Town: St. Albans

House of Representatives
Speaker Laid Before the
House and on Motion of
Mr. Hughes of St. Albans
Received Passage
February 9, 1961
HARVEY R. PEASE,
Clerk

A True Copy
Attested
HARVEY R. PEASE,
Clerk of the House

ONE-HUNDREDTH LEGISLATURE

Legislative Document **No. 664**

H. P. 464 House of Representatives, January 24, 1961

Referred to the Committee on Claims, sent up for concurrence and ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. Minsky of Bangor.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-ONE

RESOLVE, in Favor of Jim Adams, Inc. of Bangor.

Jim Adams, Inc.; reimbursed. Resolved: That there be appropriated from the General Highway Fund or the Unappropriated Surplus of the General Fund the sum of $40,400 to compensate in part said Jim Adams, Inc., of Bangor for damage suffered by extreme loss of business and business interruption to a unique and unusual degree in its automobile agency and maintenance repair shop, during the construction of the Bangor-Brewer bridge, and during the altering, widening and changing of grade, and obstructing of public streets serving said Jim Adams, Inc., in connection with the bridge construction, and during the period when traffic directional signs placed in regard to said bridge were misleading and incorrectly positioned, not compensated by the State Highway Department.

STATEMENT OF FACTS

James Adams, Inc., was, before the bridge construction the agency for Nash automobiles, in Bangor, and during the construction of the Bangor-Brewer bridge access to his place of business was hindered to an extent resulting in great loss of business.

ANSWERS OF THE JUSTICES

To the Honorable House of Representatives of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on February 9, 1961.

QUESTION (1): Can the Legislature in the exercise of its powers and judgment of what the facts actually are, constitutionally make a monetary award to the claimant as provided in L. D. 664 if the Legislature concludes damage to the claimant has been done justifying compensation?

ANSWER: We respectfully decline to answer the first question submitted to us by the House of Representatives. L. D. 664 upon its face contains language which suggests that the purpose of the bill may be to provide additional damages to the claimant arising out of either the condemnation of land or the change of grade of a highway. The brief statement of facts made a part of the bill makes no reference to negligence or trespass by agents or servants of the State. On the other hand, the prefatory statement incorporated by the House in its introduction to the questions submitted to the Justices does contain a recitation of facts "allegedly" existing. Included therein are references to acts of apparent negligence and trespass. Even here, however, there is no indication that the Legislature has yet found any part or all of these "alleged" facts to be true, nor does the language used offer essential assurance that it will have done so prior to the passage of L. D. 664. Accordingly we deem the question premature for reasons which will be made to appear.

If we look only to the face of the bill as written, the answer to Question No. 1 might well be in the negative.

Reference is made therein to elements of damage for interruption or loss of business. Interruption or loss of business in condemnation proceedings is not legally compensable in the absence of statutory authorization. Nichols on Eminent Domain, 3rd Ed., Vol. 4, Sec. 13.3, Page 254.

As to all claims in L. D. 664 for damage which would be justifiable and remediable in our courts as a proximate consequence of land condemnation, alteration, widening or changing of road grade, an enactment of the bill would constitute the appropriation of judicial prerogative by the Legislature, factual findings of injury done to a corporation in its property and the application of a remedy in damages.

All the judicial power in this State has been distributed and vested by our Constitution and complementary legislative acts thereunder and none has been left residing in the Legislature save for impeachment jurisdiction. Constitution of Maine, Article I, Sec. 19, Article III, Secs. 1, 2, Article IV, Part Third, Sec. 1, Article VI and diverse revised statutes; *Lewis* v. *Webb,* 3 Me. 326; *Durham* v. *Lewiston,* 4 Me. 140.

The warrant of security within Article I, Sec. 21 of the Constitution, Revised Statutes and notably R. S., Chap. 23, Secs. 19 through 23 (P. L., 1951, Chap. 321, Sec. 2) together with established court precedents supply exhaustive jurisdiction and adequate due process of law for injuries proximately resulting from property condemnation and road grade changes.

It is not within the bounds of legitimate legislation for the Legislature to enact a special law or pass a resolve dispensing with the general law in a particular case and granting what must be deemed a privilege and indulgence to one person or corporation by way of exemption from the general law, statutory or common, leaving all other legal persons under the operation of such general law. *Milton* v. *Railway*

Co., 103 Me. 218, 223, and cases cited therein; *State* v. *Flemming*, 66 Me. 142, 151.

If we look beyond the bill, however, and recognize that the Legislature may find facts pertaining to acts of trespass and negligence of agents and servants of the State from which it could properly conclude that a moral obligation was owed by the State to the claimant, then our answer might in the light of such a finding be in the affirmative.

The determination of the underlying facts is exclusively for the Legislature and its wisdom and judgment in making such findings are not to be questioned. Whether the facts found warrant the conclusion that a "moral obligation" exists is always subject to judicial review. "Such terms as 'moral obligation' and obligation 'founded on justice and equity' are flexible. They serve to formulate the problem rather than to provide the formula by which the problem may be solved. No yardstick has ever been devised which can be mechanically applied. Nonetheless, in every case there must exist an obligation which would be recognized, at least, by men with a keen sense of honor and with real desire to act fairly and equitably without compulsion of law. The Constitution does not prohibit the Legislature from doing in behalf of the state what a fine sense of justice and equity would dictate to an honorable individual. It does prohibit the Legislature from doing in behalf of the state what only a sense of gratitude or charity might impel a generous individual to do." *Ausable Chasm Co.* v. *State*, 266 N. Y. 326, 194 N. E. 843, 845. "The concept of liability based upon moral obligation is, except in the case of governmental liability, foreign to our law. It is not strange that such a doctrine should be accepted in the relations between the state and the individual. An individual is free to make a gift and also to recognize moral obligations, although it is axiomatic that he cannot be compelled to do so. But the state, because of the limitations of the public purpose doc-

trine, cannot make a gift. Thus the doctrine of moral obligation places the state on the same footing, in this respect, as the individual. It cannot be compelled to do so, but it is free, through appropriate legislation to satisfy that which it recognizes as its moral debt." *Koike* v. *Board of Water Supply,* 352 P. (2nd) (Hawaii) 835, 839. It has been almost universally held that public funds may be disbursed to satisfy a "moral obligation" and in each such case "some direct benefit was received by the state as a state or some direct injury suffered by the claimant under circumstances where in fairness the state might be asked to respond — where something more than a mere gratuity was involved." *People* v. *Westchester County Nat. Bank,* 231 N. Y. 465, 132 N. E. 241, 245; *Fairfield* v. *Huntington,* 23 Ariz. 528, 205 P. 814, 817; Anno. 172 A. L. R. 1408; 42 Am. Jur. 763, Public Funds, Sec. 62; 81 C. J. S. 1150, States, Sec. 133.

As noted above, however, when the general law provides an adequate remedy available to all claimants similarly circumstanced, and provides the nature and limits of damages recoverable therefor, additional compensation cannot be made available to individual claimants under the guise of discharging a "moral obligation." It is just for this reason that it must be ascertainable, preferably but not necessarily from the bill itself, that supporting facts found by the Legislature warrant legislative determination that a "moral obligation" exists.

QUESTION (2): Would payment from the General Highway Fund as provided by L. D. 664 violate Article IX of the Maine Constitution?

ANSWER: We answer in the affirmative.

Payment to the corporation named as proposed by L. D. 664 could, if at all, be justified under Constitution of Maine, Article IX, Sec. 19, only as a debt or liability incurred in construction or reconstruction of a bridge. L. D. 664 con-

templates a grant by the Legislature and not such a debt or liability.

Dated at Augusta, Maine, this 28th day of February, 1961.

Respectfully submitted,

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

SUSAN SAWYER
vs.
CONGRESS SQUARE HOTEL CO.

Cumberland. Opinion, March 13, 1961.

Tenants. Licensees. Notice of Termination.
R. S., c. 100, Secs. 42, 43; c. 122, Sec. 1, 2.
Rules 75 (a) (d); Rule 56 (e); Rule 16.

Appeals are to be processed within the time limits or such enlargements as are fixed by the court rules. Dismissal may be expected for failure to comply.

Where a person occupies a room in a hotel, registers as others, receives maid service, and has the benefit of other incidental services, she is a guest, and this true in spite of the fact that her stay there may be a long one and that she pays on a weekly or monthly basis.

ON APPEAL.

This is an appeal from a summary judgment. Appeal denied.

Udell Bramson, for plaintiff.

John Mitchell, for defendant.

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

RESCRIPT.

SULLIVAN, J. On appeal. Defendant protests that the plaintiff has not perfected her appeal since the record does not verify that the appellant within 30 days after appeal served with her designation a concise statement of the points on which she intended to rely in her appeal. Rule 75, (a), (d), Maine Rules of Civil Procedure, 155 Me. 576, 577; Rule 5, (a), 155 Me. 490.

The record dates the appeal on June 17th, A. D. 1960 and the filing of the "designation of portion of record and proceedings to be contained in record" on July 13th, within 30 days of appeal. The record then recites that the "statement of points on appeal" was *filed* on July 25th but does not chronicle that such concise statement of points was *served* within 30 days of appeal. Counsel for neither party has endeavored to rectify or amplify the record which is neutral and noncommittal as to whether or not a copy of the concise statement was in fact served and, if served, when.

Because of the institution of this case only two months following the effective date of our changed rules of civil procedure, because of the indifferent state of the record and because of the actual containment of the points on appeal in the printed case we are disposed to entertain the issues here upon the merits.

Appeals are, however, to be processed within the time limits or such enlargements as are fixed by the court rules. Dismissal may be expected to attend failure to comply.

In her complaint the plaintiff stated that she had been a permanent resident in a room of the defendant, had been

evicted therefrom without notice or right, had been deprived of her chattels and had been accordingly damaged.

The defendant by answer denied that the plaintiff had been a permanent resident at its hotel and retorted that the plaintiff had been a guest, that she had both failed and refused to pay the reasonable account against her and that her eviction had been without alternative and justified. Defendant responded that the belongings of the plaintiff had been retained by it only temporarily until they could be formally surrendered to the plaintiff. The defendant presented its counterclaim for its itemized and unpaid charges against the plaintiff for room, board and telephone service.

The defendant moved for a summary judgment pursuant to Rule 56, M. R. C. P., 155 Me. 558, and in support included an affidavit of the hotel manager from the latter's personal knowledge. The motion was urged upon the contentions that in the case at bar there is no genuine issue as to any material fact and the defendant is entitled to prevail as a matter of law.

The manager deposed that the plaintiff was and had been for some time the occupant of her hotel room the furnishings of which were the property of the defendant; that supplied daily to the plaintiff by the defendant for a composite and integrated rate were all bed linens, towels, chambermaid service, repairs, heat, electric current, water and cleaning; that several of the defendant's employees retained keys and ready access to the plaintiff's room; that possession and control of that room remained always with the defendant and use and occupancy only with the plaintiff; that the plaintiff stood indebted to the defendant in the sum of $45.93 for past occupancy, meals and telephone calls at the time of her eviction.

The plaintiff elected to furnish no opposing affidavit.

The presiding justice entertained the motion and adjudged that it be granted, that the plaintiff take nothing,

that her complaint be dismissed and that the defendant have judgment for the amount of its counterclaim with costs. The plaintiff appealed to this court and designated that the record and proceedings contained in her appeal be the complaint, answer with counterclaim, motion for summary judgment, court findings and motion for appeal. The supporting affidavit of the hotel manager is in the record before us.

The statement of the plaintiff of the points relied upon by her in her appeal protests that the presiding justice erred in granting the motion for summary judgment and in his refusal to afford a jury trial upon the issues of this case.

The plaintiff here "may not rest upon the mere allegations or denials of" her pleading. Rule 56, M. R. C. P., *supra*, (e).

This court in *Levesque* v. *Columbia Hotel,* 141 Me. 393, 401, stated:

> " - - - - It is not a question of what the situation was eighty years ago when the Norcross opinion (Norcross v. Norcross, 53 Me. 163) was written, when inns almost exclusively catered to wayfarers and travelers arriving over the highways by horse and buggy, when hotels in the cities seldom had as guests permanent boarders as they now do. The question is what, as applied to present day conditions, does the statute mean by the word 'guest.'
>
> " - - - - If a room is rented for a definite period under such circumstances that the occupant assumes full control over it and does not receive the ordinary services that the hotel offers to guests, the relationship of hotelkeeper and guest does not exist. There are of course border line cases. But where as here a person occupies a room in a hotel, registers as others do, receives maid service, and has the benefit of the other incidental services that

> the hotel gives, she is a guest, and this is true in spite of the fact that her stay there may be a long one and that she pays on a weekly or monthly basis. - - - "
>
> See, also, *Dewar* v. *Minneapolis Lodge No. 44 B. P. O. E.*, 155 Minn. 98, 192 N. W. 358, 359; *White* v. *Maynard*, 111 Mass. 250, 255; 1 American Law of Property, § 3.7, P. 192; 29 Am. Jur., Innkeepers, § 14 (citing *Levesque* v. *Columbia Hotel, supra.*)

From the foregoing authorities it becomes manifest that the delinquent plaintiff upon the record in the instant case was not entitled to notice or process under R. S., c. 122, §§ 1, 2. See, also, 29 Am. Jur., Innkeepers, § 52; *Neely* v. *Lott Hotels Co.*, 334 Ill. App. 91, 78 N. E. (2nd) 659; *Raider* v. *Dixie Inn*, 198 Ky. 152, 248 S. W. 229; *Morningstar* v. *Lafayette Hotel Co.*, 211 N. Y. 465, 105 N. E. 656.

The matter of plaintiff's belongings was not waged before the presiding justice by the plaintiff through any affidavit. Nor was defendant's right of retainer under R. S., c. 100, §§ 42, 43 or the statutory presumption in R. S., c. 100, § 45 adverted to.

Reference has been made by plaintiff's counsel to a pre-trial order of the presiding justice. Rule 16, M. R. C. P., 155 Me. 507. The pre-trial order is not before us in the record.

Appeal denied.

WILBUR L. DURGIN
vs.
BENJAMIN LEWIS

York. Opinion, March 13, 1961.

Contracts. Part Performance.
Breach. Damages. Money Counts.
Unjust Enrichment.

An award of damages, based upon the breach of a contract partly performed, must be set aside where there is no evidence from which the referee could find the existence of the express oral contract.

Money counts are not an appropriate vehicle for the recovery of profits lost by reason of the breach of an express oral contract.

An award of damages upon a money count measured by the benefit retained by defendant from part performance must find support in the evidence.

ON EXCEPTION.

This action is before the Law Court upon defendant's exceptions to an award. Exceptions sustained.

Titcomb, Fenderson & Titcomb,
Robert G. Pelletier, for plaintiff.

Berman, Berman & Wernick, for defendant.

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

WEBBER, J. In a writ brought under the rules of pleadings and procedure in effect prior to December 1, 1959 the plaintiff in the first count of his declaration declared upon an express oral contract. There were inserted allegations of part performance by the plaintiff and breach by the defendant effectively preventing further performance by plaintiff. The second count in the declaration contained the money counts followed by a specification alleging part per-

formance by the plaintiff of an oral contract described only in general terms.

In a hearing before referees, the plaintiff adduced evidence that the parties entered into a binding oral agreement, but there was no evidence from which the referees could find the existence of *the express oral contract* described in the first count of plaintiff's declaration. Under rules of pleadings then in force and which necessarily govern this case, the variance between allegation and proof is fatal to a recovery under the first count. *Dufour* v. *Stebbins,* 128 Me. 133, 137.

Turning next to the money counts, it is recognized that under appropriate circumstances the plaintiff may have recovery thereunder for the fair value of services rendered in part performance of an express contract. Damages are measured by the benefit retained by the defendant and for which he should justly pay. The money counts are not an appropriate vehicle for the recovery of profits lost by reason of defendant's breach of an express oral contract. See *Carey* v. *Bourque-Lanigan Post No. 5,* 150 Me. 62, 66; *Veazie* v. *City of Bangor,* 51 Me. 509, 512; *Thurston* v. *Nutter,* 125 Me. 411, 416; *Levine* v. *Reynolds,* 143 Me. 15, 22; *Holden Steam Mill* v. *Westervelt,* 67 Me. 446, 450; *Wright* v. *Haskell,* 45 Me. 489, 492; *Sylvester* v. *Twaddle,* 153 Me. 40, 42; 4 Am. Jur. 496, Sec. 5; Martin's Notes on Pleading, Page 37. As stated in Greenleaf on Evidence, 15th Ed., Vol. 2, Page 88:

> "(2) Where the contract, though partly performed, has been * * * rescinded and extinct (sic) by some act on the part of the defendant. Here, the plaintiff may resort to the common counts alone, *for remuneration for what he has done under the special agreement.*" (Emphasis ours.)

The referees found breach of an oral contract without specifying its nature or terms and awarded damages clear-

ly based on plaintiff's loss of profits. What the plaintiff did in the preliminary stages of performance and which might be said to have benefited the defendant were meager and obviously of little pecuniary value. In fact the evidence is silent as to any value which might be put upon it. We are forced to conclude that there was no evidence before the referees which would support their finding of damages. Had the plaintiff declared upon the contract he proved, or had he proved the contract upon which he declared together with the breach thereof, the evidence would have supported the referees' finding of damages. But this is of no avail to a plaintiff whose declaration and proof limit him to recovery under the money counts.

The point of pleading on which this case turns was not briefed or argued by the counsel for the defendant, but we cannot say that it has thereby been waived. The defendant has consistently maintained the position that the referees erred as a matter of law in their award of damages. Such is the legal result of this case.

Exceptions sustained.

HARRY C. WILSON
vs.
FLORENCE H. WILSON

Cumberland. Opinion, March 14, 1961.

Ante-Nuptial Contracts. Equity. Witnesses. Competency. Evidence. Presumptions. Fraud.

In a controversy concerning an ante-nuptial agreement, the wife of a deceased cannot testify to facts occurring prior to her husband's death, unless the door is opened by the personal representative. R. S., Chap. 113, Sec. 119.

In a controversy concerning an ante-nuptial agreement, the wife of a personal representative even though interested is a competent witness as to facts occurring before the death of a decedent under R. S., 1954, Chap. 113, Secs. 114, 119.

Whether promises contained in an ante-nuptial contract are dependent or independent is a question of interest.

Each ante-nuptial contract must be interpreted in the light of its terms and surrounding circumstances.

The partial failure of separate independent agreements, where marriage was the vital consideration of the contract, do not vitiate the contract.

Where the fact of marriage is the prime consideration, the place thereof is of minor importance.

An answer not under oath does not operate as evidence.

The burden of proving fraud is upon the one alleging it.

Where a presumption of fraud arises against the validity of contract, the one claiming under a contract has the burden of presenting evidence tending to make the non-existence of fraud as probable as its existence.

ON APPEAL.

This is a bill in equity to enforce an ante-nuptial contract. The case is before the Law Court upon appeal from a decree granting the bill. Appeal denied.

Robert Preti,
Herbert Crommett, for plaintiff.

Elton Thompson,
Arthur Peabody,
Henry Steinfeld, for defendant.

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

SIDDALL, J. This is a bill in equity brought by the plaintiff as executor of the will of Charles N. Wilson, late of South Portland, against the defendant, widow of the deceased. The bill was started under the old rules of civil procedure, and after the findings and judgment on May 11, 1960, subsequent proceedings were conducted under the new rules. The bill was brought to enforce the performance of an ante-nuptial agreement entered into between the deceased and the defendant, and to enjoin the defendant from making any claim as widow of the deceased against his estate. The case was heard by a single justice. The bill was sustained and the defendant was ordered to perform the covenants and agreements made by her in the ante-nuptial agreement. She was also permanently enjoined from setting forth any claim as widow of the deceased against his estate. From this decree defendant appealed.

The defendant by her answer admitted that she entered into an ante-nuptial agreement with the deceased on April 18, 1956, but claimed that such agreement was obtained by duress, fraud, and intimidation and that the conditions of the agreement were never complied with by the deceased. The defendant admitted that she and the deceased were married on April 26, 1956, and that he died on June 21, 1958. The defendant also admitted that she had filed in the Probate Court for Cumberland County a statutory waiver of the provisions of the will and codicil of the deceased and

was claiming her statutory rights as the widow of the deceased. It was stipulated by the parties that under the terms of the will of the deceased, his estate was devised and bequeathed to the plaintiff Harry C. Wilson, son of the deceased, and that under the terms of a codicil to said will, the testator's home on Lawn Avenue was devised to the defendant.

The issues framed in the pre-trial order prior to the hearing below were as follows:

1. Whether or not the ante-nuptial agreement was obtained by the deceased by duress and intimidation.
2. Whether or not the agreement was obtained by the deceased by fraud.
3. Whether or not the consideration for said agreement has been fully complied with.

The only witness for the plaintiff was the wife of Harry C. Wilson, the plaintiff executor. Over objection of the defendant she was allowed to testify as to events that occurred during the lifetime of the deceased. The defendant claims that this testimony was not admissible under R. S., 1954, Chap. 113, Secs. 114-119.

It is noted that a clear and exhaustive article by Bradford H. Hutchins, Esq., of the Maine Bar, on the history and analysis of what is now the foregoing legislation is printed in Vol. 40 of the records of the Maine Bar Association.

In civil suits at common law, not only the parties but all others having a certain and direct interest in the event of the suit, however small, were excluded from testifying. Also, at common law a husband and wife were excluded from being witnesses for or against each other. *Murray* v. *Joyce,* 44 Me. 342, 347; *Walker* v. *Sanborn,* 46 Me. 470, 471, 472.

These strict rules of the common law have from time to time, in this jurisdiction, been liberalized by legislation. Such legislation in effect at the time of the hearing of the case below, and now in effect, is found in R. S., 1954, Chap. 113, Sec. 114, which provides:

> "Parties, husbands, wives and others interested as witnesses — No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as party or otherwise, *except as hereinafter provided,* but such interest may be shown to affect his credibility, and the husband or wife of either party may be a witness." (Emphasis supplied.)

This provision, subject to the exception referred to therein, abrogated the common law rule of exclusion of the testimony of parties, interested persons, and that of the husband or wife of either party. We are not concerned in this case with the question of confidential communications between husband and wife.

The exception referred to in R. S., 1954, Chap. 113, Sec. 114, is found in the first paragraph of Sec. 119 of the same chapter, which reads as follows:

> "Not applicable to executors, administrators or heirs, save in special cases.—The 5 preceding sections do not apply to cases where, at the time of taking testimony or at the time of trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator or is made a party as heir of a deceased party; *except* in the following *cases:*" (Emphasis supplied.)

A qualification to this provision, pertinent to the issues of this case, is found in Subsection II thereunder. The provisions of Subsection II allow testimony of either party of facts admissible upon general rules of evidence, happening after the death of the deceased. As to facts happening be-

fore such death, the personal representative of the estate of a deceased person may testify as to any facts, admissible under the rules of evidence, and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference thereto. In cases coming within the meaning of this subsection the personal representative is the only person who can open the door to the allowance of testimony on the part of the other party to the suit, sometimes called the living party, as to facts happening prior to the death of the deceased. In the absence of testimony on the part of the personal representative as to such facts, the other party is incompetent to testify thereto. In the event that the personal representative does testify thereto, the other party is confined in his testimony to the specific facts testified to by the representative party. *Hall* v. *Otis,* 77 Me. 122, 126. The reason for the rule is that in those cases where death has closed the mouth of one party, the law seeks to make an equality by closing the mouth of the other. *Tobey, Jr. et al.* v. *Quick,* 149 Me. 306, 309, 101 A. (2nd) 187.

The law does not exclude the testimony of an interested witness, but only that of a party in cases where the other party is deceased.

> " 'The statute of this State includes only parties to the action.' *Hospital v. Carter,* 125 Me. 191, 193. An interested witness can testify. *It is only a party who cannot, in cases where the other party is deceased." Tobey, Jr. et al. v. Quick, supra.* (Emphasis supplied.)

In *Walker* v. *Sanborn, supra,* the question was whether the widow of the person whose executor brought this action was rightfully admitted as a witness. In construing R. S., 1857, Chap. 82, Sec. 83 (now R. S., 1954, Chap. 113, Sec. 119), the court said:

> "It has in some cases been contended that a widow, if interested in the estate, and all other interested

> witnesses, are necessarily excluded when the suit is by or against an executor or administrator, by the provisions of the 83d Sec. of c. 82. It is true that, by that section, the general provision for the admission of all persons, whether parties or otherwise interested, is not to be applied to any *'cases'* where either party is an executor or administrator.
>
> If by the word 'cases' we are to understand *suits* in court, then the language is broad enough to exclude all interested witnesses in such suits, and to restore the old law of exclusion as to such witnesses. But when we look at the prior legislation, we are satisfied that a more limited construction of the term must be given, to carry out the intention of the Legislature.
>
> * * * * * * *
>
> The construction we give to the word 'cases,' in the 83d section, is, that it does not mean suits or causes in court, but that the meaning is better expressed by the word *instances;* and the provision is to be limited to the case, or instance, where the plaintiff or defendant offers himself as a witness. The exclusion does not embrace, in a general designation, all causes or suits, and all the witnesses in them where the record shows an executor or administrator as a party; *but only reaches the case where, in such suits, one of the parties to the original cause of action is dead, and the other attempts to give what may be called ex parte testimony."* (Emphasis ours.)

Under the statute in cases such as this a wife cannot testify as to facts happening before the death of the deceased to which her husband could not testify. Unless the door is opened by the personal representative, the husband or the wife of the other party is not a competent witness. See *Tuck* v. *Bean,* 130 Me. 277, 278, 155 A. 277; *Hallowach Admrx* v. *Priest,* 113 Me. 510, 512, 95 A. 146; *Hubbard* v. *Johnson,* 77 Me. 139, 142; *Berry, Executor* v. *Stevens,* 69 Me. 290, 293; *Hunter, Executor* v. *Lowell,* 64 Me. 572; *Jones* v. *Simpson,* 59 Me. 180.

We are unable to find any case in which our court has been called upon to determine whether the wife of a personal representative is a competent witness as to facts occurring before the death of the deceased. Bearing in mind the purpose of the statute, and the general principles set forth in our decisions, we are satisfied that it was not the intention of the legislature to exclude such person as a witness. Her situation is quite unlike that of the wife of the other party to the suit, who, by the statute, is rendered incompetent as a witness. This incompetency is passed along to his wife. The personal representative, however, is not an incompetent witness, but may, if he chooses, give testimony as to any fact admissible under the general rules of evidence. His wife, however interested she may be in the outcome of the case, should be under no more disability to testify than other competent witnesses. Such a rule, as is true of many rules, may sometimes work an injustice, but we are satisfied that it operates in the interest of justice in the great majority of cases.

The ruling of the justice below admitting the testimony of the wife of the plaintiff was correct.

The defendant claims that the plaintiff must allege and prove that the deceased was ready and willing to perform all agreements on his part under the ante-nuptial agreement, and that a partial failure of the monetary consideration is sufficient to vitiate the entire agreement.

> "Consideration. — An antenuptial settlement or agreement to the extent that it is executory must be supported by consideration, but marriage itself is consideration for such a settlement or agreement, and indeed, it is said to be perhaps the most valuable and highly respected consideration of the law in this as well as other cases. This is true even where the parties had theretofore lived in illicit relations with each other. Marriage, however, is distinguishable from other valuable considerations

in that it is not capable of being reduced to a value which can be expressed in dollars and cents, and also in that, after the marriage, the status cannot be changed by setting it aside or by rescinding or canceling it, and hence the parties cannot be placed in statu quo, which necessarily results in peculiar application of rules as to specific performance." 26 Am. Jur., Sec. 277, p. 884, 885.

"Performance and Breach.—The general rule is that where parties enter into an antenuptial agreement, each must perform the terms and conditions of that agreement before he or she can claim the benefits to be derived therefrom. However, the rule that equity will not compel a rescission where there has been partial performance has been applied to a marriage settlement where the marriage has occurred, but the claim is made that other considerations, such as to be a kind and dutiful spouse, to use property for the joint benefit of the spouses, and to take care of the other spouse in old age, have not been complied with. It has been ruled that since marriage is a consideration that cannot be restored, covenants in a marriage settlement or agreement are independent, and failure of their performance by one party does not defeat his or her right to performance by the other party, if the former is willing and can perform or the latter has a right to damages for the breach, unless it is clear that the intention of the parties was otherwise, in which case such failure of performance defeats any right of the defaulting party to performance on the part of the other party. Where an antenuptial agreement, whereby one spouse releases rights in the property of the other, rests on a consideration additional to that afforded by the marriage, it has been held that the *total* failure of the additional consideration authorizes the assertion of the rights released by the agreement." 26 Am. Jur. Sec. 285, p. 891, 892. (Emphasis supplied.)

Whether promises are to be considered independent or dependent promises is one of intent and must be determined

by considering the language of the contract, the nature of the act required, and the subject matter of the contract. *Skowhegan Water Co.* v. *Village Corporation,* 102 Me. 323, 332, 66 A. 714.

Two of the matters which courts have deemed important in determining whether the stipulations are independent or dependent are (1) the order in time in which performance is to take place, and (2) the fact that on each side the promises go only to a part of the consideration and a breach may be compensated in damages or the injured party otherwise have a perfect remedy. *Hunt* v. *Tibbetts,* 70 Me. 221, 225, 226.

> "In the nature of the case precise boundaries are impossible. The question that must be decided is whether on the whole it is fairer to allow the plaintiff to recover, requiring the defendant to bring a cross-action or counterclaim for such breach of contract as the plaintiff may have committed, or whether it is fairer to deny the plaintiff a right of recovery on account of his breach, even at the expense of compelling him to forfeit any compensation for such part performance as he has rendered. The decision of this question must vary with the special circumstances of each case. Nevertheless, some principles may be laid down. Where several promises are made by one party, a breach of one of them necessarily goes to only part of the consideration, but it may be a vital part, or it may be a minor part. A breach of a separate collateral promise of minor importance will not justify refusal by the other party to perform if the main promise to him has been or is being substantially performed. On the other hand, even though the breach occurs after part performance, if it is of such a material or essential character as to go to the root of the contract, further performance by the injured party is excused." WILLISTON ON CONTRACTS, Revised Edition, Sec. 841.
>
> "The defenses of total failure and partial failure of consideration depend upon different principles.

> The defendant who pleads total failure denies the consideration. . . . . But the defense of partial failure admits the contract."
>
> *Judkins* v. *Chase, et al.,* 121 Me. 230, 232.

> "When there is a failure of a part of a lawful consideration the part which failed is simply a nullity and imparts no taint to the residue. . . . . if there is a substantial consideration left it will still be sufficient to sustain the contract."
>
> 17 C. J. S., Contracts, Sec. 130. See also 12 Am. Jur., Contracts, Sec. 360.

Where there are several independent promises, one party may bring an action without averring performance. *Lloyd* v. *Jewell, et al.,* 1 Me. 352, 357, 358.

The ante-nuptial contract was set forth in the bill of complaint and was admitted in evidence. What are the obligations of the parties thereunder? The marriage contemplated therein was consummated. That part of the contract, found by the court to be its most important condition, has been performed, and the consideration cannot be restored. Receipt of the sum of six thousand dollars was acknowledged by the defendant in the contract. She claims, however, that this payment was not actually received. A witness for the defendant testified that she was present at a time of a conversation between the defendant and the deceased in relation to this six thousand dollar item. The witness testified that the defendant stated in the presence of the deceased that she had received only thirty-three hundred dollars. She also testified that the deceased then told the defendant not to worry about it; that she would get it. The court in his decree referred to this testimony and found that taking all of the testimony in the case in its most favorable light for the defense it could be found as a fact that the monetary portion of the consideration of the contract was only partially satisfied.

The contract also contained reciprocal agreements that all property belonging to either party before marriage re-

mained his or her separate property and that each could dispose of such property without consent of the other. Nothing further remained to be done by either party in this respect, except, of course, neither party could effectively convey real estate without the release of the rights of the other. This was taken care of by mutual covenants requiring each to sign all necessary documents for that purpose. There is no evidence that the deceased in his lifetime was requested to sign such a document, but in any event, this covenant was enforceable by proper complaint in the event of a refusal to perform by either. An agreement in the contract that the deceased would make no claim as surviving husband against the estate of the defendant became inoperative on the death of the deceased. Paragraph 6 of the agreement reads in part: "It is further covenanted and agreed between the parties hereto that the giving and granting of the use of said property to said party of the second part [the defendant] for the term of her natural life and the payment to her of said six thousand dollars as aforesaid, shall be in lieu of all claims that the said party of the second part, as surviving widow, might have or make or claim in the estate of the said party of the first part, ..." As already stated, the payment of this sum of six thousand dollars was acknowledged in the instrument. However, the full amount thereof might not have been paid. The court below found ambiguity in the first part of the above covenant. The evidence in the case does not clear up the ambiguity, and the provision appears to be meaningless unless it refers to that part of the contract which provided that all property belonging to the defendant before marriage should remain her separate estate and could be disposed of without consent of the other party to the contract.

The justice below ruled that the most important condition of the contract was the marriage without which there could be no contract upon which the other conditions could be based. He further ruled that assuming a partial failure

of consideration in so far as the payment of six thousand dollars was concerned, that such partial failure was not sufficient cause for rescission and did not destroy the contract, particularly where the contracting parties performed the most important condition of the contract by entering into the marriage state.

No general rule can be stated that marriage is always the only consideration which goes to the root of an ante-nuptial contract. In some cases there may be one or more other considerations as important as that of marriage. Each ante-nuptial contract must be interpreted in the light of its terms and the surrounding circumstances. A careful reading of the contract and record in this case satisfied us that the marriage was the vital consideration of the contract, and that all other agreements therein were independent thereof, performance of which need not be alleged.

In effect the court ruled that the essence and main consideration of the contract was the marriage, and, the marriage having been performed, a partial failure of consideration in other respects did not vitiate this particular contract. The ruling of the court was correct.

We note that at the conclusion of plaintiff's case the defendant made two motions to dismiss. The court by the terms of his findings and judgment necessarily denied these motions. In the first motion the defendant relied upon the ground that the marriage was performed in New Hampshire, although the ante-nuptial contract recited that the parties contemplated marriage under the laws of the State of Maine. It is unnecessary for us to say more with relation to this motion than that the *fact* of the marriage was the prime consideration for the contract, and that the *place* of the marriage was of minor importance. The second motion was based on the general grounds that the plaintiff had shown no right to relief. For reasons already given, this motion has no merit. Denial of both motions was proper.

Before turning to the question of fraud, duress, or intimidation, we discuss the defendant's contention that the testimony of a single witness without corroborative evidence is not sufficient to prove the allegations of a bill of complaint. She claims that her answer, so far as responsive to the bill, must be taken as true unless overturned by two witnesses, or by one witness with strong corroborative circumstances. The pleadings in this case were filed and the evidence was taken out under the old rules of civil procedure. An answer under oath was not required by the bill, and therefore, the answer does not operate as evidence. *Clay* v. *Towle,* 78 Me. 86, 88; Whitehouse's Equity Practice, Sec. 390.

We now proceed to a discussion of the question of fraud, duress, or intimidation in the procurement of the ante-nuptial contract, although technically this issue may not have been raised by the appeal pleadings in this case.

The defendant admits the execution of the ante-nuptial contract. She claims, however, that her signature thereon was obtained by fraud, duress, or intimidation. These are affirmative defenses, and the burden of proof is upon the defendant. This burden does not shift, but under certain circumstances a presumption of fraud may arise. In such event, the plaintiff has the burden of going forward with evidence showing the non-existence of the presumed fraud. An exhaustive presentation of the law relative to the evidential effect of presumptions is set forth in the case of *Hinds* v. *John Hancock Insurance Co.,* 155 Me. 349.

Where the provisions for the wife as survivor are clearly disproportionate to the husband's wealth, a presumption of fraud by designed concealment arises. In such event, the person claiming under the contract has the burden of presenting evidence tending to make the nonexistence of fraud as probable as its existence. Evidence which, if believed by the factfinder, tends to prove that there was "a full knowledge and understanding on the part of the wife at the time

of execution, of all the facts materially affecting her interest, viz.: the extent of his wealth and her rights in his property as his survivor, and how modified by the proposed agreement," will cause the presumption to disappear as an aid to the party who has throughout the burden of proving fraud. *Denison* v. *Dawes,* 121 Me. 402, 404; *Hinds* v. *John Hancock Insurance Co., supra.*

We recognize, however, that an ante-nuptial contract, under all of the circumstances existing in a particular case, may be so unconscionable that courts will not aid in its enforcement even if the prospective wife had full knowledge of the property affairs of the other party.

The contract and evidence disclose that the contract was entered into by parties of mature years, both of whom had been previously married and were the parents of grown children. The agreement recited that each of the parties thereto owned real or personal property, without stating the nature or value thereof, with provisions that such property should remain forever the property of the then owner, to be controlled by such owner as if he or she were unmarried, and that each would sign all necessary documents to transfer such property when sold by the other. Each, in effect, released any rights in the estate of the other by inheritance or otherwise. Under the agreement the defendant acknowledged the receipt of the sum of six thousand dollars as a further consideration. No evidence was introduced by either party to show the nature or extent of the property owned by the defendant at the time of the execution of the contract. However, testimony was introduced from which the court might reasonably have concluded that the deceased, prior to the execution of the contract, had informed the defendant of his financial worth, and that the defendant understood she was giving up her rights as widow in the estate of the deceased. Also, as bearing on the knowledge on the part of the defendant of the financial condition of the

deceased, the undisputed testimony indicates a very close association between the parties for many years prior to their marriage.

The justice below found no evidence that fraud, duress, or intimidation had influenced the signing of the agreement on the part of the defendant.

In actions tried upon the facts without a jury, findings of facts shall not be set aside unless clearly erroneous. Rule 52 (a) Maine Rules of Civil Procedure.

A review of the evidence fails to convince us that the above finding of the justice is clearly erroneous.

The entry will be

Appeal denied.

HOWARD G. YEATON, ET AL.
vs.
ORRIN KNIGHT, ADMR., ET AL.

Cumberland. Opinion, March 16, 1961.

Wrongful Death. Settlement.
Attorneys. Counsel Fees. Referees.
Specific Findings.

Action to recover damages under R. S., 1954, Chap. 165, Sec. 10 (Wrongful Death Act) must be brought in the name of the personal representative of the deceased and the personal representative shall be the one to retain counsel. The attorney in tort claims may properly deduct his reasonable fee before remitting to his client.

A request for specific findings by a referee must be made before entry of the order of reference. Sec. 537. Field & McKusick.

A motion for supplemental findings by a referee comes too late after acceptance of the referee's original report and judgment.

ON APPEAL.

This is an appeal from the acceptance of a supplemental report of a referee. Appeal sustained without costs.

Elton Thompson, for plaintiff.

Robert A. Wilson,
John C. Fitzgerald, for defendant.

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

DUBORD, J. This case is before us on an appeal under M. R. C. P. 73 from the acceptance, by a Justice of the Superior Court of a supplemental report of a referee.

Ida M. Knight, wife of Orrin Knight, died instantaneously on December 27, 1957, as a result of injuries received by being struck by a motor vehicle, under circumstances giving rise to an action for damages under the provisions of Sections 9 and 10, Chapter 165, R. S., 1954, as amended, known as Lord Campbell's Act or the Death Statute.

She was survived by her husband and eight children by a former marriage. There is no evidence to indicate pecuniary injuries on the part of any of the children.

Orrin Knight retained John C. Fitzgerald, and Robert A. Wilson, Portland attorneys to seek to recover damages for his own serious personal injuries and for the alleged tortious death of his wife. Because of certain friendly relations between Attorney Wilson and the father of the driver whose car struck Mrs. Knight, Mr. Wilson assumed only a passive attitude in the case and Mr. Fitzgerald became the active attorney who investigated and pressed the claim to a successful conclusion.

Negotiations looking towards the settlement of the claim for damages arising out of the death of Ida M. Knight were

entered into with the insurance carrier of the alleged tort feasor. Because of doubtful liability, a compromise offer in the amount of $3,000.00 was accepted. Pending negotiations for a settlement, the eight children of Ida M. Knight retained counsel, and there was agreement on their part to the amount of the proposed settlement.

In accordance with well recognized custom and legal necessity, before payment of the agreed amount was made, letters of administration upon the estate of Ida M. Knight were issued to the widower, Orrin Knight.

Payment of the sum of $3,000.00 was made to counsel for Orrin Knight and the claim legally closed.

During the time which elapsed between the death of Mrs. Knight and the final settlement of the claim arising out of her death, the children, or some of them, paid their mother's funeral bill in the amount of $600.00.

All parties agreed that the amount of $600.00 should be deducted from the total amount received, before division was made between the claimants; and it was understood by all parties that the amount of $600.00 should be refunded to the children who paid the funeral bill, or to their counsel.

A dispute arose as to the manner of dividing the balance. It was settled by the agreement that the division should be on a per capita basis between the surviving husband and the eight children.

In the meantime by writ dated January 26, 1959, the eight children had brought suit against Orrin Knight in his capacity as administrator, and his attorney, John F. Fitzgerald, to recover under a general money count the sum of $2,133.36 alleged to have been paid to the defendants under the provisions of Section 10, Chapter 165, *supra,* for the use of the plaintiffs. No specifications were filed to indicate how the plaintiffs had arrived at the amount they were suing for.

Included in the declaration was a count claiming interest from June 13, 1958, this date presumably being the one when the settlement of the claim of Mrs. Knight's estate was effected.

By agreement, the action was referred to a single referee with the right of objections to the acceptance of his report reserved by both parties.

By report filed April 15, 1960, the referee found for the plaintiffs in the sum of $2,133.33, without interest. The docket shows that on the same date, a Justice of the Superior Court entered an order of acceptance, upon agreement of the parties. It is further recorded that judgment was rendered simultaneously.

Within a few days thereafterwards, the plaintiffs in this action (or some of them) brought suit against the defendants in this action to recover the amount of the funeral bill. The defendants, being of the opinion that the question of the funeral bill had been litigated in the prior action, filed a motion on May 2, 1960, praying that the referee file a supplemental report indicating his findings of fact and conclusions of law.

Pursuant to this motion, the referee filed a supplemental report in which he outlined the facts of the prior litigation in detail.

He indicated that he arrived at his finding by the following process of arithmetic:

"Total amount recovered	3000.00
Less: Counsel fee	750.00
	2250.00
Funeral bill (Paid by Plaintiffs)	600.00
Remaining for Distribution	1650.00
Orrin Knight — 1/9 of $1650.00	183.33

Plaintiffs' share of Distribution 8/9 of $1650.00	1466.67
Reimburse Plaintiffs for paying Funeral bill	600.00
Total Due Plaintiffs	$2066.67"

This supplemental report was filed on May 13, 1960. Notice of intention to object to its acceptance was filed by counsel for the plaintiffs. Pursuant to this notice a hearing was set upon the matter and on June 9, 1960, all counsel being present and participating, a Justice of the Superior Court entered a ruling to the effect that the findings of fact were accepted.

Thereupon the plaintiffs appealed and set forth the following as their statement of points on appeal:

"1. The Court erred in allowing Supplementary Report of the Referee after the Referee's report had been allowed and judgment rendered thereon.

"2. The Court erred in allowing Supplementary Report of the Referee after the Referee's report had been accepted, as it contained certain statements contrary to the declaration in the writ on which judgment had already been rendered.

"3. That the Court erred in allowing Supplementary report of the Referee as the computation of amounts determined were determined by including payment of funeral expenses by Defendants, which in fact have never been paid by said Defendants.

"4. That the Court erred in allowing Supplementary report of Referee because it was contradictory to judgment already obtained, and is detrimental to a pending suit for reimbursement to Plaintiffs for payment of the funeral bill which Defendants neglected to pay.

"5. That the findings of the Court were clearly erroneous."

While the ostensible issue is the supplemental report, we are convinced that the real issue raised by counsel for the plaintiffs is one of division of counsel fees.

That the real bone of contention relates to the fees charged by the attorney for the administrator is clearly shown in brief of counsel for the plaintiffs in which he sets forth the issues as follows:

> "1. Whether attorneys' fees should have been deducted from the damages prior to distribution.
>
> "2. Whether attorneys' fees should be prorated between attorney for Plaintiffs and attorney for Defendant.
>
> "3. Whether the Supplementary Report could be an explanation of facts arrived at in the Referee's report which was filed and accepted on account of basis of computation therein.
>
> "4. Whether the Court had a right to allow and accept the Supplementary Report after the original report had been accepted by agreement and judgment entered."

That the basic contention of counsel for the plaintiffs relates to a division of fees is also indicated by a statement addressed to the General Committee of the Cumberland Bar Association where he says in his statement, made a part of the record, that the matter was being submitted "for determination as to rights of parties and *determination of fees.*" (Emphasis supplied.) It is indicated that the General Committee of the Cumberland Bar Association declined to render an opinion.

It is conceded that the counsel fee of $750.00, arrived at by a charge of 25% of the collection, is fair and reasonable.

Counsel for the plaintiffs contends, that he is entitled to eight-ninths of the counsel fee and he advances the following arithmetical formula as the basis for division of the amount of $3,000.00 collected by counsel for Orrin Knight:

"Amount of settlement,	$3,000.00	
Funeral expenses paid by children	600.00	
Balance for division	$2,400.00	
Due Orrin Knight, 1/9		$ 266.67
Due children, 8/9		2133.33
Total reimbursement to children	$2,133.33	
plus reimbursement for funeral expenses paid by them,	600.00	
	$2,733.33	

plus interest from date of payment

Fees Agreed upon as $750.00 to be divided 1/9 to Mr. Fitzgerald and 8/9 to Mr. Thompson."

We revert now to the points on appeal specified by the plaintiffs.

Under point No. 1, the plaintiffs allege error on the part of the court in allowing the supplemental report after the original report had been allowed "and judgment rendered thereon."

This point appears to be well taken. There seems to be no provision in the New Rules of Civil Procedure authorizing the action adopted by counsel for the defendants in filing a motion for a supplemental report indicating findings of fact and conclusions of law. It is alleged in the motion that it was being filed pursuant to the provisions of Rule 53 (e) (1) M. R. C. P. The only reference to findings of fact and conclusions of law to be found in this section of the rules is the first sentence which reads as follows:

> "The referee shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report."

While there seems to be no specific provision in the New Rules of Civil Procedure outlining the method to be used when it is desired that a referee make findings of fact and conclusions of law, a request for such findings must be made before the entry of the order of reference. See § 53.7, Page 437, Field & McKusick.

Section 5, Chapter 121, R. S., 1954, as amended, specifies what action the court may take upon the report of a referee. It is provided that "the court may accept, reject or recommit the report * * *." Consequently, it would seem that after a report of a referee has been filed, and before it has been accepted, if counsel for either side so desires, a request may be addressed to the court for its recommittal, and if granted the cause may be heard anew on such issues as appear pertinent and appropriate.

In support of defendants' position that the motion for a supplemental report seeking to clarify the original findings of the referee was proper procedure, the case of *Smith* v. *Putney*, 18 Me. 87, was cited. In that case, after a jury verdict was rendered, but before it was affirmed, at the request of counsel for the defendant, the jury was asked and permitted to answer, how they had arrived at their verdict. This court saw no objection to this procedure, *"provided the inquiry be made at the time of giving in the verdict."* (Emphasis supplied.)

However, the situation in *Smith* v. *Putney, supra,* is not analogous to the one in the instant case, because in this case judgment had already been rendered when the motion for a supplemental report was filed. We would see no objection to the application of the doctrine enunciated in *Smith* v. *Putney, supra,* to a case where the motion is filed prior to the acceptance of the report of a referee.

In any event, there being no sanction, either by statute or by rule of court, for the procedure adopted in this case, it

follows that the appeal of the plaintiffs upon this issue must be sustained.

In view of this finding pertaining to point No. 1, it is unnecessary for us to discuss the remaining points on appeal.

However, we are constrained to state that failure on our part to give consideration to what we have already indicated is the basic underlying controversy would delay a prompt and equitable conclusion of the litigation in which the parties to this action are involved.

Although, in view of the opinion we have already expressed, we are not permitted to give consideration to the supplemental findings of the referee, we do not need this information in order to reach a determination of how the referee divided the amount of $3,000.00 collected by counsel for the defendants.

Upon this point, there is sufficient information in statements of counsel, made a part of the record, to permit us to conclude for ourselves by the process of arithmetic how division was arrived at. Under the theory of the defendants, division was made after deducting the funeral bill and the counsel fees. On the theory of the plaintiffs, division should be made by deducting the funeral bill and then dividing the balance per capita between the surviving husband and the eight children, and then adding the funeral bill to the amount claimed to be due to the children.

We can reckon for ourselves that upon the theory of the defendants, the amount of $2,066.67 was properly due the plaintiffs. There is nothing in the record to indicate why this amount was increased to $2,133.33. Whether the difference is made up of interest or was arrived at by compromise is immaterial.

Action to recover damages under the Death Statute must be brought in the name of the personal representative of the

person deceased. Such is the directive contained in Section 10, Chapter 165, R. S., 1954.

This provision of law presupposes that the personal representative shall be the one to retain counsel. In this case, Orrin Knight retained the other defendant as his attorney. As a result of his efforts, settlement of the claim and collection thereon was effected. He is the attorney who is entitled to the fee.

We are cognizant of the fact that in cases where an attorney has been retained to press a tort claim, he may first properly deduct a reasonable fee from the amount of his collection before he remits to his clients.

The manner in which the referee arrived at his finding was correct. Payment on the part of the administrator of the estate of Ida M. Knight to the plaintiffs of the amount of $2,133.33, will include the funeral bill and preclude successful action in any other litigation to recover a similar amount.

The entry will be:

Appeal sustained, without costs.

ALEXINA BROUILLETTE
vs.
WEYMOUTH SHOE COMPANY
AND
LIBERTY MUTUAL INSURANCE CO.

Androscoggin. Opinion, March 20, 1961.

Workman's Compensation. Evidence. Expert Opinion. Hearsay. Production of Documents. Waiver.

A medical opinion based on hearsay is as objectionable as hearsay itself.

The failure of counsel to request for inspection the production of "reports" from an attorney witness known to be in the witness' possession may result in an abandonment of his position.

Harmless error does not justify the granting of an appeal.

ON APPEAL.

This is a petition to review incapacity. The case is before the Law Court on appeal. Appeal denied. Decree affirmed. Allowance of $250.00 ordered to appellant for expenses of appeal.

Berman & Berman, for plaintiff.

Forrest Richardson,
Richard D. Hewes, for defendant.

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

WEBBER, J. This matter originated as a petition for review of incapacity brought before the Industrial Accident Commission by an employer seeking to terminate the payment of compensation to an injured employee.

The facts are not in dispute. Mrs. Brouillette fell at her work on January 15, 1959 injuring her right shoulder and

arm. She was directed by her employer to consult the late Dr. Gard Twaddle, who treated her until March when he decided that she should see an orthopedic specialist. She elected to consult Dr. Philip Archambault, who treated her for some time. She testified that in August, 1959 he advised her to return to employment. Instead of doing so, however, she chose to consult another orthopedic specialist, Dr. Carleton Rand, who after examination also advised her to return to work. Dr. Rand, himself a witness before the Commission, was of the opinion in September, 1959 that the apparent limitation of motion of her arm was attributable mainly to disuse and that a return to employment would constitute good therapy and the best remedy for such a condition. In the latter part of September she applied to her former employer, to three other concerns and to two employment agencies for work and was informed in each case that there was no work available. There is no suggestion that she was denied employment because of any physical incapacity. Upon this evidence the Commission found that incapacity for work had terminated on September 26, 1959 and that her inability to obtain employment thereafter was attributable to economic conditions and not to the results of her injury.

There was ample evidence to support the findings of the Commission and it is necessary only to consider the effect of alleged errors in rulings made by the Commission upon the admission of evidence.

Dr. William Casey, an orthopedic specialist called as an expert medical witness by the petitioner, had not examined or treated Mrs. Brouillette. He testified that he had examined x-ray pictures of the injured shoulder and a "report" made by Dr. Archambault, and that he was "aware" of Dr. Twaddle's diagnosis and treatment and of Dr. Allan Woodcock's "evaluation" of the injury. None of the doctors referred to were witnesses at the hearing. Neither the x-ray pictures nor any medical reports were presented or admitted

in evidence. At this juncture Dr. Casey was permitted, over objection, to state his opinion that Mrs. Brouillette's injury was an incomplete fracture of the lesser tuberosity of the right humerus. Subsequently counsel for the appellant noted his exception to the refusal of the Commission to order petitioners to produce the medical reports which Dr. Casey stated he had seen. Still later counsel for Mrs. Brouillette placed an attorney for the petitioners on the witness stand and disclosed the fact that at least certain of the "reports" in question were present in the hearing room in this attorney's possession. At this stage, however, counsel for appellant made no request that the attorney produce them for inspection nor did he inquire as to their contents.

It was error to permit Dr. Casey to state an opinion based on unverified x-ray pictures, on "reports," the contents of which were then and still are unknown and which were clearly hearsay, and on whatever conversations or reports or other form of hearsay had made him "aware" of Dr. Twaddle's diagnosis and Dr. Woodcock's "evaluation." A conclusion based on hearsay is as objectionable as hearsay itself. *Sprague* v. *Sampson,* 120 Me. 353, 356. An expert witness may not give an opinion based in part on the opinions of others. The opinion, if not based upon his own firsthand observation, should at least be grounded upon facts supplied by others for which there is support in the evidence. Unless the factual foundation which underlies the opinion is known and subject to the test of cross-examination, it is virtually impossible to conduct intelligent and effective cross-examination as to the opinion itself. *Nazzaro* v. *Angelilli* (1926), 217 App. Div. 415, 216 N. Y. S. 721; *Ipsen* v. *Ruess* (1948), 239 Iowa 1376, 35 N. W. (2nd) 82, 91; 32 C. J. S. 255, Sec. 536; *id.* page 359, Sec. 552; Anno. 98 A. L. R. 1109 and cases cited; 20 Am. Jur. 661, Sec. 787, *et seq.*

We are satisfied, however, that the error here was harmless and in no way prejudicial to the appellant. Dr. Casey

gave an opinion as to the existence of the incomplete fracture which is in accord with all the evidence in the case and is in no way disputed or controverted. Dr. Rand testified that this was the injury received. Dr. Casey's opinion upon this matter, although improperly received, was merely cumulative and was addressed to a subject not in issue between the parties. Moreover, a question could have been framed at this stage which would have been technically correct and which without doubt would have elicited the same answer. As to counsel's right to see the "reports," a question arises as to whether he did not abandon this position by failing to ask the attorney witness to produce them for inspection. But whether that be so or not, they were themselves hearsay and their legitimate usefulness to the cross-examiner ended when Dr. Casey gave an opinion as to the accuracy of which there is no dispute.

In further testimony Dr. Casey expressed opinions as to the relationship between bursitis and trauma and as to the expected duration of limitation of motion as the result of such an injury as was suffered by the claimant. In these instances, however, the witness made it perfectly clear in his testimony that these opinions were based entirely upon his own knowledge and experience as an orthopedic specialist and not in any degree whatever upon anything contained in "reports" or the opinions of other doctors. The witness was carefully and thoroughly cross-examined as to the reasons underlying his judgment.

We conclude that the only errors in rulings upon evidence were harmless and in no way prejudiced the appellant in an effective presentation of her case.

Appeal denied.
Decree affirmed.
Allowance of $250 ordered to appellant for expenses on appeal.

INHABITANTS OF TOWN OF ISLAND FALLS
vs.
A. K. R., INC.

Aroostook. Opinion, March 23, 1961.

Title. Tax Deeds. Adverse Possession. R. S., 1954, Sec. 16. Uncultivated Lands. Possession. Constructive Possession. Liens.

The rule that occupancy of a portion of land extends to the whole parcel does not apply where the deed conveys more than one parcel not enclosed in a common fence or in some way merged.

Adverse possession must be based on more than a mere mental intention; such physical facts as give notice to the owner of hostile intent must be present.

A town cannot claim adverse title and at the same time recognize the title in the one from whom it claims by placing a lien thereon.

The burden of proof is on the one asserting adverse possession.

ON REPORT.

This is an action to determine title. The case is before the Law Court upon report. Judgment for defendant.

Pilot & Pilot, for plaintiff.

M. P. Roberts, for defendant.

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

SIDDALL, J. On Report. This is a real action brought by the Inhabitants of Island Falls to determine title to an undivided five-sixteenths interest in and to some fifty-six lots or parts of lots of wild land situated in the plaintiff township. Defendant filed a plea of general issue with brief statement that plaintiff's title was invalid and ineffectual. The case was referred to a single justice under the old rules of court. Objections to the acceptance of the referee's re-

port were not acted upon by the presiding justice, and the case was reported by agreement to this court. We consider that the case is reported here for final determination on the facts as disclosed by the record.

It was stipulated that the property interest in dispute was owned by one Ansel L. Lumbert at the time of his death in 1929. He devised one-half thereof to one Ola Rivett-Carnac and the remaining one-half to certain trustees. On July 21, 1933, the estate of Ansel L. Lumbert was represented insolvent and commissioners in insolvency were appointed. On May 3, 1934, a waiver of the provisions of the will was filed by the widow, "Hazel L. Lumbert." Several suits were brought against the estate, and after judgment the property was sold by sheriff's deed. We are not quite clear in regard to the meaning of a stipulation that these deeds conveyed the interest of "Hazel H. Lumbert" in the real estate. In any event, the purchasers at the sheriff's sale conveyed their respective interests acquired under the sheriff's deed to one M. Jay Kramer. On January 30, 1940, Albert P. Putnam was appointed administrator d.b.n.c.t.a. of the estate of Ansel L. Lumbert, and he, as such administrator, gave a deed to the said M. Jay Kramer, the exact nature of which is not set forth in the stipulations. In 1952 M. Jay Kramer conveyed to the defendant the real estate in question.

The property was sold by the tax collector of plaintiff township for nonpayment of taxes on said property assessed against said Ola Rivett-Carnac and said trustees for the years 1931 and 1932. The property was bought by the Inhabitants of Island Falls at the collector's sale for each of these years, and after the statutory redemption period for the payment of the tax in each year had expired, a deed describing the property by individual lot numbers was received by the plaintiff and recorded.

The plaintiff concedes that the *tax deeds are invalid,* but claims title to the demanded premises by adverse possession

under color of title. The character of the occupancy of the land in question by the plaintiff falls short of the requirements of common law adverse possession, and the plaintiff does not argue otherwise.

Title by adverse possession rests upon statutes limiting the time within which an owner must bring a complaint for the recovery of land held adversely by another. The plaintiff claims adverse possession sufficient to meet the requirements of R. S., 1954, Chap. 174, Sec. 16, relating to the limitation of actions for uncultivated lands in incorporated places. This section reads as follows:

> "**Limitations of actions for uncultivated lands in incorporated places.**—No real or mixed action for the recovery of uncultivated lands or of any undivided fractional part thereof, situated in any place incorporated for any purpose, shall be commenced or maintained against any person, or entry made thereon, when such person or those under whom he claims have, continuously for the 20 years next prior to the commencement of such action or the making of such entry, claimed said lands or said undivided fractional part thereof under recorded deeds; and have, during said 20 years, paid all taxes assessed on said lands or on such undivided fractional part thereof, however said tax may have been assessed whether on an undivided fractional part of said lands or on a certain number of acres thereof equal approximately to the acreage of said lands or of said fractional part thereof; and have, during said 20 years, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of such lands or of undivided fractional parts of such lands in this state."

The burden of proof of title by adverse possession is upon the party asserting it. *Penobscot Development Company* v. *Scott*, 130 Me. 449, 157 A. 311.

The plaintiff must prove (1) that he had claimed the land in dispute continuously for twenty years next prior to the

commencement of its action, under recorded deeds, (2) that he had paid all taxes assessed on said lands during said 20 years, and (3) that he had during all of said period held such exclusive, peaceable, continuous and adverse possession of said land as comports with the ordinary management of such lands or of undivided fractional parts thereof.

The tax deeds under which the plaintiff claims color of title describe the property as fifty-six separately numbered lots or parts of lots, not embraced under one description. The lots do not constitute one tract of land, and by grouping contiguous lots together we find a number of groups separated from each other and located in different parts of the township. There is no evidence that the lots were enclosed by a fence. Ordinarily where one occupies a portion of land under a deed, his occupancy constructively extends to the whole of the land included in the deed. However, where more than one lot is conveyed by deed, unless the lots are enclosed by a common fence, embraced under one general description, or in some way merged into one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the tract, the rule above stated does not apply. *Hornblower* v. *Banton,* 103 Me. 375, 377.

The parties stipulated that the officials of the plaintiff township would testify and the town records disclose that certain possessory acts on the property were carried out by the town during the period from 1932 to 1954. They do not agree, however, on the interpretation of these stipulations. The plaintiff claims that these acts, under the stipulations, apply to all areas of the property in question, and the defendant contends that the stipulations cannot be given such a broad interpretation. However, it is unnecessary for us to resolve the differences between the parties in relation to the stipulations. Undisputed facts are present that decisively determine the rights of the parties, as between themselves, under the issues in this case.

Under the statute the plaintiff, during the entire period of twenty years next prior to the commencement of the action, must have held such exclusive, peaceable, continuous and *adverse* possession of the property as comports with the ordinary management thereof.

To be adverse the plaintiff's possessions must be hostile under a claim of ownership or title against the true owner. ". . . . adverse possession, to create title, does not consist alone of mental intentions but must also be based on the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and such as will give notice of such hostile intent." *Webber* v. *Barker,* 121 Me. 259, 264.

The action in this case was commenced on February 14, 1956. The record discloses that taxes were assessed by the plaintiff township in 1935 and 1936 against the same persons named in the tax deeds relied upon by the plaintiff to show color of title. Collector's tax liens, so called, were recorded for these years. Thus, within twenty years next prior to the date of the writ in the instant case the town has recognized an interest in the same persons whose property had been sold for nonpayment of taxes, and deeds thereof acquired by the town. Furthermore, lien claims to secure the payment of taxes for these years were filed against the same property by the town upon whom rests the burden of proving that at that time it held the property adversely. The plaintiff cannot claim title by adverse possession, and at the same time recognize the title in one from whom it claims. The taxation of the property, under the circumstances of this case, clearly indicates a lack of adverse claim.

The plaintiff has failed to prove the necessary elements to establish title by adverse possession.

The entry will be

Judgment for Defendant.

Opinion, March 24, 1961.

OPINION OF JUSTICES

Whether the Law Court would uphold *State* v. *Latham*, 115 Me. 176 and declare a proposed Act (requiring milk dealers pay producers semi-monthly) unconstitutional should not be answered by the justices individually as an advisory opinion in advance of a justiciable controversy before the Law Court.

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

OPINION

OF THE JUSTICES OF THE SUPREME JUDICIAL COURT
GIVEN UNDER THE PROVISIONS OF SECTION 3
OF ARTICLE VI OF THE CONSTITUTION

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER
DATED MARCH 7, 1961

ANSWERED MARCH 24, 1961

SENATE ORDER PROPOUNDING QUESTIONS

March 7, 1961

WHEREAS, a bill entitled "An Act Relating to Payment by Dealers to Producers for Milk Purchased" (Senate Paper 402, Legislative Document 1345), is pending before the Senate of the 100th Legislature and it is important that the Legislature be informed as to the constitutionality of the proposed bill; and

WHEREAS, it appears to members of the Senate of the 100th Legislature that certain provisions of this bill present important questions of law and the occasion is a solemn one;

THEREFORE, be it

ORDERED, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give this Legislature their opinion on the following questions:

1. Is this proposed legislation in conformity with Article I, Section 1, of the Constitution of the State of Maine as a valid exercise of the police power and the protection of the public welfare?

2. Is this proposed legislation valid under the 14th Amendment to the Constitution of the United States, or is it subject to the objection that it places upon a limited class of debtors an additional process to enforce payment of bills, to which process other classes of debtors are not subjected?

3. Is this proposed legislation valid under Article I, Section 11, of the Constitution of the State of Maine, and Article I, Section 10, of the Constitution of the United States of America, which sections prohibit the State from passing any law impairing the obligation of contracts?

A true copy attest:

CHESTER T. WINSLOW,
Secretary of the Senate

Name: Parker

County: Piscataquis

In Senate Chamber
March 7, 1961
Read and Passed
CHESTER T. WINSLOW,
Secretary

ONE-HUNDREDTH LEGISLATURE

Legislative Document **No. 1345**

S. P. 402 In Senate, February 8, 1961

Referred to Committee on Agriculture. Sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary

Presented by Senator Parker of Piscataquis.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-ONE

AN ACT Relating to Payment by Dealers to Producers for Milk Purchased.

Be it enacted by the People of the State of Maine, as follows:

R. S., c. 33, § 4-A, additional. Chapter 33 of the Revised Statutes is amended by adding a new section 4-A, to read as follows:

'Sec. 4-A. Semi-monthly payment by dealers to producers. At least as often as semi-monthly, each dealer shall make payment to his producers of all sums due for products purchased or received during the preceding semi-monthly period.

Upon due notice and after hearing the Maine Milk Commission may suspend or revoke the license of a dealer who violates this section.'

ANSWER OF THE JUSTICES

To the Honorable Senate of the State of Maine:

The undersigned Justices of the Supreme Judicial Court individually acknowledge receipt of your communication of

March 7, 1961, requesting our advice concerning the constitutionality of a bill entitled "An Act Relating to Payment by Dealers to Producers for Milk Purchased" (Senate Paper 402, Legislative Document 1345).

In considering the questions submitted, we are faced with the fact that on two occasions our Court has held statutes of like purpose with L. D. 1345 unconstitutional.

In *State* v. *Latham,* 115 Me. 176, the Court in 1916 held a 1915 Act unconstitutional in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The statute read as follows:

> "Every person, firm or corporation purchasing cream or milk for the purposes of reselling or manufacturing the same into other products, shall pay the producer, unless otherwise provided for by written contract, semi-monthly; payment to be made on the first day of each and every month for all cream or milk received prior to the fifteenth day of the preceding month, and payment to be made on the fifteenth day of each and every month for all cream or milk prior to the first day of the same month."

The Court said, at p. 177:

> "The statute in question when analyzed appears to be designed to compel purchasers of a particular product, intended for a particular use, to pay their purchase debts at particular times on pain of criminal prosecution, punishment by fine, and, of course, imprisonment for thirty days, if the fine is not paid. R. S. ch. 136, sect. 12. Whether such a statute, designed to aid in the collection of mere civil obligations by the use of the strong arm of the criminal law is within the proper exercise of the police power is at least questionable. Certainly it is not unless the regulation intended be for the promotion of the public health, safety, morals, comfort or welfare."

and again at p. 179:

> "It is class legislation. Its discriminations are not based upon any real differences in situation or condition. We feel compelled to hold that it conflicts with fundamental laws and is, therefore, of no effect."

In *State* v. *Old Tavern Farm, Inc.*, 133 Me. 468 (1935), the Court, with two justices dissenting, declared unconstitutional a 1933 Act requiring that the proprietor of a milk gathering station give a bond, or deposit money or securities, to secure payment to producers, as a condition precedent to obtaining a license. The Court held the Act violated both the Fourteenth Amendment of the United States Constitution and Art. I, Sec. 1 of the Maine Constitution. The opinion of the Court reads, at p. 471:

> "The Constitution of the State of Maine affirmatively secures to all persons an equality of right to pursue any lawful occupation under equal regulation and protection by law. Its words are these:
>
> " 'All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.' *Const. of Maine,* Art. I, Sec. 1.
>
> "Pertinent provisions of the Fourteenth Amendment to the Constitution of the United States are:
>
> " ' . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

at p. 476:

> " 'The Latham Case is of controlling analogy.' "

In *State* v. *Latham, supra,* we have payment to producers required under criminal penalties. In *State* v. *Old Tavern*

Farm, Inc., supra, we have a bond or other security as a condition of obtaining a license. In L. D. 1345 we have a proposal of payment required under penalty of loss of license under the Milk Control Act (R. S., c. 33). The three proposals are alike in substance.

We are cognizant of the following facts:

(1) that the Old Tavern Farm case arose under a statute enacted in 1933, and was decided in July 1935, only a few months after the original enactment under the Emergency Clause of the Act creating a Milk Control Board (Laws 1935, c. 13);

(2) that the decision in the Old Tavern Farm case was in accord with the minority view of the decided cases in the nation; or stated differently, that the two justices in dissent adopted the majority view;

(3) that the requirement of a bond to secure payments by dealers to producers (using the terms in a general sense, and not with the definitions of the Milk Control Act specifically in mind) has been apparently upheld in connection with Milk Control Acts (*Nebbia* v. *New York,* 291 U. S. 502), and

(4) that neighboring states provide by statute for bonds designed to secure payments to producers of milk New Hampshire (R. S. annotated, c. 185: 4 through 10; Vermont statutes annotated, T. 6, §§ 1965, 1966, and 1968; Massachusetts General Laws annotated, c. 94, § 42 B).

In light of the earlier cases, the questions submitted in substance come to this: In the opinion of the justices would the Supreme Judicial Court sitting as the Law Court overrule its decisions of 1916 and 1935 in the *Latham* and *Old Tavern Farm* cases?

It becomes, therefore, of the highest importance that we determine precisely our duty as individual justices in acting upon the questions presented.

> "They (the Justices of the Supreme Judicial Court) shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives."
>
> Maine Constitution, Art. VI, Sec. 3.

The opinion given is the opinion of each justice as an individual. It is not the opinion of the *Supreme Judicial Court.* The fact that justices often, and perhaps usually, join in one opinion does not alter the fact that the opinion is not that of the Court, but of each justice. To illustrate, the Court decided the *Old Tavern Farm* case by a vote of 4 to 2. The dissenting justices stated their reasons for the record. The vitality of the case comes from the action of the majority who decided the issue.

In an advisory opinion there is no decision; there is no binding precedent. We said in *Martin* v. *Maine Savings Bank,* 154 Me. 259, at 269:

> "It is familiar law that an advisory opinion binds neither the justice who gave the opinion nor the court when the same questions are raised in litigation. Justice Rufus Tapley, in *Opinion of the Justices,* 58 Me. at 615, stated the principle in apt language:
>
> > " 'We can only proceed in the investigation upon the views of the law appertaining to the question, as they appear to us upon first presentation, and anticipate as well as we can the ground which may be urged for or against the proposition presented, never regarding the opinions thus formed as conclusive, but open to review upon every proper occasion.'
>
> "Our duty is to consider the problem anew in light of the issues presented and with the aid and assistance of the research, briefs, and arguments of counsel."

In the questions before us we have the converse of the *Martin* or *Industrial Building Authority Act* case. There an advisory opinion was followed by a litigated case. Here we have like statutes declared unconstitutional in two fully litigated cases followed by the request for an advisory opinion.

Each justice in giving his advisory opinion must necessarily be bound by the existing law under the decided cases of the Court. He cannot, any more than if he were sitting as a single justice to hear and decide a case, or were a judge of any other court, or a member of any other tribunal, do other than accept the decision of the Supreme Judicial Court sitting as the Law Court, except, of course, insofar as the laws of the United States or the decisions of the Supreme Court of the United States might control. When, as here, the issue has been clearly determined, he should not indicate what his views may be, or, indeed whether he has views, upon the existing validity of the settled law.

The occasion to reconsider the issue, with all the relevant facts arising both in the legislative process and in the development and presentation of the particular case, and with the benefit of briefs, research, and arguments, will come in litigation between party and party. "The impact of actuality and the intensities of immediacy are wanting," to quote from Justice (then Professor) Felix Frankfurter. 37 Harvard Law Rev. 1002, 1006. At best, in an advisory opinion we consider the legislative proposal. The *tug of litigation*, it seems to us, is of prime importance in the situation here presented. It was in litigation that our predecessors as a Court forty-five years ago, and again twenty-six years ago, made the decisions. It is this process which we consider here appropriate.

This is not the occasion to write at length on the advantages and disadvantages of advisory opinions. It is sufficient to note that however useful such opinions may be as

a guide in proposed actions, they do not replace, and are not designed to replace, or to be a substitute for, decisions made in course of litigation.

The Justices of the Massachusetts Court said, in an analogous situation, in 115 N. E. 978, at 979 (1917):

> "It is established also that in answering questions submitted to them under chapter III, article II, of the Constitution, the Justices of this court are bound by the decisions of the court upon matters respecting which that court is the final authority. It is not open to the Justices in answering questions submitted to them under the Constitution to attempt to overrule a decision made by the court in a cause between party and party or to speculate upon the correctness of such a decision. If such a decision is to be overruled, it can be only after argument in another cause between party and party, where the rights of all can be fully guarded. It cannot be overturned by an advisory opinion of the Justices given without the benefit of argument. Without intimating that there is ground to question our decisions, it is enough to say that we are bound by them.
>
> "We construe all of the questions as applying to the two bills presented therewith and answer them all in the negative."

In Colorado, we read:

> "It is well understood that during the last ten years this Court has rendered several decisions denying the power. . . That there are decisions by the courts of other states in opposition as well as in support of the doctrine thus announced must be admitted. But we are decidedly of the opinion that the decisions of this court, deliberately announced in actual litigated cases, ought not to be overruled upon ex parte arguments in response to legislative questions."
>
> * * * * * * * * *
>
> "Without intimating in any manner what conclusion might be reached in case the questions now

> presented should be brought before the court in the regular course of litigation, we do not deem it proper to express any further opinion at this time." 15 Colorado 598 (1890), *In re House Resolutions Concerning Street Improvements.*

We are aware that the *Latham* and *Old Tavern Farm* cases do not touch the third question relating to impairment of contracts. It would seem useless, however, to give our opinion on this question in light of our expressed views on the first and second questions. If the Act becomes law, and if a case comes before the Court, not before us as individual justices, then will be the occasion to determine the constitutional issues in the case.

In responding in this manner, we fully realize that the importance of the questions of law is not lessened by the decisions of the Court rendered in 1916 and 1935.

The question here is whether the justices in their advisory opinion will overrule the earlier decisions of the Court. It is this question which, on mature reflection, we deem should not be answered, but should be left to litigation.

Dated at Augusta, Maine, this 27th day of March, 1961.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

LORING W. PRATT ET AL.
vs.
ROBERT H. MOODY

Kennebec. Opinion, April 21, 1961.

Boundaries. Title.
Deeds. M. R. C. P. 52 (a)

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 the credibility of the witnesses.

The burden is on the appellant to prove error.

ON EXCEPTIONS.

This is a boundary dispute before the Law Court upon exceptions to findings by a single justice. Exceptions overruled.

Weeks, Hutchins & Frye, for plaintiff.

Niehoff & Niehoff, for defendant.

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

SIDDALL, J. On exceptions. This is a real action brought by the plaintiffs for possession of certain real estate located on the shore of Messalonskee Lake. The action was brought and heard under the old rules of court. The parties to the suit are adjoining owners of land on said lake, the defendant's property being located north of that of the plaintiffs'. The defendant filed a plea of nondisseisin and a disclaimer as to part of the property demanded, thereby putting in issue the location of the dividing line between the lots. The case was heard by the presiding justice without a jury with right of exceptions reserved as to matters

of law. The presiding justice found for the defendant and plaintiffs duly filed exceptions.

In 1947 the properties of the plaintiffs and the defendant were a part of a larger tract with a shore frontage of approximately twelve hundred feet. In April, 1947, this property was divided into two parcels of land, each having a shore frontage of approximately six hundred feet. A survey and a plan of the division were made by Carl Crane, an engineer and a witness for the defendant at the hearing below. The southerly half of the land, also called the westerly half, became the property of one Wallace. The northerly half, also called the easterly half, upon which the land in question was located, became the property of Roy E. Dudley and Calla B. Dudley. In 1947, a plan of the southerly half, dividing it into lots, was made by Crane for the owner. In 1948 the owner of the southerly half sold to Marjorie Dore lots numbered one and two on this plan. Lot number one adjoins the northerly half of the property as divided along land that is the subject matter of this suit and owned by the plaintiffs. The northerly line of the Dore lot, also designated as the easterly line, begins at the intersection of a right of way with the side line of the Wallace property, and runs along that property *through an iron pipe near the shore of the lake to Messalonskee Lake.*

In 1948 the Dudleys, owners of the northerly half of the divided tract, conveyed to Irving A. Moody and Bess B. Moody, predecessors in title to both plaintiffs and defendant, a portion of the half owned by them. The deed describes the property as being on the easterly shore of the lake as follows:

> "Beginning at an iron pin set into the ground, which pin marks the northeast corner of the lot here conveyed; *thence westerly two hundred (200) feet, more or less, to a second iron pin set into the ground near the shore of the Lake, at a point three hundred (300) feet more or less, northerly from*

the northwest corner of property of Mrs. Marjorie Dore; thence through said iron pin in the same course to the Lake; thence southerly three hundred (300) feet, more or less, along the shore of the lake to a point westerly of an iron pin marking the northwest corner of said Dore property and on an extension westerly of the Dore north line; thence easterly to the iron pin marking the northwest corner of the Dore north line; thence easterly to the iron pin marking the northwest corner of the Dore property and through said iron pin along the Dore north line two hundred (200) feet, more or less, to another iron pin set into the ground, which pin marks the southeast corner of the parcel here conveyed; thence northerly three (300) feet, more or less, to the point of beginning." (Emphasis supplied.)

It will be noted that there is an apparent error in the above description consisting in the repetition of the course from the shore easterly to the iron pin.

On September 3, 1949, the Moodys conveyed to the plaintiffs a portion of the property conveyed to them by the Dudleys. This deed describes the property conveyed as being on the easterly shore of the lake with the following description:

"*Beginning at an iron pin set in the ground on the shore of said lake, said point being the south west corner of said Moody property; thence running northerly along the shore of said lake approximately two hundred (200) feet;* thence easterly in a line parallely to the northerly line of said Moody property two hundred (200) feet to a point in the easterly boundary of said Moody property; thence southerly along the easterly line of said Moody property approximately two hundred feet to the southwest corner of said Moody property; thence westerly along the southerly bound of said Moody property two hundred feet (200') more or less to the point of beginning." (Emphasis supplied.)

On December 10, 1949, the Moodys disposed of the remainder of the property conveyed to them by the Dudleys,

by deed to the defendant. In this deed the property is described as being on the easterly shore of the lake and is further described as follows:

> "Beginning at a point on the easterly shore of said lake, said point being the northwesterly corner of Lot now owned by Dr. Loring Pratt; thence, northerly along the shore of said lake one hundred feet (100′) more or less to an iron pin; thence easterly two hundred feet (200′) more or less to an iron pin set in the ground; thence southerly one hundred feet (100′) more or less to the northeast corner of the land of said Dr. Pratt.
>
> Meaning and intending to convey the remainder of our land acquired by us by Warranty Deed, dated September 13th, 1948 and recorded in the Kennebec Registry of Deeds, Book 880, Page 182."

Much testimony in the case concerned the iron pin mentioned in the first two descriptions quoted above. The plaintiffs claim that this iron pin was one known in the record for purposes of identification as iron pin #1, and was located about nine feet easterly of the shore in the division line between the properties of Dore and the plaintiffs. The defendant claims that this pin was located on the division line about a foot from a blazed cherry tree and about twenty feet westerly of iron pipe #1, so called. It may be noted that there is testimony in the case that there is a small inlet between these two points. There is also testimony of Carl Pratt that he placed a stake near the blazed cherry tree at the time of the division survey in 1947, and that there was no water between that point and what is now the location of iron pin #1.

The court found that he was not satisfied that the point on the shore which forms the common corner of the parties to this suit was located by starting at the iron pin contended by the plaintiffs to be the starting point. He found the evidence was equally credible that the pin was on the shore

near the cherry tree. He further found that in order to bring defendant's cottage over his line, the two hundred feet shore line would have to be projected over water, although the plaintiffs' deed calls for the line to run along the shore. He noted that the shore line is not depicted as a straight line, nor could it be concluded from the deeds that either lot is a parallelogram. He concluded the exact starting point of the plaintiffs' deed was ambiguous.

The burden was upon the plaintiffs to establish their title to the land in dispute. In effect, the court held that they had not carried that burden.

It seems unnecessary to discuss in detail the testimony in the case relative to the location of the iron pin mentioned in the plaintiffs' deed. However, a brief summary of that testimony is in order. We first note that the shore line, according to the deeds, runs approximately north and south, and that the true compass directions indicate the shore line as running nearly east and west. In order to avoid confusion we follow the directions as they appear in the deeds. We also note that the witnesses, in many important parts of their testimony, used the words "this" and "that" in describing a certain line or location on an exhibit without other identification having been made of the line or location referred to by such witnesses.

The deed from the Dudleys to the Moodys mentions four iron pins, two near the shore line, one at the southeast corner of the lot, and one at the northeast corner. Carl Crane, a witness for the defendant testified that in 1947 he surveyed for the then owner a tract of land running from the lake to the highway, of which the properties later owned by the parties to this action was a part. At that time, according to his testimony, he ran the outside lines and a center division line of this tract. He established a point halfway of the approximately twelve hundred feet of shore frontage very close to a cherry tree blazed by him and placed a stake

within a foot of that tree as a marker. At that time, the only marker on the property was the stake or pin near the cherry tree. In 1950, at the request of the defendant, he surveyed the properties of the plaintiffs and defendant. He used the pin or stake at the cherry tree as being Marjorie Dore's corner. At that time he saw the pin known as iron pin #1, and apparently there were other pins, the location of which is not clear from his testimony. He also testified that he placed pins on the dividing line between plaintiffs' and defendant's lots and that his survey indicated to him that the defendant's cottage was not over the plaintiffs' line. Richard Moody, a brother of the defendant, testified that in 1947 he acquired lot #3 which was located on the south side of lot #2 owned by Marjorie Dore. In 1947, prior to the date of plaintiffs' deed, he went onto the property with the owner of the tract of land of which lot #3 was a part. At that time he was shown a short pin near a blazed cherry tree. He located his lot from this point. He saw no other pin at the time. Robert Moody, the defendant, testified that shortly after his father (and mother) bought the land in dispute from the Dudleys he was shown a pin near a cherry tree by Mr. Dudley, one of the grantors in the deed to the Moodys.

On the other hand, Sherman K. Smith, an engineer for the plaintiffs, testified that in 1956 he surveyed the properties purchased by the parties from the Moodys. At the time he found iron pin #1, and also two other iron pins designated by him as iron pin #2 and iron pin #3. In a plan prepared by him from this survey he locates pin #2 as the southeast corner and iron pin #3 as the northeast corner of the property surveyed. The distance between iron pin #2 and iron pin #3 is shown on the plan as 277.8 feet. He testified that there was no stake near a cherry tree when he made his survey, but that a stake was placed on the line and a foot or two easterly of the cherry tree by him and Mr. Crane. He

measured off two hundred feet from iron pin #2 toward iron pin #3 and at this point placed an iron rod marker labeled iron pin A, and also measured two hundred feet from iron pin #1 toward the north and placed an iron rod near the shore labeled iron pin B. He stated that the defendant's cottage was astride the line running from iron pin A to iron pin B. In 1957 he found iron pins #1, 2, and 3 in place but A and B had disappeared. Iron pins A and B were then replaced with wooden stakes. Loring W. Pratt, one of the plaintiffs, testified that the time their property was purchased on September 3, 1949, there were iron pipes at points marked by iron pin #1, iron pin #2, and iron pin #3. He also testified that "in the region in the vicinity of iron pipe A" there was a branch of a tree that had a rag tied to it. There was a square wooden stake about a foot long "in the vicinity of iron pipe B," and it had a tin can turned upside down over the top of it. He also testified that at the time of the purchase, Richard Moody, son of one of the grantors, showed him iron pipe #1 and stake with rag tied to it and the square wooden peg with the can turned over it. Richard Moody had testified that the only pin he knew about was the one at the blazed cherry tree and couldn't remember whether or not he had pointed it out to Mr. Pratt. Ralph A. Knowlton testified that he made a survey of the property on October 31, 1957, and found iron pins #1, 2, and 3. He found the distance between pin #1 and 2 to be 192.15 feet. He found various stakes and a pin "roughly or approximately" at the location of iron pin A, and a wooden stake approximately in the position of iron pin B; also a pipe and a pin somewhat southerly and westerly of that wooden stake. He felt that a line between the two most westerly pins would miss the defendant's cottage. He testified that he measured a line two hundred feet easterly from and parallel to the line from iron pipe #1 and iron pipe #2, and that the defendant's cottage was over that line.

The plaintiffs in their declaration described the property demanded as beginning at an iron pipe in the northwest corner of the Dore lot, "located nine feet more or less, southeasterly of the shore of said Lake." Obviously the plaintiffs' reference was to iron pin #1. The burden was upon the plaintiffs to show title to the property demanded. In order to establish the dividing line between the properties of the defendant and plaintiffs the first step was to establish the starting point of plaintiffs' deed. This was essential in order to find the correct terminus on the shore of the first course in plaintiffs' deed. At that terminus point the line between the properties starts, and runs in an easterly direction therefrom parallel to the northerly line of the Moodys' property to a point in the easterly line thereof. Plaintiffs' easterly line runs southerly from that point to the southeast corner of the Moodys' property, claimed by the plaintiffs to be at the location of iron pin #2. The exact distance of that easterly line depends upon the point where the parallel line strikes the easterly line of the Moodys' property.

We have already set forth the findings of the presiding justice. "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." Maine Rules of Civil Procedure, Rule 52 (a). See *Harriman* v. *Spaulding,* 156 Me. 440, 443, 444. A ruling of fact by a single justice should not be overruled unless the appellate court is clearly convinced of its incorrectness, and the burden is upon the appealing party to prove the error. *Flagg* v. *Davis, et al.,* 147 Me. 71, 85; 83 A. (2nd) 319. After a careful reading of the record we are not satisfied that the findings of fact by the court below were clearly erroneous.

The plaintiffs claim, however, that the evidence clearly locates the plaintiffs' north, east, and south lines and that therefore the plaintiffs' shore line must be the distance

between the plaintiffs' north and south lines as a matter of law. The answer to this argument is that they did not clearly establish the location of their north line nor the exact measurement of their east line. An examination of the plaintiffs' deed discloses that their north line runs parallel to the Moodys' north line. Assuming that the Moodys' north line is undisputed, the distance between the two parallel lines depends upon the northerly terminus along the shore of the lake of the first course in plaintiffs' deed. That course runs from the starting point northerly *along the shore* approximately two hundred feet. No base lines were mentioned in the description of this course. The course did not purport to run to a monument and, therefore, the word "approximately" has no application. The plaintiffs' north line was not clearly established due to the failure of the plaintiffs to establish to the satisfaction of the presiding justice its beginning point on the shore of the lake. The plaintiffs assert that their east line is exactly two hundred feet in length. This is not necessarily so. The plaintiffs' deed describes their north line as running easterly from the shore parallel to the Moodys' north line to a point in the easterly boundary of the Moodys' property, thence southerly along that easterly line *approximately two hundred feet* to the southeast corner of the Moodys' property. The word "approximately" as used in this course had a meaning because the course runs to a corner as a monument. Whether the exact measurement of this course is two hundred feet, or more or less than that number of feet, depends upon the point where the plaintiffs' north line intersects the Moodys' east line. The plaintiffs claim that the Moodys' north line is parallel to the Dore's north line. Although the plaintiffs' north line is parallel to the north line of the Moodys' land, a careful examination of the deeds and the record in the case fails to convince us that the north line of the plaintiffs' property is also parallel to the Dore's north line.

The plaintiffs also claim as a matter of law that the lots of the plaintiffs and defendant must be considered as being parallelograms in shape. The presiding justice ruled otherwise. Although the north and south sides of the defendant's lot are parallel, we are not satisfied that the easterly and westerly sides are parallel. As stated above, we are not satisfied that the north and south sides of the plaintiffs' lot are parallel.

The plaintiffs also claim that the deed to the plaintiffs calling for a line "approximately two hundred feet" without reference to any monument controlling the length must be taken as the distance stated, unless the distance is controlled by other calls. The principle of law is correctly stated. However, as previously stated the length of the plaintiffs' east side is controlled by a monument and may be more or less than two hundred feet depending upon the distance between the point of intersection of plaintiffs' north line with Moodys' east line and the southeast corner of the Moodys' property. The plaintiffs' south line is controlled by two monuments, and apparently is over two hundred feet in length irrespective of whether the starting point is the one claimed by the defendant or the one claimed by the plaintiffs. The north line may be more or less than two hundred feet depending upon the distance between the terminus of the first course in plaintiffs' deed and the point where a line parallel to the Moodys' north line intersects the Moodys' east line. We have already stated that the word "approximately" has no application in the measurement of the shore line.

The plaintiffs also contend that it does not appear that the plaintiffs' grantors had any knowledge of the pin claimed by the defendant to be the starting point of plaintiffs' deed. The defendant offered testimony, which, if believed, tended to show that the pin was there when plaintiffs' grantors received their deed. Whether the plaintiffs' grant-

ors actually knew of the existence of the pin may be evidence to consider, but is not conclusive. The court undoubtedly took into consideration all of the testimony bearing upon plaintiffs' grantors knowledge of any of the monuments referred to in the testimony given before him.

It is unnecessary for us to discuss the question of whether or not the parties had agreed upon a division line.

The entry will be

Exceptions overruled.

STATE OF MAINE
vs.
RALPH E. DESMOND

Somerset. Opinion, April 21, 1961.

Driving Under Influence.

Where the evidence is sufficient the verdict must stand.

ON EXCEPTIONS.

This is a criminal action for driving under the influence before the Law Court upon exceptions. Exceptions overruled. Judgment for the State.

PER CURIAM.

The respondent was charged with operating a motor vehicle on a public highway in Fairfield while under the influence of intoxicating liquor. The case was tried before a jury. At the conclusion of the evidence in the case respondent made a motion for a directed verdict. The motion was denied by the presiding justice and respondent filed excep-

tions. These exceptions present the only issue before this court. The respondent claims that the evidence was insufficient to prove operation or that the respondent was under the influence of intoxicating liquor. A careful examination of the record discloses ample evidence to justify a jury in finding beyond a reasonable doubt that the respondent did operate an automobile as charged in the complaint and that he was at the time of such operation under the influence of intoxicating liquor.

The entry will be

Exceptions overruled
Judgment for the State.

Stuart Hayes, for plaintiff.

Anthony Cirillo, for defendant.

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

MARGUERITE M. NELSON
vs.
MAINE TURNPIKE AUTHORITY

Androscoggin. Opinion, April 24, 1961.

Torts. Sovereign Immunity. Turnpikes. Defective Highways.

The doctrine of sovereign immunity extends to the Maine Turnpike Authority.

Statutory authority to "sue" and "be sued" does not result in waiver of sovereign immunity in tort cases involving liability to the traveler for a defective highway.

Previous litigation involving torts in the nature of nuisance and situations analogous to takings by eminent domain, where the issue of immunity was not raised, are not precedent for defective highway cases.

Sovereign immunity in situations like the instant case is long established and changes should come from the Legislature.

ON EXCEPTIONS.

This is a tort action before the Law Court upon exceptions to the sustaining of a demurrer. Exceptions overruled.

Berman & Berman, for plaintiff.

Linnell & Choate, G. Curtis Webber, for defendant.

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

WILLIAMSON, C. J. The issue is whether the Maine Turnpike Authority is immune from tort liability for personal injuries to a traveler arising from negligence in the maintenance of the Turnpike. The action was brought before the adoption of the new rules of civil procedure and is before us

on exceptions by the plaintiff to the sustaining of defendant's demurrer in the Superior Court.

The Maine Turnpike Authority was created by the Legislature in P. & S. Laws, 1941, c. 69. Provisions of the Act on which, in the words of the plaintiff, "this case hinges" are:

> "**Sec. 4. Powers.** (a) The 'Maine turnpike authority' shall be a body both corporate and politic in the State of Maine and shall have powers (1) to sue and be sued; . ."
>
> "**Sec. 18. Governmental function.** It is hereby declared that the purposes of this act are public and that the authority shall be regarded as performing a governmental function in the carrying out of the provisions of the act."

In *Nat. Bk., Boston* v. *Turnpike Authority,* 153 Me. 131, 136 A. (2nd) 699 (1957), in holding that an amendment to the Act providing payment for utility relocation on the Augusta extension was unconstitutional, we said, at p. 155:

> "It (the Maine Turnpike Authority) is 'a body both corporate and politic' and 'shall be regarded as performing a governmental function.'
>
> "The Authority 'in order to facilitate vehicular traffic between the southwestern and northeastern section of the state of Maine' 'for the benefit of the people of the state of Maine and for the improvement of their commerce and prosperity in which accomplishment the authority will be performing essential governmental functions' was authorized to construct, operate and maintain a turnpike, with the approval of the State Highway Commission, from Kittery to Fort Kent. Such authorization by the legislature was tantamount to 'a determination that the public exigency requires such road.' *Lynn & Boston Railroad Company v. Boston & Lowell Railroad Corporation,* 114 Mass. 88, 91. It had to be a limited access road from its very design and

purpose. Revenue bonds payable solely from tolls were sanctioned, for the cost of construction. Such bonds were not to be a debt of the state of Maine, nor could the faith or credit of the State be at all pledged in their behalf. The turnpike when paid for was to become the property of the State, to be operated thereafter by the State Highway Commission. The Authority was granted power to acquire, hold and dispose of personal property and to acquire 'by purchase, continuation, lease or otherwise, real property and rights or easements therein deemed by it necessary or desirable for its purposes and to use such property.' Right of eminent domain was accorded as to real property. The Authority was afforded immunity from levy, sale and lien except for the lien granted its bondholders upon its net receipts. Its property, income and the securities it might issue were exempted from all Maine taxes. The turnpike was made available at all times, without charge, to the armed services.

"The turnpike was manifestly to be a type of public highway and the Authority was, in its legislative conception, a governmental agency with police power plainly conferred."

In brief, the State established an instrumentality or agency to construct, operate and maintain a great highway, financed through tolls, and eventually to become a part of the state highway system.

The plaintiff, it is to be noted, contends not that the State itself is subject to tort liability, but that the immunity of the State does not extend to the Authority. *Jones Company* v. *State,* 122 Me. 214, 119 A. 577, involving negligence in the allowance of temporary liberty to a mental patient at a state hospital, is a typical case of a tort action against the State under the authority of a legislative Resolve. For an interesting summary of Maine law see Leflar & Krantowitz on "Tort Liability of the States," 29 N. Y. U. Law Rev. 1363, 1381 (1954).

The plaintiff maintains:

> "*1.* That the Maine Turnpike Authority is not such a State Agency as to be clothed with the State's immunity from suit or from liability for tort;
>
> "*2.* If the Authority is a State Agent to be so immune, then by virtue of Section 4-A of The Act, the State, by giving the Authority the power to sue or be sued, has waived such immunity."

and

> 3. That the doctrine of governmental immunity, either from suit or from liability, should not extend to a separate corporation organized by the State to perform a governmental function.

First — It was settled in *Nat. Bk., Boston* v. *Turnpike Authority, supra,* that the Authority is "a governmental agency with police power plainly conferred." The State has delegated to the Authority the carrying out of a "governmental function," namely, the construction, maintenance, and operation of a public highway. The Legislature could have placed the Turnpike within the state highway system under the control of the State Highway Commission. It chose, however, doubtless for financial reasons, to make use of an instrumentality or agency.

The plaintiff points to the *Opinion of the Justices,* 146 Me. 249, 80 A. (2nd) 417 (1951), in which all of the justices joined in advising the House that the Authority was not a State Department within the meaning of what is now Art. IX, Sec. 19, of our Constitution, prohibiting the expenditure of the gasoline tax unless "under the direction and supervision of a state department having jurisdiction over such highways and bridges. . . "

The advisory opinion was limited to the consideration of a proposed statute providing payments from the gasoline tax to the Authority in light of the constitutional provision

designed to prevent diversion of the tax. There is no suggestion that the status of the Authority as an instrumentality or agency of the State was under consideration, except with reference to the particular constitutional provision. The issue of immunity of the Authority from liability in tort was not even faintly before the justices.

The plaintiff would equate the Authority with a public utility operating for profit and created by Act of the Legislature. In our view, there are wide differences between the Authority and, let us say, the usual railroad operation. In the Turnpike there is no element of private profit. It is the State, and the State alone, that ultimately benefits from the operation of the Turnpike. Further, we do not ordinarily consider the operation of a railroad as a public or governmental function. Whether it may under some circumstances be so considered, is not an issue before us.

The plaintiff urges that many provisions of the Turnpike Act are inconsistent with the creation of the Authority as an Agency of the State. Attention is called to the provisions that the Authority may "make contracts with . . . the state of Maine or any of its agencies or instrumentalities, . ." (Sec. 4 (a) (9)), must reimburse the State Highway Commission (Sec. 3 (d)), cannot pledge the credit of the State (Sec. 2), takes title to property in the name of the Authority (Sec. 5 (b)), is not under supervision or regulation by any State Commission, Board, or Agency with reference to the tolls (Sec. 11 (d)), and may be placed in receivership for benefit of the bondholders (Sec. 12).

Such provisions do no more in our opinion than make clear that the governmental function of constructing, operating and maintaining the Turnpike is delegated to the Authority as an agency of the State. The Authority is a separate corporate entity from the State to be sure, but this does not deny that the State is the real party in interest in its activities.

The power to contract with the State or other agencies of the State may be of value to the Authority and to the other contracting parties. We know of no reason why the State should not secure the benefits from such action without destroying the agency of the Authority.

We hold that the Authority is immune from tort liability under the circumstances here disclosed, without at this time considering the possible loss of immunity by waiver. This view is in accord with the great weight of authority. See cases collected in Annot. 62 A. L. R. (2nd) 1222, 1224.

Second — We are convinced that the "sue and be sued" clause does not operate as a waiver of the immunity of the defendant from tort liability under the circumstances of the instant case. The great weight of authority is to this effect. Annot. 62 A. L. R. (2nd) 1232. See also *Spangler* v. *Florida State Turnpike Authority* (Fla.) 106 So. (2nd) 421 (1958).

The contrary view has been taken in Federal cases. In *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U. S. 275, 79 S. Ct. 785 (1959), for example, the Supreme Court held a waiver of immunity from a "sue and be sued" clause, although neither state in which the Bridge Commission was organized would have so ruled.

We do not think the Legislature in 1941, or any time since then, intended to broaden "sue and be sued" into authority to sue a state agency such as the defendant for negligence in maintenance of a highway.

In discussing this phase of the case, we must at all times take care to treat only of the situation at hand. We are not interested in liability or immunity from liability in other situations. For example, in the *Kennebunk et al. Water Dist.* v. *Maine Turnpike* cases, 145 Me. 35, 71 A. (2nd) 520 and 147 Me. 149, 84 A. (2nd) 433, the Water District sought damages resulting from a turbid condition of the water in Branch Brook, the water supply for certain towns, brought

about by the action of the Authority in constructing the Turnpike. Both cases turned on the pleadings. In the second case we said, at p. 162:

> "The declaration contains averments which, if true and established by evidence, would justify a recovery for damages actually suffered by the plaintiff, down to and including the date this action was commenced, because of the injury to the waters of Branch Brook as a source of public water supply."

The question of immunity from such liability was not raised. The court, without question, was of the view that the "sue and be sued" clause permitted an action of this type with recovery against the Agency or Authority. The situation was indeed analogous to that created by a taking in eminent domain. The case did not involve liability to the traveler for a defective highway, but liability for continuous damage and practical destruction of the water supply of a public utility.

The cases do not stand for the proposition that the State in the 1941 Act waived all sovereign immunity of the Authority against liability. They hold in substance that immunity from liability for torts in the nature of a nuisance was waived, and no more. The case of the traveler on the Turnpike skidding on a negligently maintained surface with resulting personal injuries as here was not before the court and was not expressly or impliedly ruled upon in the opinion. See *Topsham* v. *Lisbon,* 65 Me. 449; *Tuell* v. *Inhabitants of Marion,* 110 Me. 460, 86 A. 980; *Hope Natural Gas Co.* v. *West Virginia Turnpike Commission* (W. Va.), 105 S. E. (2nd) 630 (1959); Fuller and Casner, *Municipal Tort Liability in Operation,* 54 Harvard Law Rev. 437, 443 (1941).

The *Nat. Bk., Boston* v. *Turnpike* case, *supra,* as we have seen, goes to liability on contracts and to the constitutionality of an attempted change in the contract between the

Authority and the bondholders. The question of liability in tort was not before the court.

In *Taylor* v. *New Jersey Highway Authority,* 22 N. J. 454, 126 A. (2nd) 313, 62 A. L. R. (2nd) 1211, cited by the plaintiff, the court, in holding the Authority was liable in tort for personal injuries to a visitor of a tenant sustained from negligence in maintaining a common stairway in a multi-family dwelling house appropriated by eminent domain for highway purposes, said:

> "The New Jersey Highway Authority Act (NJSA 27:12B-1 et seq.) contains no language which speaks in terms of the immunity or its waiver but it does contain ample evidence of the legislative intent that the Authority shall be suable at least to some extent. Thus there is an express provision that the Authority shall have power 'to sue and be sued in its own name': and on many occasions the Authority has in fact sued and been sued." 62 A. L. R. (2nd) 1219.

The New Jersey court, however, expressly excluded from its opinion a situation such as that before us in saying, "Similarly there is no need in the instant matter to consider whether there was any legislative intent to waive the defendant's immunity against claims alleging the negligent maintenance of the public highway in disregard of its public duty; we shall assume, for present purposes, that within the doctrine of the Strader and Stephens cases that immunity continues." 62 A. L. R. (2nd) 1222.

The two *Kennebunk Water District* cases, *supra,* and the *Taylor* case, *supra,* are analogous. In neither Maine nor New Jersey did the court have before it the issue of liability to the traveler for negligent maintenance of the highway.

It is of interest and significance that in many instances liability in tort of a Turnpike Authority or Agency is established by statute, or, stated differently, that there is express

waiver of governmental immunity to a limited degree. Such statutes are some evidence of the view that immunity is retained in the absence of waiver expressly stated in the legislative act. Examples are:

Massachusetts Turnpike Authority

> "Until the turnpike shall have became a part of the state highway system under the provisions of section seventeen of this act, the Authority shall be liable to any person sustaining bodily injury or damage in his property by reason of a defect or want of repair therein or thereupon to the same extent as though the turnpike were a way within the meaning of sections fifteen, eighteen and nineteen of chapter eighty-four of the General Laws, and shall be liable for the death of any person caused by such defect or want of repair to the same extent as is provided in chapter two hundred and twenty-nine of the General Laws. Any notice of such injury, damage or death required by law shall be given to any member of the Authority or to the secretary-treasurer." *Opinion of the Justices,* 330 Mass. 713, 113 N. E. (2nd) 452, 462 (1953); Massachusetts General Laws Annot. appendix to c. 81.

New York State Thruway Authority

Easley v. *New York State Thruway Auth.,* 153 N. Y. S. (2nd) 28 (1956).

See also summary New York law, 29 N. Y. P. Law Rev. 1391.

Ohio Turnpike Commission

Hoffmeyer v. *Ohio Turnpike Commission,* 166 N. E. (2nd) 543, 545 (1960).

> "Coupled with these specific responsibilities are: 1) the general statement that it can 'sue and be sued in its own name. . . .' Ohio Revised Code Section 5537.04(D); and more significantly, 2) the

admonition that though the activities shall be essential governmental functions, *'the commission shall not be immune from liability by reason thereof.'* Ohio Revised Code Section 5537.02."

Nebraska Turnpike Authority

"The new Nebraska Turnpike Authority is apparently liable for its torts." Nebraska Rev. Stat. Ann. § 39-1235 (Cum. Supp. 1953) : 'The authority . . . may be sued by any person for damages for breach of contract or for injuries to his person or property. . . ' " 29 N. Y. U. Law Rev. 1388.

Oklahoma Turnpike Authority

Oklahoma Turnpike Authority v. *Kitchen,* 337 P. (2nd) 1081, 1087 (1959).

"O.S. 1951 § 653, provides that the Turnpike Authority shall be liable for personal injuries or property damages caused by it through its negligence or the negligence of its servants."

In *Gerr* v. *Emrick,* 283 F. (2nd) 293 (1960), the United States Court of Appeals, Third Circuit, held that the Pennsylvania Turnpike Commission was liable in tort for negligent failure to maintain a guard rail. Without a state decision on the precise question, the Federal Court was forced "to make our own determination of what the Pennsylvania Supreme Court would probably rule in a similar case."

The Federal Court relied heavily upon *Lichtenstein* v. *Pa. Turnpike Com.,* 398 Pa. 415, 158 A. (2nd) 461 (1960), in which the Pennsylvania Court held the Commission was liable for interest on an award, although in like circumstances interest could not be charged to the Commonwealth, saying that the Act "which created the Turnpike Commission, constituted it 'an instrumentality of the Commonwealth,' performing 'an essential governmental function of the Commonwealth.' But, equally so is every legislatively

ordained municipal corporation, school district or political subdivision."

"It is also clear from what was decided and said in *Lichtenstein* that the Pennsylvania Turnpike Commission occupies the status of a 'legislatively ordained municipal corporation, school district or political subdivision' and as such is suable for negligence in the discharge of its legislatively assigned functions to construct, operate and maintain the Pennsylvania Turnpike. It is settled in Pennsylvania that municipalities or political subdivisions may be sued for negligent maintenance of their highways." *Gerr* v. *Emrick, supra,* at p. 296. The *Gerr* case does not, in our view, aid the plaintiff.

We are not prepared to say that the Maine Turnpike Authority does not differ in important respects from the usual Maine quasi-municipal corporation, such as a water district, or from a Maine town or municipal corporation. The Authority beyond question is carrying out a governmental function of a nature and size that only the State may reasonably be expected to conduct. No municipality or county could construct, operate and maintain a turnpike serving such an area. The Turnpike is a great highway of statewide importance and concern.

There has been no showing here either of the liability of the Authority under a particular statute, or of acts or failure to act of a nature chargeable against any municipality or the State under any statute if committed, for example, on a state highway. In commenting upon the application of the *Gerr* case, we in no way intimate what our opinion would be under any circumstances other than those existing in the case at bar.

Third — The third question is whether the governmental immunity from liability for tort under the existing circumstances and presently applicable to the Authority should be

destroyed. The doctrine of immunity of such agencies of government, and indeed of government itself, has been subject to sharp criticism and attack in the past few years. 2 Harper & James, Torts (1956), § 29.1 *et seq.* with references to the earlier material; Prosser, Torts, c. 24 (2d ed. 1955); Davis on "Tort Liability of Governmental Units," 40 Minn. Law Rev. 751 (1956).

In *Molitor* v. *Kaneland Community Unit District No. 302,* 18 Ill. (2nd) 11, 163 N. E. (2nd) 89, the Illinois Court in 1959 broke with the past in holding a school district would be liable in tort to a pupil for personal injuries sustained when the school bus in which the pupil was riding left the road if the accident resulted from the driver's negligence. The court said, in departing from *stare decisis,* at p. 96: "We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern society." The court noted that the immunity rule was judge-made and so could be judge-changed. Justice Davis, in a dissenting opinion, focused attention upon the policy making power of the Legislature and commented upon the reaction of the Legislature since *Molitor* in restoring, in part at least, tort immunity.

The California Court, in *Muskopf* v. *Corning Hospital District,* 11 Cal. Rptr. 89, 90 (1961), came to a like conclusion with the Illinois Court. The court said:

> "After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust."

Two justices in dissenting believed "that the question of abolishing governmental immunity is for the Legislature."

The problem is clearly set forth in the learned opinions of the Illinois and California Courts. The path, however, in our opinion is not plain to the conclusions reached by the majority of each court.

The policy of immunity from liability for tort under the circumstances before us has been so long established and so long acted upon that only the clearest and most convincing reasons should compel a reversal by our court. It cannot be questioned that Legislatures and the people of the State from 1820 have acted or refrained from acting in reliance upon sovereign immunity.

We may agree that the State or its agency, the Authority, ought to bear the plaintiff's loss under the circumstances set forth. We may agree that sovereign immunity from tort liability has served its usefulness and ought to be destroyed. These are reasons directed, in our opinion, to the determination of the policy of the State, and not to the construction of legislative acts in the process of ascertaining the intent of the Legislature.

The issue is not complex. Should sovereign immunity in tort, time tested in our State, be discarded or destroyed? This is a policy question which, in our opinion, is more properly directed to the Legislature than to the court. Federal Tort Claims Act of 1946, 28 U. S. C. A. §§ 2671-2680 is an outstanding example of waiver of immunity by legislative action. The demurrer was correctly sustained.

The entry will be

Exceptions overruled.

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

* * * * * * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER DATED APRIL 4, 1961

ANSWERED APRIL 21, 1961

SENATE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In Senate, April 4, 1961

WHEREAS, it appears to the Senate of the One Hundredth Legislature that the following are important questions of law and the occasion is a solemn one, and

WHEREAS, there is pending before the Senate of the One Hundredth Legislature a bill (Senate Paper 497, Legislative Document 1496, a new draft of Senate Paper 283, Legislative Document 884), entitled AN ACT Governing Hospitalization of the Mentally Ill, and

WHEREAS, it is the desire of the One Hundredth Legislature to enact legislation that will facilitate the orderly hospitalization of the mentally ill within the protections afforded to all citizens by the Constitution of the State of Maine, and the Constitution of the United States, and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed bill,

ORDERED, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give the Senate their opinion on the following questions:

1.

Do the provisions of Section 171 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized as a voluntary patient under Section 169 of said Legislative Document?

2.

Do the provisions of Section 185 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized as a patient:

(a) Under Section 173 of said Legislative Document,

(b) Under Section 174 of said Legislative Document,

3.

Do the provisions of Section 186 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized under Section 175 of said Legislative Document?

4.

If the other provisions of Legislative Document 1496 are adequate to protect the constitutional rights of any person hospitalized under the provisions of said Legislative Document, may the Legislature provide that the Writ of Habeas Corpus shall not be available to any such person, notwithstanding the provisions of Article I, Section 10, of the Constitution of Maine?

5.

If it is necessary that the Writ of Habeas Corpus be at all times available to a person hospitalized, as mentally ill, along with the other statutory provisions for release, or review provided in Legislative Document 1496, would a pa-

tient hospitalized pursuant to Section 175 of said document have a right to apply for a Writ of Habeas Corpus under Section 190 of said Legislative Document, or pursuant to chapter 126 of the Revised Statutes of 1954, even though,

(a) Said patient sought a Writ of Habeas Corpus within three days of his hospitalization under an order issued pursuant to Section 175 — solely on the grounds he was not mentally ill at the time of his application for the Writ?

(b) Said patient sought a Writ of Habeas Corpus within three months of having been denied a re-examination of his order of hospitalization under Section 186, solely on the grounds that he had fully and completely recovered from his mental illness at the time of his application for the Writ?

In Senate Chamber
April 4, 1961
Read and Passed
CHESTER T. WINSLOW,
Secretary

A true copy attest:

CHESTER T. WINSLOW,
Secretary of the Senate

New draft of: S. P. 283, L. D. 884

ONE-HUNDREDTH LEGISLATURE

Legislative Document **No. 1496**

S. P. 497 In Senate, March 22, 1961

Reported by Senator Lord of Cumberland from Committee on Health and Institutional Services. Printed under Joint Rules No. 10.

CHESTER T. WINSLOW, Secretary

Presented by Senator Lord of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-ONE

AN ACT Governing Hospitalization of the Mentally Ill.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 27, §§ 168 - 194, additional. Chapter 27 of the Revised Statutes is amended by adding 27 new sections to be numbered 168 to 194, to read as follows:

'Hospitalization of the Mentally Ill.

Sec. 168. Definitions. Each word or term defined in this section has the meaning indicated in this section for the purposes of sections 168 to 194, unless a different meaning is plainly required by the context.

I. Department. "Department" means the Department of Mental Health and Corrections.

II. Head of hospital. "Head of hospital" means the individual in charge of a hospital, or his designee.

III. Hospital. "Hospital" means a public or private hospital or institution, or part thereof, equipped to provide in-patient care and treatment for the mentally ill.

IV. Licensed physician. "Licensed physician" means an individual licensed under the laws of the State of Maine to practice medicine or osteopathy and a medical officer of the Government of the United States while in this State in the performance of his official duties.

V. Mentally ill individual. "Mentally ill individual" means an individual having a psychiatric or other disease which substantially impairs his mental health. For the purposes of sections 168 to 194, the term "mentally ill individual" does not include mentally retarded or sociopathic individuals.

VI. Patient. "Patient" means an individual under observation, care or treatment in a hospital pursuant to sections 168 to 194.

Voluntary Hospitalization.

Sec. 169. Authority to receive voluntary patients. The head of a private hospital may and, the head of a public hospital, subject, except in case of medical emergency, to the availability of suitable accommodations, may admit for observation, diagnosis, care and treatment any individual who is mentally ill or has symptoms of mental illness and who, being 16 years of age or over, applies therefor, exclusive of those persons with pending criminal action.

Sec. 170. Discharge of voluntary patients. The head of the hospital shall discharge any voluntary patient who has recovered or whose hospitalization he determines to be no longer advisable. He may discharge any voluntary patient if to do so would, in the judgment of the head of the hospital, contribute to the most effective use of the hospital in the care and treatment of the mentally ill.

Sec. 171. Right of release on application. A voluntary patient who requests his release or whose release is requested, in writing, by his legal guardian, parent, spouse or adult next of kin shall be released forthwith except that:

I. Patient admitted on own application. If the patient was admitted on his own application and the request for release is made by a person other than the patient, release may be conditioned upon the agreement of the patient thereto; or

II. Head of hospital certifies release unsafe. If the head of the hospital, within 10 days from the receipt of the request, files with the probate court of the county where said hospital is situated or a judge thereof, whether in session or in vacation, a certification that in his opinion the release of the patient would be unsafe for the patient or others, release may be postponed on application for as long as the court or a judge thereof determines to be necessary for the commencement of proceedings for judicial hospitalization, but in no event for more than 10 days.

Notwithstanding any other provision of sections 168 to 194, judicial proceedings for hospitalization shall not be commenced with respect to a voluntary patient unless release of the patient has been requested by himself or the individual who applied for his admission.

Involuntary Hospitalization. Admission Provisions.

Sec. 172. Authority to receive involuntary patients. The head of a private hospital may and the head of a public hospital, subject, except in case of medical emergency, to the availability of suitable accommodations, shall receive therein for observation, diagnosis, care and treatment any individual whose admission is applied for under any of the following procedures:

I. Medical certification, nonjudicial procedure. Hospitalization on medical certification; standard nonjudicial procedure.

II. Medical certification, emergency. Hospitalization on medical certification; emergency procedure.

III. Court order. Hospitalization on court order; judicial procedure.

Sec. 173. Hospitalization on medical certification; standard nonjudicial procedure. Any individual may be admitted to a hospital upon:

I. Application. Written application to the hospital by a friend, relative, spouse or guardian of the individual, a health or public welfare officer, or the head of any institution in which such individual may be; and

II. Certification. Certification by 2 licensed physicians that they have examined the individual and that they are of the opinion that:

A. He is mentally ill, and

B. Because of his illness is likely to injure himself or others if allowed to remain at liberty, or

C. Is in need of care or treatment in a mental hospital, and because of his illness, lacks sufficient insight or capacity to make responsible application therefor.

The certification by the licensed physicians may be made jointly or separately, and may be based on examination conducted jointly or separately. An individual with respect to whom such certification has been issued may not be admitted on the basis thereof at any time after the expiration of 15 days after the date of examination. The head of the hospital admitting the individual shall forthwith make a report thereof to the department.

Such a certificate, if it states a belief that the individual is likely to injure himself or others if allowed to remain at liberty, upon endorsement for such purpose by a judge of any court of record within whose jurisdiction the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application.

Sec. 174. Hospitalization on medical certification; emergency procedure. Any individual may be admitted to a hospital upon:

I. Application. Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

II. Certification. A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained.

An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of 3 days after the date of examination. The head of the hospital admitting the individual shall forthwith make a report thereof to the department.

Such a certificate, upon endorsement for such purpose by a judge of any municipal court within whose jurisdiction the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application.

Sec. 175. Hospitalization upon court order; judicial procedure. Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written

application with the probate court by a friend, relative, spouse or guardian of the individual, or by a licensed physician, a health or public welfare officer, or the head of any public or private institution in which such individual may be or where he may be found. Any such application shall be accompanied by a certificate of a licensed physician stating that he has examined the individual and is of the opinion that he is mentally ill and should be hospitalized, or a written statement by the applicant that the individual has refused to submit to examination by a licensed physician.

Upon receipt of an application the court shall give notice thereof to the proposed patient, to his legal guardian, if any, and to his spouse, parents and nearest known other relative or friend. If the court has reason to believe that notice would be likely to be injurious to the proposed patient, notice to him may be omitted.

As soon as practicable after notice of the commencement of proceedings is given or it is determined that notice should be omitted, the court shall appoint 2 licensed physicians to examine the proposed patient and report to the court their findings as to the mental condition of the proposed patient and his need for custody, care or treatment in a mental hospital. Said physician shall be compensated as authorized by the court and paid by the department.

The examination shall be held at a hospital or other medical facility, at the home of the proposed patient or at any other suitable place not likely to have a harmful effect on his health. A proposed patient to whom notice of the commencement of proceedings has been omitted shall not be required to submit to an examination against his will, and on the report of the licensed physicians of refusal to submit to an examination, the court shall give notice to the proposed patient as provided under this section and order him to submit to such examination.

If the report of the licensed physicians is to the effect that the proposed patient is not mentally ill, the court may without taking any further action terminate the proceedings and dismiss the application; otherwise, it shall forthwith fix a date for and give notice of a hearing to be held not less than 5 nor more than 15 days from receipt of the report.

The proposed patient, the applicant and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify and to present and cross-examine witnesses, and the court may in its discretion receive the testimony of any other person. The proposed patient shall not be required to be present, and all persons not necessary for the conduct of the proceedings shall be excluded, except as the court may direct in its discretion. The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered. An opportunity to be represented by counsel shall be afforded to every proposed patient who is indigent, and if neither he nor others provide counsel, the court shall appoint counsel, who shall be compensated by the department as authorized by the court.

If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient is mentally ill, and because of his illness is likely to injure himself or others if allowed to remain at liberty, or is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization, it shall order his hospitalization; otherwise, it shall dismiss the proceedings.

Unless otherwise directed by the court, it shall be the responsibility of the sheriff of the county in which the probate court has jurisdiction to assure the carrying out of the order within such period as the court shall specify.

The court is authorized to appoint a special commissioner who shall be a member of the bar of the State to assist in the conduct of hospitalization proceedings. In any case in which the court refers an applicant to the commissioner, the commissioner shall promptly cause the proposed patient to be examined and on the basis thereof shall either recommend dismissal of the application or hold a hearing as provided in this section and make recommendations to the court regarding the hospitalization of the proposed patient. Said commissioner shall be compensated as authorized by the court and paid by the department.

The head of the hospital admitting a patient pursuant to proceedings under this section shall forthwith make a report of such admission to the department.

Sec. 176. Hospitalization by an agency of the United States. If an individual ordered to be hospitalized pursuant to section 175 is eligible for hospital care or treatment by any agency of the United States, the court, upon receipt of a certificate from such agency showing that facilities are available and that the individual is eligible for care or treatment therein, may order him to be placed in the custody of such agency for hospitalization. When any such individual is admitted pursuant to the order of such court to any hospital or institution operated by any agency of the United States within or without the State, he shall be subject to the rules and regulations of such agency. The chief officer of any hospital or institution operated by such agency and in which the individual is so hospitalized shall with respect to such individual be vested with the same powers as the heads of hospitals or the department within this State with

respect to detention, custody, transfer, conditional release or discharge of patients. Jurisdiction is retained in the appropriate courts of this State at any time to inquire into the mental condition of an individual so hospitalized, and to determine the necessity for continuance of his hospitalization, and every order of hospitalization issued pursuant to this section is so conditioned.

Sec. 177. Transfer of mentally ill persons from out of the state institutions. The commissioner may, upon request of a competent authority of a state, or of the District of Columbia, which is not a member of the Interstate Compact on Mental Health, grant authorization for the transfer of a mentally ill patient directly to a Maine state hospital, provided said patient has resided in the State of Maine for a consecutive period of one year during the 3-year period immediately preceding commitment in such other state or the District of Columbia; that said patient is currently confined in a recognized state institution for the care of the mentally ill as the result of proceedings considered legal by that state; that a duly certified copy of the original commitment proceedings and a copy of the patient's case history is supplied; that if, after investigation, the commissioner shall deem such a transfer justifiable; and that all expenses incident to such a transfer be borne by the agency requesting same. When the commissioner has authorized such a transfer, the Superintendent of the State Hospital designated by him shall receive the patient as having been regularly committed to said hospital under section 173.

Sec. 178. Care of mentally ill members of armed forces; status. Any member of the armed forces of the United States, who was a resident of the State at the time of his induction into the service, who shall be determined by a federal board of medical officers to have a mental disease not incurred in line of duty, shall be received at either of the state hospitals for the mentally ill in the discretion of the

commissioner, without formal commitment, upon delivery of such person, together with the findings of such board of medical officers that such person is mentally ill, at the hospital designated by said commissioner.

After delivery of such person at the hospital designated by said commissioner, his status shall be the same as if he had been committed to the hospital under section 173.

Sec. 179. Transportation; temporary detention. Whenever an individual is about to be hospitalized under sections 173, 174 or 176, the sheriff of the county or a state or local police officer shall, arrange for the individual's transportation to the hospital with suitable attendants and by such means as may be suitable for his medical condition. Whenever practicable, the individual to be hospitalized shall be transported to the hospital by one or more of his friends or relatives, or shall be permitted to be accompanied by one or more of his friends or relatives.

Pending his removal to a hospital, a patient taken into custody or ordered to be hospitalized pursuant to sections 168 to 194 may be detained in his home, a licensed foster home or any other suitable facility under such reasonable conditions as the sheriff of the county may fix, but he shall not, except because of and during an extreme emergency, be detained in a nonmedical facility used for the detention of individuals charged with or convicted of penal offenses. The sheriff of the county or his properly accredited assistant shall take such reasonable measures, including provision of medical care, as may be necessary to assure proper care of an individual temporarily detained pursuant to this section.

Involuntary Hospitalization. Post-Admission Provisions.

Sec. 180. Notice of hospitalization. Whenever a patient has been admitted to a hospital pursuant to sections 173 or 174 on the application of any person other than the patient's

legal guardian, spouse or next of kin, the head of the hospital shall notify the patient's legal guardian, spouse or next of kin, if known.

Sec. 181. Medical examination of newly admitted patients. Every patient admitted pursuant to sections 173, 174 or 175 shall be examined as soon as practicable after his admission.

The head of the hospital shall arrange for examination by a staff physician of every patient hospitalized pursuant to section 174. If such an examination is not held within 3 days after the day of admission, or if a staff physician fails or refuses after such examination to certify that in his opinion the patient is mentally ill and is likely to injure himself or others if allowed to remain at liberty, the patient shall be immediately discharged.

Sec. 182. Transfer of patients. The department may transfer, or authorize the transfer of, a patient from one hospital to another either within or out of state if the department determines that it would be consistent with the medical needs of the patient to do so. Whenever a patient is transferred, written notice thereof shall be given to his legal guardian, parents and spouse, or, if none be known, his nearest known relative or friend. In all such transfers, due consideration shall be given to the relationship of the patient to his family, legal guardian or friends, so as to maintain relationships and encourage visits beneficial to the patient.

Upon receipt of a certificate of an agency of the United States that facilities are available for the care or treatment of any individual heretofore ordered hospitalized pursuant to law or hereafter pursuant to section 175 in any hospital for care or treatment of the mentally ill and that such individual is eligible for care or treatment in a hospital or institution of such agency, the hospital may cause his transfer

to such agency of the United States for hospitalization. Upon effecting any such transfer, the court ordering hospitalization, the legal guardian, spouse and parents, or if none be known, his nearest known relative or friend and the department shall be notified thereof by the hospital. No person shall be transferred to an agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of mental illness, unless prior to transfer the court originally ordering confinement of such person shall enter an order for such transfer after appropriate motion and hearing. Any person transferred as provided in this section to an agency of the United States shall be deemed to be hospitalized by such agency pursuant to the original order of hospitalization.

Sec. 183. Discharge. The head of a hospital shall as frequently as practicable, but not less often than every 12 months, examine or cause to be examined every patient and whenever he determines that the conditions justifying involuntary hospitalization no longer obtain, discharge the patient and immediately make a report thereof to the department.

Sec. 184. Convalescent status; rehospitalization. The head of a hospital may release an improved patient on convalescent status when he believes that such release is in the best interests of the patient. Release on convalescent status may include provisions for continuing responsibility to and by the hospital, including a plan of treatment on an outpatient or nonhospital patient basis. Prior to the end of a year on convalescent status, and not less frequently than annually thereafter, the head of the hospital shall reexamine the facts relating to the hospitalization of the patient on convalescent status and, if he determines that in view of the condition of the patient convalescent status is no longer necessary, he shall discharge the patient and make a

report thereof to the department. Convalescent status of voluntary patients must be terminated within 10 days after receiving from the patient a request for discharge from convalescent status.

Prior to such discharge, the head of the hospital from which the patient is given convalescent status may at any time readmit the patient. If there is reason to believe that it is to the best interests of the patient who had been involuntarily admitted to be rehospitalized, the department or the head of the hospital may issue an order for the immediate rehospitalization of the patient. Such an order, if not voluntarily complied with, shall, upon the endorsement by a judge of a municipal court of the county in which the patient is resident or present, authorize any health or police officer to take the patient into custody and transport him to the hospital, or if the order is issued by the department to a hospital designated by it.

Sec. 185. Right to release; application for judicial determination. Any patient hospitalized under section 173 or 174 who requests to be released or whose release is requested in writing by his legal guardian, spouse or adult next of kin shall be released within 10 days after receipt of the request except that, upon application to the probate court or a judge thereof, whether in session or in vacation, supported by a certification by the head of the hospital that in his opinion such release would be unsafe for the patient or for others, release may be postponed for such period not to exceed 10 days as the court or a judge thereof may determine to be necessary for the commencement of proceedings for a judicial determination pursuant to section 175.

The head of the hospital shall inform involuntary patients in writing, on admission, of their right to release as provided in this section and shall provide reasonable arrangements for making and presenting requests for release.

Sec. 186. Petition for re-examination of order or hospitalization. Any patient hospitalized pursuant to section 175 shall be entitled to a re-examination of the order for his hospitalization on his own petition, or that of his legal guardian, parent, spouse, relative or friend, to the probate court of the county in which he resides or is detained. Upon receipt of the petition, the court shall conduct or cause to be conducted by a special commissioner proceedings in accordance with such section 175, except that such proceedings shall not be required to be conducted if the petition is filed sooner than 6 months after the issuance of the order of hospitalization or sooner than one year after the filing of a previous petition under this section.

Provisions Applicable to Patients Generally.

Sec. 187. Right to humane care and treatment. Every patient shall be entitled to humane care and treatment and, to the extent that facilities, equipment and personnel are available, to medical care and treatment in accordance with the highest standards accepted in medical practice.

Sec. 188. Mechanical restraints and seclusion. Restraint, including any mechanical means of restricting movement, and seclusion, including isolation by means of doors which cannot be opened by the patient, shall not be applied to a patient unless it is determined by the head of the hospital or his designee to be required by the medical needs of the patient. Every use of mechanical restraint or seclusion and the reasons therefor shall be recorded and available for inspection. The limitation of the use of seclusion by this section shall not apply to maximum security installations.

Sec. 189. Right to communication and visitation. Every patient shall be entitled:

I. Mail. To communicate by sealed envelopes with the department, clergyman or his attorney and with the court,

if any, which ordered his hospitalization, and to communicate by mail in accordance with the regulations of the hospital;

II. Visitors. To receive visitors unless definitely contraindicated by his medical condition; except, however, he may be visited by his clergyman or his attorney at any reasonable time.

Sec. 190. Writ of habeas corpus. Any individual detained pursuant to sections 168 to 194 shall be entitled to the writ of habeas corpus upon proper petition by himself or a friend to any court generally empowered to issue the writ of habeas corpus in the county in which he is detained.

Sec. 191. Disclosure of information. All certificates, applications, records and reports made for the purpose of sections 168 to 194 and directly or indirectly identifying a patient or former patient or an individual whose hospitalization has been sought under sections 168 to 194 shall be kept confidential and shall not be disclosed by any person except insofar:

I. Consent of individual. As the individual identified or his legal guardian, if any, or, if he is a minor, his parent or legal guardian, shall consent, or

II. Necessity. As disclosure may be necessary to carry out any of the provisions of sections 168 to 194, or

III. Court directive. As a court may direct upon its determination that disclosure is necessary for the conduct of proceedings before it or that failure to make such disclosure would be contrary to the public interest.

Nothing in this section shall preclude disclosure, upon proper inquiry, of information as to his current medical condition, to any members of the family of a patient or to his relatives or friends or to other hospitals or accredited so-

cial agencies; nor shall this section affect the public-record status of the court docket, so-called.

Any person willfully violating any provision of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than $500 and by imprisonment for not more than one year.

Sec. 192. Detention pending judicial determination. Notwithstanding any other provisions of sections 168 to 194, no patient with respect to whom proceedings for judicial hospitalization have been commenced shall be released or discharged during the pendency of such proceedings unless ordered by the Superior Court or a judge thereof upon the application of the patient, or his legal guardian, parent, spouse or next of kin, or upon the report of the head of the hospital that the patient may be discharged with safety.

Sec. 193. Additional powers of the department. In addition to the specific authority granted by other provisions of sections 168 to 194, the department shall have authority to prescribe the form of applications, records, reports and medical certificates provided for under sections 168 to 194 and the information required to be contained therein; to require reports from the head of any hospital relating to the admission, examination, diagnosis, release or discharge of any patient; to visit each hospital regularly to review the commitment procedures of all new patients admitted between visits; to investigate by personal visit complaints made by any patient or by any person on behalf of a patient; and to adopt such rules and regulations not inconsistent with sections 168 to 194 as it may find to be reasonably necessary for proper and efficient hospitalization of the mentally ill.

Sec. 194. Unwarranted hospitalization or denial of rights; penalties. Any person who willfully causes, or conspires with or assists another to cause, the unwarranted

hospitalization of any individual under sections 168 to 194, or the denial to any individual of any of the rights accorded to him under said sections, shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment for not less than one year nor more than 5 years, or by both.'

Sec. 2. R. S., c. 10, § 22, sub-§ VIII, amended. Subsection VIII of section 22 of chapter 10 of the Revised Statutes is amended to read as follows:

'**VIII. Insane person.** The words "insane person" may include an idiotic, non compos, lunatic or distracted person~~; but in reference to idiotic or non compos persons this rule does not apply to sections 10, 13, 96 to 112, inclusive, 130 to 133, inclusive and 135 to 147, inclusive, of chapter 25~~. **This rule does not apply to chapter 27.'**

Sec. 3. R. S., c. 25, §§ 24-27, repealed. Sections 24 to 27 of chapter 25 of the Revised Statutes are repealed.

Sec. 4. R. S., c. 25, § 29, amended. Section 29 of chapter 25 of the Revised Statutes is amended to read as follows:

'**Sec. 29. License revoked after hearing.** Upon the failure of any superintendent or manager of such licensed hospital or house to comply with any of the provisions of ~~the 7 preceding~~ sections 22, 23 **and 28 and of the provisions of chapter 27, sections 169 to 176 and sections 181 to 194**, the commissioner may order a hearing to be held and notify in writing said superintendent or manager of such hearing, by 7 days' notice, to be held at the State House at Augusta, and if it shall appear to the commissioner that ~~the provisions of~~ said sections have not been complied with, he may revoke the license of said hospital or house.'

Sec. 5. R. S., c. 27, § 13, amended. The last sentence of the 2nd paragraph of section 13 of chapter 27 of the Revised Statutes is amended to read as follows:

'If prior to the expiration of the original sentence it is the opinion of the head of the institution which has charge of the patient that the patient should remain in the custody of the institution after the expiration of such sentence, the patient may be recommitted to either of the state hospitals upon complaint of the head of the institution which has charge of the patient under ~~the provisions of~~ sections ~~110 and 111~~ **169, 172, 173 or 175**; or to the Pineland Hospital and Training Center under ~~the provisions of~~ section 145.'

Sec. 6. R. S., c. 27, §§ 100-117, repealed. Sections 100 to 113, as amended, section 113-A, as enacted by chapter 195 of the public laws of 1957, and sections 114 to 117, as amended, of chapter 27 of the Revised Statutes, are repealed.

Sec. 7. R. S., c. 27, § 119, amended. The 3rd sentence of section 119 of chapter 27 of the Revised Statutes is repealed as follows:

'~~The expense of such transfer shall be paid as provided in section 102~~.'

Sec. 8. R. S., c. 27, § 124, amended. The last sentence of section 124 of chapter 27 of the Revised Statutes is amended to read as follows:

'A certified copy of the certificate signed by the prison physician shall accompany said order of commitment made hereunder, and said judge shall keep a record of his doings ~~and furnish a copy to any interested person requiring and paying for it~~.'

Sec. 9. R. S., c. 27, § 129, amended. The last sentence of section 129 of chapter 27 of the Revised Statutes is amended to read as follows:

'Persons committed by a Justice of the Superior Court before final conviction, or after conviction and before sentence, whether originally committed or subsequently removed

thereto, and insane convicts after the expiration of their sentences, shall be supported while in the ~~insane~~ hospital **for the mentally ill** in the manner provided by law ~~in the case of persons committed by municipal officers, and the provisions of sections 137 to 139, inclusive, shall apply to such cases.~~'

Sec. 10. R. S., c. 27, §§ 131-142, repealed. Sections 131 to 142 of chapter 27 of the Revised Statutes are repealed.

ANSWERS OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on April 4, 1961.

L. D. 1496, entitled "An Act Governing Hospitalization of the Mentally Ill," is designed, as the Senate order states, to "facilitate the orderly hospitalization of the mentally ill within the protections afforded to all citizens" by the State and Federal Constitutions. The bill provides a new and comprehensive law in substitution for statutes relating to commitment of the insane. It is plainly based upon a "Draft Act Governing Hospitalization of the Mentally Ill" prepared in 1951 in the Federal Security Agency by the National Institute of Mental Health, Public Health Service and the Office of the General Counsel. Sections 168 through 194 of L. D. 1496 follow closely the Draft Act without changes of constitutional significance.

In the foreword of the Draft Act we read, in words equally applicable to L. D. 1496:

> "The general objectives of the Draft Act were stated in 1869 by Isaac Ray:
>
> "In the first place, the law should put no hindrance in the way to the prompt use of those instrumen-

> talities which are regarded as most effectual in promoting the comfort and restoration of the patient. Secondly, it should spare all unnecessary exposure of private troubles, and all unnecessary conflict with popular prejudices. Thirdly, it should protect individuals from wrongful imprisonment. It would be objection enough to any legal provision, that it failed to secure these objects, in the completest possible manner."

With these general considerations in mind we turn to the questions.

QUESTION (1): Do the provisions of Section 171 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized as a voluntary patient under Section 169 of said Legislative Document?

ANSWER: We answer in the affirmative.

The restrictions on release in our opinion are reasonable. The commentary on Section 4 of the Draft Act (Sec. 171 of L. D. 1496) is apt.

> "This limitation on release may appear inconsistent with the objective of encouraging voluntary hospitalization by assuring prospective patients and their families that admission to the hospital is subject to revocation. However, if the condition of the person is such that it is unsafe for him to go unrestrained, the necessity of steps to secure his detention and treatment is the same whether he is outside or inside the hospital at the time the condition develops."

QUESTION (2) (a), (b): Do the provisions of Section 185 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized as a patient:

(a) Under Section 173 of said Legislative Document.

(b) Under Section 174 of said Legislative Document?

ANSWER: We answer in the affirmative.

Section 185 provides, in our opinion, a prompt and effective method for institution of proceedings for release by the person or persons acting in his behalf. The limitations on release are substantially like those established in Section 171 for the discharge of the voluntary patient.

In 1955, in an advisory opinion in 151 Me. 24, at 34, to the Senate, the Justices were unanimously of the view that a provision substantially like Section 185 would be constitutional. We reach a like conclusion.

QUESTION (3): Do the provisions of Section 186 of Legislative Document 1496 adequately protect the constitutional rights of any person hospitalized under Section 175 of said Legislative Document?

ANSWER: We answer in the affirmative.

Section 186 is applicable only to the patient who is hospitalized by order of the Probate Court under Section 175. The limitations upon the right to a re-examination of the Court order are not unconstitutional.

The Court may entertain a petition for re-examination at any time. Section 186 does no more than protect the Court against the required re-examination of its order until after a time for a change in the patient's condition. There are many provisions in L. D. 1496 for the protection of the patient. For example: Examination of the patient "as frequently as practicable, but not less often than every 12 months, . . " and discharge by the head of the hospital (Sec. 183); "Right to communication and visitation" (Sec. 189); "Unwarranted hospitalization or denial of rights; penalties" (Sec. 194).

Further, as we shall later discuss in more detail, the writ of habeas corpus is at all times available to the patient.

QUESTION (4): If the other provisions of Legislative Document 1496 are adequate to protect the constitutional

rights of any person hospitalized under the provisions of said Legislative Document, may the Legislature provide that the Writ of Habeas Corpus shall not be available to any such person, notwithstanding the provisions of Article I, Section 10, of the Constitution of Maine?

ANSWER: We answer in the negative.

Our Constitution reads: "And the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, Sec. 10.

The "great writ of liberty" must not be destroyed or weakened. *Stuart* v. *Smith,* 101 Me. 397. The writ of habeas corpus must remain available at all times to any person hospitalized under an Act such as L. D. 1496.

In consideration of Question (4), our attention has been directed specifically to Section 190 relating to habeas corpus, and Section 192 providing for detention pending judicial determination. On its face as now worded, Section 192, in operating *notwithstanding* Section 190, unconstitutionally limits and abridges the right to habeas corpus.

There is nothing objectionable, in our view, with Section 192, except in connection with Section 190. Indeed, in the 1955 advisory opinion a provision substantially like Section 192 was considered constitutional. There was, however, no provision such as the present Section 190 relating to habeas corpus under review.

The difficulty may be corrected readily by adding at the end of Section 192, the words "or upon writ of habeas corpus under Section 190." Section 192 would then no longer limit the availability of the "great writ."

Comparison with other provisions of L. D. 1496 also suggests the possibility of inadvertent reference in Section 192

to "Superior Court," when the court proceedings are in the Probate Court.

QUESTION (5) (a), (b): If it is necessary that the Writ of Habeas Corpus be at all times available to a person hospitalized, as mentally ill, along with the other statutory provisions for release, or review provided in Legislative Document 1496, would a patient hospitalized pursuant to Section 175 of said document have a right to apply for a Writ of Habeas Corpus under Section 190 of said Legislative Document, or pursuant to chapter 126 of the Revised Statutes of 1954, even though,

(a) Said patient sought a Writ of Habeas Corpus within three days of his hospitalization under an order issued pursuant to Section 175 — solely on the grounds he was not mentally ill at the time of his application for the Writ?

(b) Said patient sought a Writ of Habeas Corpus within three months of having been denied a re-examination of his order of hospitalization under Section 186, solely on the grounds that he had fully and completely recovered from his mental illness at the time of his application for the Writ?

ANSWER: We answer in the affirmative.

As we have said, the writ of habeas corpus must always be available.

Dated at Augusta, Maine, this 21st day of April, 1961.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

BANGOR AND AROOSTOOK RAILROAD COMPANY, RE: APPLICATION TO OPERATE AS A COMMON CARRIER OF FREIGHT AND MERCHANDISE BY MOTOR VEHICLE. BANGOR AND AROOSTOOK RAILROAD COMPANY, RE: PETITION TO AMEND ITEM "H" OF COMMON CARRIER CERTIFICATE NO. 137.

Kennebec. Opinion, April 27, 1961.

P. U. C.
Public Convenience and Necessity.

Where findings of the P. U. C. are not based upon substantial evidence the decree must fail.

The burden of proving public convenience and necessity are upon the petitioner under Secs. 25 and 20 of R. S., 1954, Chap. 48.

The word "substituted" in R. S., 1954, Chap. 25, need not be construed where the findings of the P. U. C. fail for lack of proof.

ON EXCEPTIONS.

This is a P. U. C. application for substituted service before the Law Court upon exceptions. Exceptions sustained. (Substituted service denied.)

Scott W. Scully,
Joseph Campbell, for plaintiff.

Frank Libby,
John G. Feehan, for Commission.

Raymond Jensen,
Roland Rice, for Trucking Co.

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

TAPLEY, J. On exceptions. These cases are to be considered together. Cole's Express, Bemis Express, Inc.,

Houlton Truck Express, Fox & Ginn, Inc. and Maine Motor Rate Bureau are intervenors. They will be designated hereafter as the protestants. Two applications were filed by the Bangor and Aroostook Railroad Company seeking authority to operate as a common carrier by motor vehicle. We first consider the application requesting authority to operate as a common carrier of freight and merchandise for hire by motor vehicle between Northern Maine Junction, in the Town of Hermon, and points and places located on the lines of the Bangor and Aroostook Railroad Company in Aroostook County and the Towns of Patten and Sherman Station also located on the lines of the railroad company. The point of departure is Northern Maine Junction, in the Town of Hermon. The application requests permission to operate only on Mondays of each week. The second application is to amend Common Carrier Certificate #137, which authorizes a motor vehicle movement between Oakfield and Fort Kent, by adding authority to carry freight and merchandise in such movement so that said amended certificate shall read:

> "Between Oakfield and Fort Kent via highway routes #11, #212 and unnumbered route Oakfield to Smyrna Mills, passing through and serving intermediate points, transporting mail for the United States Government; express shipments for itself, or for or in connection with, Railway Express Agency, Inc.; and freight and merchandise, with the provision that no express shipments or freight and merchandise shipments shall be transported unless the same have had or are to have a prior or subsequent movement by the Bangor and Aroostook Railroad Company, and that said traffic shall move on a rail bill of lading."

After hearing on both applications the Commission decreed:

> "1. That Certificate No. 171, Docket X-3745, now issued to the Bangor and Aroostook Railroad Company be amended to include the transportation of, —

Meats between Northern Maine Junction in the Town of Hermon, on the one hand, and points and places located on the lines of the Bangor and Aroostook Railroad Company in Aroostook County and the Towns of Patten and Sherman Station, on the other hand, departing Northern Maine Junction on Mondays only;

"2. That Certificate No. 137, Docket X-1729, now issued to the Bangor and Aroostook Railroad Company be amended by substituting the following for item 'H' as now appearing therein, —

Between Oakfield and Fort Kent via highway routes #11, #212 and unnumbered route Oakfield to Smyrna Mills, passing through and serving intermediate points, transporting mail for the United States Government; express shipments for itself, or for or in connection with, Railway Express Agency, Inc., and meats, with the provision that no express shipments or meat shipments shall be transported unless the same have had or are to have a prior or subsequent movement by Bangor and Aroostook Railroad Company, and that said traffic shall move on a rail bill of lading;"

The decree was signed by two members of the Commission, while a third dissented in part. The protestants filed exceptions, being seven in number.

Exception 1 objects to the judgment and decree as unwarranted in law because it is not supported by any substantial evidence and is predicated on erroneous applications of law.

Exception 2 urges that the application of the petitioner, Bangor and Aroostook Railroad Company, in Docket X-3745 was found to be governed by the provisions of Sec. 25 of Chap. 48 of the R. S. of Maine, rather than by Sec. 20 of said chapter.

Exception 3 attacks the decree on the basis that the Commission determined that the application of the petitioner

in Docket X-1729 was governed by the provisions of Sec. 25 of Chap. 48, rather than by Sec. 20 of said chapter.

Exception 4 treats of the objection to the decree of the Public Utilities Commission determining that convenience and necessity require the amendment of Certificate #137 when there is no substantial evidence to justify this finding.

Objection by *Exception 5* refers to a finding,

> "As before stated, the refrigerated service on meat shipments and the pickup and delivery of such shipments was instituted on June 15, 1958 and has since continued. The applicant now desires to continue such transportation by motor vehicle on Monday nights *in lieu of* the refrigerated car movement by rail." (Emphasis supplied.)

Complaint is that there is no substantial evidence to support the finding,

> "The applicant now desires to continue such transportation by motor vehicle on Monday nights *in lieu of* the refrigerated car movement by rail." (Emphasis supplied.)

Exception 6 says there is no substantial evidence to justify the finding,

> "We are of the opinion that this change in mode of transportation will not alter the competitive situation nor impair the operations of existing motor carriers."

Exception 7 is quoted in its entirety:

> "Whether the application of Bangor and Aroostook Railroad Company is governed by the provisions of Section 25 of Chapter 48 of the Revised Statutes of Maine, 1954, or by Section 20 of said Chapter, intervenors allege that the applicant has failed to sustain the burden of proof and that there is no substantial evidence to justify the findings of the majority of the Public Utilities Commission

> and the ruling, judgment and decree of the majority of said Commission based thereon is, therefore, erroneous, and that the rights of said intervenors have been substantially prejudiced thereby."

Portions of Secs. 20 and 25 of Chap. 48, R. S., 1954 are concerned in the issues of this case. There is marked disagreement between the petitioner and the protestants. The petitioner takes the position that it is requesting the right to perform substituted truck for rail service under provisions of Sec. 25, while the protestants say that the requirements of Sec. 20 are applicable and that Sec. 25 is not here concerned. The Bangor and Aroostook Railroad has operated for many years from Northern Maine Junction to many towns in Aroostook County, also to Patten and Sherman Station in Penobscot County. The railroad has performed a pickup and delivery service in conjunction with the Maine Central Railroad Company and has solicited freight and merchandise in Bangor. It appears from the testimony that on Mondays meat shipments have not always been ready in time to make the scheduled departure of train #57 at ten o'clock in the evening and that on such Mondays as the meat shipment is not ready to leave at the scheduled time of ten o'clock the railroad desires authority to haul it over the highways by motor vehicle. It is necessary for the railroad to have available the meat shipment by six or six-thirty, for four hours are required to properly handle the shipment and place it in the refrigerated car ready for shipment. The railroad claims it has thirty-five regular customers in Northern Maine who avail themselves of this control temperature service. It is important to these customers that they receive their shipment of meat early Tuesday morning in order to have it available for delivery to customers early on Tuesday, and failure of prompt delivery causes inconvenience to the customer and, in one instance, the railroad lost its largest customer because of inability to

serve the customer. Testimony of the petitioner has it that departure of train #57 from Northern Maine Junction is late "practically every Monday." The sum and substance of petitioner's evidence is that if train #57 is late in departure, caused by the meat shipment, there is inconvenience to the consignees of the meat and also to the railroad. With this type of supplies, time is of the essence, according to the contention of the petitioner. If scheduled departure of freight trains is delayed, inconvenience results, not only to the customer, but also the delay affects the operation of the train to the extent that it fails to connect with other trains, thereby causing many receivers of carload freight inbound to Aroostook County to suffer inconvenience. The applicable portion of Sec. 25 provides:

> "Applications may be filed with the commission by railroads, electric railways, railway express or water common carriers asking its approval of operation by motor vehicles over the highways by or in connection with the service of such carriers, where highway transportation has been substituted by or for such carrier prior to January 1, 1935, for transportation service previously performed by such carrier or is to be substituted for transportation now performed by or for any such carrier. Hearings shall be ordered by the commission on every such application and notice thereof shall be given in such manner and to such persons, firms and corporations as the commission deems necessary at least 7 days prior to the date fixed therefor. If, after such hearing, the commission shall find that the operation is a service which regularly has been performed by or for such carrier prior to and since January 1, 1935, it shall grant a certificate of public convenience and necessity as a matter of right, and in cases where such service regularly has been performed by or for any such carrier prior to January 1, 1935, the service lawfully may be continued pending the issuance of such a certificate, provided application for such a certificate is filed with the commission within 15

> days after July 6, 1935; but if such service has not been regularly performed prior to and since January 1, 1935 such a certificate shall be issued only if the commission shall find that the public convenience and necessity require and permit such operation."

The protestants contend that Sec. 20 is the controlling statute under the circumstances of this case. Sec. 20 reads in part as follows:

> "No person, corporation, partnership, railroad, street railway or other transportation company shall operate, or cause to be operated, any motor vehicle or vehicles not running on rails or tracks upon any public way in the business of transporting freight or merchandise for hire as a common carrier over regular routes between points within this state without having obtained from the commission a certificate declaring that public necessity and convenience require and permit such operation. ------- In determining whether or not such a certificate shall be granted, the commission shall take into consideration the existing transportation facilities and the effect upon them, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, conditions of and effect upon the highways involved and the safety of the public using such highways. No such certificate shall be issued unless and until the applicant has established to the satisfaction of the commission that there exists a public necessity for such additional service and that public convenience will be promoted thereby."

The petitioner says that it is seeking relief under Sec. 25 on the basis that it is performing a substituted service and that "the public convenience and necessity require and permit its operation."

It is obvious that Sec. 25 applies to a railroad which is performing a carrier service and desires permission to sub-

stitute highway transportation for rail service. It is equally clear that if, after application and hearing, the Commission finds "that the public convenience and necessity require ---- such operation" it shall issue a permit allowing substitution of highway transportation for that of rail. Sec. 25 *requires proof of public convenience and necessity* unless the substituted service had occurred previous to January 1, 1935.

Sec. 20 provides:

> "No person, corporation, partnership, railroad, street railway or other transportation company shall operate, or cause to be operated, any motor vehicle or vehicles not running on rails or tracks upon any public way in the business of transporting freight or merchandise for hire as a common carrier over regular routes between points within this state without having obtained from the commission *a certificate declaring that public necessity and convenience require and permit such operation.* -------." (Emphasis supplied.)

In Sec. 20, as in Sec. 25, no certificate shall be issued "unless and until the applicant has established to the satisfaction of the Commission that there exists a public necessity for such additional service and that public convenience will be promoted thereby."

There seems to be no reason to determine that the words, "public convenience and necessity" are to have any different meaning or shades of meaning as applied to Sec. 25 than they do in light of Sec. 20. Under either section the burden is on the petitioner to prove public convenience and necessity and lacking such proof, petitioner cannot prevail.

The proof which the statute requires of convenience and necessity is the convenience and necessity of the public as distinguished from that of the individual or group of individuals. In re *John M. Stanley, Exceptant,* 133 Me. 91;

Chapman re Petition to Amend, 151 Me. 68; *Ballard, Re Contract Carrier Service,* 152 Me. 158.

What does the record disclose as to proof of public convenience and necessity? A number of persons testified who operate businesses which have been served by the petitioner in the delivery of meat products. Some of them testified as to their needs and requirements of the delivery of meat. There is evidence of the availability of common carrier truckers from Bangor to the towns served by the Bangor & Aroostook who are adequately equipped to carry the traffic on Monday nights or on any other nights in the week. The area could and would be properly served by the established highway transportation facilities now in force. It is the opinion of this court that the degree of proof which is necessary to establish public convenience and necessity is lacking in this case. In other words, the factual findings of the majority of the Commission, viz.:

> "We find that the present and future public convenience and necessity require the operation by applicant as a common carrier by motor vehicle for the transportation of meats between Northern Maine Junction in the Town of Hermon and points and places located on the lines of the Bangor and Aroostook Railroad Company in Aroostook County and the Towns of Patten and Sherman Station, departing said Northern Maine Junction Monday nights and delivering said points and places Tuesdays, and further, that such convenience and necessity require the amendment of item 'H' of said Certificate No. 137 to provide for the transportation of meats as hereinafter set forth."

are not supported by any substantial evidence.

> "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 vs Caribou, etc., Company, 121*

> *Me. 422, 424.* Here, as with a jury verdict, a mere difference of opinion between court and commission in the deductions from the proof, or inferences to be drawn from the testimony, will not authorize the disturbance of a finding." *Gilman, et al vs Somerset Farmers Co-Operative Telephone Company, et al, 129 Me. 243-248.*

This court in *Public Utilities Commission* v. *Johnson Motor Transport,* 147 Me. 138, at page 143, said:

> "The Law Court is not an appellate court from the Public Utilities Commission to retry questions of fact. Facts found by the Commission are not open in this court, unless the Commission shall find facts to exist without any substantial evidence to support them. If a factual finding, as a basis for an order by the Commission, is supported by any substantial evidence, the finding is final. ------- 'Substantial evidence' is such evidence as taken alone would justify the inference of the fact."
>
> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co., et al vs National Labor Relations Board, et al, 305 U. S. 197, 229.*

In view of the fact we have determined that the same test of public convenience and necessity must be applied to applications under either Sec. 20 or 25 and that the petitioner has failed to prove public convenience and necessity, there is no requirement for us to construe the word "substitution" as it is used in Sec. 25.

The entry in each case will be,

Exceptions sustained.

RAILWAY EXPRESS AGENCY, INCORPORATED
RE: APPLICATION FOR COMMON CARRIER CERTIFICATE BETWEEN PORTLAND AND ROCKLAND, MAINE.
X-4457

Kennebec. Opinion, April 27, 1961.

Railroads. Express. Trucks.
Common Carriers. P. U. C.

The Railway Express Agency even though not itself a physical carrier may under Sec. 25 of R. S., 1954, Chap. 48, substitute highway transportation for rail transportation provided it meets the requirements of public convenience and necessity.

Sec. 25 concerns itself with "rail express" as a carrier and the use of motor vehicles "in connection with the service of such carrier" and service "to be substituted for transportation now performed by or for any such carrier."

Sec. 20 not applicable.

Factual findings of the P. U. C. supported by substantial evidence are final.

ON EXCEPTIONS.

This is a proceeding before the P. U. C. for substitution of trucks for railway service. The case is before the Law Court upon exceptions. Exceptions overruled. (Substitution approved.)

William H. Marx,
R. E. Johnson, for Railway Express.

Raymond Jensen,
Roland Rice, for Trucking Co.

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

TAPLEY, J. On exceptions. The petitioner, Railway Express Agency, Inc., by application to the Public Utilities

Commission, seeks authority to provide a substitute motor for rail service for the handling of express traffic which formerly was served by trains 52, 55, 56 and 57 of the Maine Central Railroad. Trains 52 and 57 were discontinued January 17, 1959 and trains 55 and 56 were to be discontinued April 4, 1959. (When the petition was brought the petitioner had knowledge of the proposed discontinuance as of April 4, 1959 and, as a matter of public knowledge, it is noted that trains 55 and 56 are now no longer in service.) Congdon Transportation, B & E Motor Express, Inc., Arthur Fish, Fox & Ginn, Inc., Boston & Rockland Transportation Co., Lincoln's Express, Inc., Emile Thibault and the Maine Motor Rate Bureau were permitted to intervene in opposition to the application. These intervenors, with the exception of Maine Motor Rate Bureau, are motor common carriers operating under certificates of public convenience and necessity issued by the Public Utilities Commission authorizing service to some or all of the points involved in these proceedings. The Railway Express Agency, Inc., according to its application, desires to operate its own motor vehicles as a common carrier between Portland and Rockland, Maine and intermediate points to serve the same area which it has been doing by rail transportation. The Public Utilities Commission, by majority vote, found:

> "***** We find that the present and future public convenience and necessity require operation by Applicant as a common carrier by motor vehicle for transporting freight or merchandise for hire, moving in express service in intrastate commerce between Portland and Rockland, Maine passing through and serving intermediate points of Yarmouth Junction (Yarmouth), Freeport, Brunswick, Bath, Wiscasset, Newcastle, Damariscotta, Waldoboro and Warren, subject to such conditions as we in the future may find it necessary to impose in order to restrict Applicant's operations to express service; that Applicant is fit, willing and able properly to perform such service and to conform to

> the requirements of Maine law and our rules and regulations thereunder; that a certificate authorizing such operation should be granted as hereinafter conditioned, and that the application in all other respects should be denied."

Based on the findings, the following decree was issued:

> "1. That Railway Express Agency, Inc. be, and it hereby is, authorized to operate motor vehicles over the public highways as a common carrier transporting freight and merchandise for hire between its agencies or stations in Portland, Maine and Rockland, Maine serving its agencies or stations in Yarmouth Junction (Yarmouth), Freeport, Brunswick, Bath, Wiscasset, Newcastle, Damariscotta, Waldoboro and Warren, subject to the following terms and conditions.
>
> 2. The service to be performed is limited to service which is auxiliary to or supplemental of Railway or air express service.
>
> 3. Shipments transported shall be limited to those moving on a through bill of lading or express receipt.
>
> 4. Such further specific conditions as we in the future may find it necessary to impose in order to restrict the operation herein authorized to service which is auxiliary to or supplemental of Railway or air express service."

The intervenors object to the decision of the Public Utilities Commission, as evidenced by the exceptions. There are actually seven exceptions but due to an error in numbering there appears to be eight.

Exception 1 is general in its application, contending that the ruling, order, judgment and decree of the Commission are not supported by any substantial evidence and are predicated on erroneous applications of law.

Exception 2 is taken to the finding of the Commission that "The issue is whether public convenience and necessity re-

quires the continuation of this intrastate express service at the points involved by the use of motor vehicles in lieu of rail service." The intervenors say that this finding is in error as it misstates the issue and reveals a basic misconception of the nature of the case.

Exception 3 proposes that the majority finding of the Commission that Sec. 25 of Chap. 48, R. S. 1954 is the section governing the procedure rather than Sec. 20 of the same chapter is erroneous.

Exception 4 presents the contention that if the Commission was correct in determining that the application of the petitioner was governed by the provisions of Sec. 25 then it was in error in finding that the petitioner had proved public convenience and necessity to service the Portland to Rockland route intrastate as provided by the provisions of Sec. 25.

Exception 5 attacks the finding, "Its (petitioner) express service primarily involves the expedited transportation of small shipments at generally higher rates from, to and between the considered points." by ignoring certain evidence in making the finding and failing to limit the decree to the kind of service it found that the petitioner rendered.

Exception 6 (7). The intervenors complain by this exception that the Commission found public convenience and necessity without applying any standards in arriving at the decision.

Exception 7 (8). Intervenors say that when the Commission admitted petitioner's exhibits 8, 9 and 10 they committed errors of law.

The intervenors argue that the majority of the Commission is in error by finding that petitioner's allegation is governed by Sec. 25. They contend that the facts of this case do not come within the meaning and intent of Sec. 25 as

the applicant has not been the physical carrier and now proposes the creation of a new service by inaugurating its own motor vehicle transportation and, therefore, must be governed by the provisions of Sec. 20. Pertinent portions of Secs. 25 and 20 read as follows:

> "**Sec. 25.** Applications may be filed with the commission by railroads, electric railways, railway express or water common carriers asking its approval of operation by motor vehicles over the highways by or in connection with the service of such carriers, where highway transportation has been substituted by or for such carrier prior to January 1, 1935, for transportation service previously performed by such carrier or is to be substituted for transportation now performed by or for any such carrier. Hearings shall be ordered by the commission on every such application and notice thereof shall be given in such manner and to such persons, firms and corporations as the commission deems necessary at least 7 days prior to the date fixed therefor. If, after such hearing, the commission shall find that the operation is a service which regularly has been performed by or for such carrier prior to and since January 1, 1935, it shall grant a certificate of public convenience and necessity as a matter of right, and in cases where such service regularly has been performed by or for any such carrier prior to January 1, 1935, the service lawfully may be continued pending the issuance of such a certificate, provided application for such a certificate is filed with the commission within 15 days after July 6, 1935; but if such service has not been regularly performed prior to and since January 1, 1935 such a certificate shall be issued only if the commission shall find that the public convenience and necessity require and permit such operation."

> "**Sec. 20.** No person, corporation, partnership, railroad, street railway or other transportation company shall operate, or cause to be operated, any motor vehicle or vehicles not running on rails

> or tracks upon any public way in the business of transporting freight or merchandise for hire as a common carrier over regular routes between points within this state without having obtained from the commission a certificate declaring that public necessity and convenience require and permit such operation. --------- In determining whether or not such a certificate shall be granted, the commission shall take into consideration the existing transportation facilities and the effect upon them, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, conditions of and effect upon the highways involved and the safety of the public using such highways. No such certificate shall be issued unless and until the applicant has established to the satisfaction of the commission that there exists a public necessity for such additional service and that public convenience will be promoted thereby."

The Railway Express Agency is a corporation qualified to transact business in all states. It was organized by the principal railroads of the country to conduct the express business over their lines and lines of other carriers and to engage in a general transportation business. The Railway Express Agency, Inc. is engaged in rendering an express service by medium of rail transportation, such service performed in accordance with the tariffs and other rules or regulations filed with the Federal, State or foreign authorities. It deals in services and the most important factor in performing these services is transportation. The mode of transportation, in the instant case, it has used for the past fifty years has been rail transport. By these proceedings the Railway Express Agency, Inc. is not requesting any change in the authority to express any different types of merchandise but to substitute highway transportation for rail transportation due to the fact that rail transportation is no longer possible because of the fact that there are no trains operating in the

territory involved in these proceedings. The facts do not constitute an inauguration of a new service but a substitution of motor for rail transportation of an existing service. It may be expressed in another manner by saying that there is to be no change in the service but only in the method of rendering such service. According to Sec. 25 if this applicant had been operating its service previous to January 1, 1935 by rail and had substituted highway transportation for the rail service prior to January 1, 1935 it would have been granted a certificate of public convenience and necessity as a matter of right. However, in the instant case the applicant was not using motor transport before January 1, 1935 nor has it used such mode of transportation since 1935 so it is incumbent upon it to produce such substantial evidence upon which the Commission may base a finding that the public convenience and necessity require highway motor transportation. *Bangor and Aroostook Railroad Company, Re: Application to operate as a common carrier of freight and merchandise by motor vehicle,* 157 Me. . The intervenors strongly urge that Sec. 25 does not apply under the circumstances of this case where the applicant was not itself the physical carrier and therefore Sec. 20 should govern. We cannot agree with this contention. Sec. 25 concerns itself with railroads, electric railways, *rail express* and water common carriers. Permission is given to apply to the Commission for "its approval of operation by motor vehicles over the highways by or *in connection with the service of such carriers,* where highway transportation has been substituted by or for such carrier prior to January 1, 1935, for transportation service previously performed by such carrier *or is to be substituted for transportation now performed by or for any such carrier."* (Emphasis supplied.) Railway Express, according to Sec. 25, is a common carrier. The Railway Express Agency, Inc. uses rail as a mode of transportation in performing its services also utilizes a fleet of motor trucks largely in terminal pickup,

delivery and transfer service and to a considerable extent in line-haul operations. Thus the service of the Railway Express Agency, Inc. as a common carrier is performed transportation-wise by either rail or highway motor transportation. The traffic handled by the Railway Express Agency, Inc. on the trains is express shipments which move under express tariffs and express billings. The substitution of motor transport for rail service would not involve any change in the traffic as it would move under the same tariffs and the same billing as formerly.

Sec. 25 was obviously enacted for the purpose of regulating highway transportation when motor vehicle transportation was required to be substituted for that of rail. There was no need of such an enactment where a common carrier sought to inaugurate a transportation service by motor vehicle as a previous enacted section (Sec. 20) provides the procedure in that case. Some two years after the enactment of Sec. 20 the Legislature passed an amendment to Chap. 48 (Sec. 25) which established certain procedures applicable to a particular class of common carriers, these classes being railroads, electric railways, railway express or water common carriers. These types of common carriers at the time of the passage of the amendment were recognized as those which under certain circumstances or conditions might find it necessary, in connection with the service they rendered, to substitute a different mode of transportation from that which they were then using. The Legislature saw fit to protect that carrier who was at the time of the enactment of the Legislature providing substituted highway transportation for rail transportation when it inserted a so-called, "grandfather clause" in the amendment. Those named carriers proving a substituted motor for rail transportation performed before January 1, 1935 would be granted a certificate of public convenience and necessity as a matter of right. What about the railroads, electric railways and, in the instant case, the railway express who desired to sub-

stitute motor vehicle transportation for rail transportation which had not been regularly performed prior to and since January 1, 1935? Did the Legislature intend that those seeking substitution after January 1, 1935 do so under Sec. 20? We do not think so. We are of the opinion, and so rule, that if the Commission finds from evidence of a substantial nature that public convenience and necessity require and permit such substitute operation then such a certificate shall issue.

The Railway Express Agency, Inc. transports goods and merchandise of every description, especially that type requiring great dispatch or careful handling. Articles and commodities of great value are part of normal express traffic, such as currency, negotiable securities, furs, jewelry, etc. There are at times government shipments moving under armed surveillance, all of which require extra special care and a specialized service. The express truck is driven by a trained employee who is familiar with express business and the rules and regulations and the necessary paper work in making reports and using forms prescribed by the company. If the operations were not carried on by the Railway Express Agency's truck equipment and employees, there could be delays in meeting trains which would result in late deliveries to consignees. If trains or other connecting agencies are late, an express operated truck will await their arrival which provides a flexibility of service which would not be available by an independent motor carrier operation. Independent truck carriers handling express traffic as an incidental phase of their business, with employees under the control and subject to the demands of their own business instead of devoting their sole interests to an express service, would not provide a satisfactory and efficient substitution.

The record discloses substantial evidence of public convenience and necessity. For instance, a lobster shipper con-

siders Railway Express Agency service the most dependable for his type of business; a mail order grocery and perishable food business contends that the service meets a requirement not provided by other carriers; and a large industrial plant using a perishable item in the manufacture of its product finds the type of service rendered by the Railway Express Agency a necessary adjunct to the operation of the business. These cited instances are typical of others of like nature presented to prove public convenience and necessity.

> "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.* Here, as with a jury verdict, a mere difference of opinion between court and commission, in the deductions from the proof, or inferences to be drawn from the testimony, will not authorize the disturbance of a finding.
>
> "On the other hand, whether, on the record, any factual finding, underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions. *Hamilton v. Caribou, etc., Company,* supra." *Gilman, et al vs Somerset Farmers Co-Operative Telephone Company, et al, 129 Me. 243, at page 248.*
>
> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co., et al vs National Labor Relations Board, et al, 305 U. S. 197, 229.*

See *Bangor and Aroostook Railroad Company, Re: Application to operate as a common carrier of freight and merchandise by motor vehicle, supra.*

The Railway Express Agency, Inc., by substituting the method of transportation, is not in any manner encroaching upon the rights of those carriers now serving the area. They suffer no prejudice by the substitution, either by loss of business or invasion of rights. The Railway Express Agency, Inc. should not be penalized because of the loss of an established mode of transportation resulting from circumstances over which it had no control, providing it can prove that public convenience and necessity, as well as public interest, require the continuance of the service by substituted motor vehicle transportation. The record discloses that it has satisfied the requirements of proving public convenience and necessity. The record also demonstrates the fact that the findings of the majority of the Commission are supported by substantial evidence.

There is no merit in intervenors' exceptions to the admission of Exhibits 8, 9 and 10.

Exceptions overruled.

MARTIN S. JOYCE, JR.
vs.
LEON T. WEBBER, ET AL.

Cumberland. Opinion, May 2, 1961.

Ordinances. Civil Service.
Police. Suspensions.

The municipal officers under broad legislative authority may provide for limited suspensions of a police officer by the Chief of Police for disciplinary purposes without notice or hearing. (Civil Service Ordinance, Sec. 1, Rule XI.)

In the absence of protective provisions of the ordinance or controlling legislative limitations, suspension or removal may be imposed with or without cause.

ON APPEAL.

This is an appeal to the Law Court. Appeal denied.

Robert C. Robinson, for plaintiff.

Barnett I. Shur, for defendant.

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

WEBBER, J. The petitioner for the writ of mandamus is a police officer of the City of Portland who received a limited suspension of five days without pay for disciplinary purposes by order of the Chief of Police. By this action the petitioner seeks to compel the Civil Service Commission of the City of Portland either to grant an original hearing on such suspension or alternatively to entertain an appeal from such order. The Commission asserts that it has no jurisdiction in the matter of limited suspensions for disciplinary purposes. The justice below denied the requested relief and the petitioner's appeal brings the matter on for review.

Any protection afforded a police officer from such disciplinary action as was here imposed upon him by the Chief of Police must stem from the provisions of the civil service ordinance in force in the City of Portland. The applicable portions of Sec. 1 of Rule XI of that ordinance provide:

> "Sec. 1. The Chief of the Police Department * * * may, for disciplinary purposes, suspend without pay any member, * * * from the performance of his duties, for one offense for a period of not more than fifteen consecutive days, and for periods aggregating not more than thirty days in a calendar year for more than one offense on account of violation of department rules, inefficiency, incompetence, misconduct, negligence, insubordination, disloyalty, or other sufficient cause and said Chief of the Police Department * * * shall immediately upon such suspension file with the Civil Service Commission a written statement of the reasons for such suspension, and a copy of said statement shall be personally delivered to the department member or shall be mailed to him at his last and usual place of abode."

In contrast to the foregoing provisions relating to the limited suspension rights vested in the Chief of Police, the ordinance further provides in Secs. 2 and 3 of Rule XI for the more extensive powers of suspension and removal vested in the Civil Service Commission and for the rights of the officer to notice and hearing in such cases. The applicable portions of these sections are as follows:

> "Sec. 2. The Civil Service Commission shall have the power and authority to demote, layoff, suspend and remove members of the Police Department * * * for cause and after the presentation of charges and hearing. They shall further have the right to reinstate any such demoted, laid-off, suspended, or removed member of the Police Department * * * after a hearing and on recommendation of the head of the department to which the applicant seeks reinstatement, provided the City

> Manager joins in such recommendation for reinstatement.
>
> "Sec. 3. Pending a hearing before the Civil Service Commission for the demotion, lay-off, suspension or removal of a member of (the) department, the Chief of Police * * * and the City Manager * * * may, for the cause to be presented to said Civil Service Commission, suspend any member of said department(s), such suspension to be without pay and to continue until the next succeeding meeting of the Commission."

It is significant that Sec. 1 did not provide for the notice, lodging of charges and hearing which are afforded by Secs. 2 and 3. We are satisfied that this distinction was intentional on the part of the municipal officers when they enacted the civil service ordinance. A police department necessarily partakes of some of the attributes of a military establishment. Discipline and order must be maintained and a measure of unquestioned authority must be vested in the responsible commanding officer. The ordinance quite realistically takes this into account by vesting in the Chief of Police carefully limited powers of disciplinary action which he may employ without the necessity of notice, preferment of formal charges or hearing. From his exercise of these powers no appeal is provided. The petitioner readily admits that the municipal officers were fully empowered to insert this distinction in the ordinance. His position is rather that by their choice of words in Sec. 1 they did not succeed in eliminating the necessity of notice and hearing. We cannot agree with the petitioner's contention that the language of Sec. 1 by its use of the words "or other sufficient cause," inferentially at least, provided for notice and hearing.

That portion of Sec. 1 which provides that the Chief of Police must after the exercise of his limited power of suspension file with the Commission a written statement of

his reasons for the action and furnish the officer with a copy thereof by no means compels the conclusion that the petitioner is thereby given a right of appeal. We see in this provision no more than a recognition of the necessity for the Commission to keep full and adequate records as to the conduct and performance of all members of the department.

We think the petitioner tends to confuse the rights of a police officer under civil service with the rights of a person charged with crime. The latter is by the general law and by statute always entitled to know the charge lodged against him and he is afforded both hearing and appeal. In contrast, the civil service employee has no protection against suspension and removal except as may be specifically provided by the civil service statute or ordinance in effect. In the absence of such ordinance provisions or a special enactment by the Legislature which may be controlling, suspension or removal may be imposed with or without cause. *Yantsin* v. *City of Aberdeen* (1959), 345 P. (2nd) (Wash.) 178; see *Gray* v. *City of McKeesport* (1938), 133 Pa. Super. 24, 1 A. (2nd) 834.

The petitioner relies heavily on certain cases which are readily distinguishable. In *Andrews* v. *King*, 77 Me. 224, the statute established the tenure of office of a city marshal and provided for his removal for cause "after hearing." In *Andrews* v. *Police Board,* 94 Me. 68, the statute likewise limited the power of the police board to removal for cause. In that case there was no pretense that "cause" existed but removal was based only upon the desire of the board to reduce the size of the force. The court added that the phrase "removal for cause" as used in the legislative enactment contemplated and required notice and hearing. To the same effect and interpreting the same statute, *Cote* v. *Biddeford,* 96 Me. 491, and *Ducharme* v. *Biddeford,* 110 Me. 6. So also in *State* v. *Donovan,* 89 Me. 448, where the city charter granted by the Legislature provided for "removal for

cause" and required that removal by the mayor be with the advice and consent of the aldermen. We are satisfied that the protection afforded a civil service employee by the foregoing cases was guaranteed to the petitioner by Secs. 2 and 3 of Rule XI. In each case the court was seeking the intention of the Legislature from the words employed. We find nothing in those cases, however, which intimates or suggests that the Legislature, or municipal officers acting as in the instant case under broad legislative authority, could not provide for limited suspension for disciplinary purposes without notice or hearing. The petitioner cites us no case which so holds and, as already noted, we find the contrary held in a case in which the issue was squarely raised. *Yantsin* v. *City of Aberdeen, supra.* We conclude that the municipal officers of the City of Portland had the necessary authority and by their choice of language in Sec. 1 of Rule XI manifested a clear intention to confer upon the Chief of Police limited disciplinary power which in its exercise would require neither notice nor hearing and from which no appeal would lie.

Pursuant to a rule making authority conferred upon him by the ordinance, the Chief of Police promulgated certain Rules and Regulations of the Police Department. The petitioner calls particular attention to the provisions of Rule 2017 pertaining to "Discipline." It is unnecessary to discuss this rule in detail. It is enough to say that Rule 2017 falls far short of providing for the original hearing by the Commission or the appeal contended for by the petitioner. It may also be noted that insofar as rules promulgated by subordinate authority tend to contravene the provisions of controlling law, in this case the ordinance, such rules and regulations are of no effect and will "be promptly declared invalid." *McKenney* v. *Farnsworth,* 121 Me. 450, 452. We cannot regard these rules as adding anything to the rights of the petitioner in the instant case.

We conclude that in accordance with the clear intendment of Sec. 1 of Rule XI the petitioner in the circumstances of the instant case possessed no right either to an original hearing before the Commission or to an appeal to that body and that the writ of mandamus was properly denied. Accordingly the entry will be

Appeal denied.

FRANK A. GIBSON
vs.
RODERICK MCMILLIN

Oxford. Opinion, May 11, 1961.

Law Court. Transcript.
Rule 75 m; Rule 8 (d), (c).

In tort actions, contributory negligence is not an affirmative defense and the burden of proving due care is upon the plaintiff, except in death actions and injuries to one deceased at the time of trial.

Statements prepared under Rule 75 m. as substitutes for transcripts of testimony, upon objection made, must be submitted to the court for settlement and approval. Rule 75 m.

ON APPEAL.

This is an appeal before the Law Court. Appeal dismissed.

Gerry Brooks, for plaintiff.

Mahoney & Desmond, for defendant.

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

DUBORD, J. This cause originated before the promulgation of the Maine Rules of Civil Procedure by a writ return-

able to the Norway Municipal Court. It is a tort action in which the plaintiff sought to recover property damages arising out of a motor vehicle collision. The declaration contains the usual allegations of due care on the part of the plaintiff, negligence on the part of the defendant, and damages.

The case was defaulted in the Municipal Court and judgment entered for the plaintiff. The defendant appealed to the Superior Court.

It appears that no pleadings were filed by the defendant in either court and the case went to a hearing before a single justice without a jury and without a stenographic reporter. The presiding justice entered a decree wherein, after a finding that the plaintiff was guilty of contributory negligence, judgment for the defendant was ordered.

The plaintiff then filed an appeal under the provisions of the new rules.

No stenographic report being available, plaintiff attempted to prepare a statement of the evidence, pursuant to the provisions of M. R. C. P. 75 (m), which rule permits the preparation of a statement of evidence from the best available means, including recollection, for use instead of a stenographic transcript.

The record indicates that this statement as prepared by counsel for the plaintiff was properly served upon the counsel for the defendant. Counsel for the defendant thereupon filed objections to certain portions of the statement prepared in behalf of the plaintiff.

Subsequent to the entry of judgment for the defendant, the presiding justice filed a certificate purporting to be pursuant to the provisions of M. R. C. P. 52 (a) in which he stated that: "By cross examination and through questions addressed by the court to the plaintiff and his chief witnesses glaring inconsistencies in the plaintiff's contentions were apparent to the presiding justice. Lacking too was

credibility. The plaintiff's contributory negligence was established by his own testimony."

Plaintiff now argues that the issuance of such a certificate is not sanctioned under the provisions of M. R. C. P. 52 (a) and he seeks to have this certificate stricken from the record.

A study of the rule involved appears to sustain the contention of counsel. Consequently, we shall give no consideration to this certificate of the presiding justice.

However, there are other reasons, entirely unrelated to this certificate, actuating the opinion we propose to render.

Counsel for the plaintiff invokes the provisions of M. R. C. P. 8 (d) and contends that because of failure on the part of the defendant to deny the allegations contained in the declaration in the writ, they are to be considered as having been admitted.

He also argues that under the provisions of M. R. C. P. 8 (c) there was an obligation on the part of the defendant to plead as an affirmative defense the contributory negligence of the plaintiff if he intended to rely on such defense. This is an erroneous conclusion on the part of counsel for the plaintiff. Contributory negligence is not an affirmative defense, except in actions for negligently causing death or for injuries to a person who is deceased at the time of the trial, and the burden of proving due care in a tort action of this type has always been, and still is, on the plaintiff.

As to the other contention based upon M. R. C. P. 8 (d), we must remember that this action was instituted prior to the time when the new rules went into effect. The record is bare of any indication that objection was made by the plaintiff to the fact that no pleadings had been filed. Had such objection been made, undoubtedly the simple plea of the general issue would have been prepared and filed. We must, therefore, conclude that the cause was tried as if the defendant had filed a plea of the general issue.

Reverting now to M. R. C. P. 75 (m), this rule contains a provision that when objections are filed to a statement prepared upon recollection, such statement must be submitted to the court for settlement and approval.

There is nothing in the record to indicate that this procedure was followed.

Consequently, as far as this court is concerned we are left simply with a case where there is no record before us of the evidence which was adduced at the trial before the presiding justice.

The appeal must, therefore, be considered purely upon the provisions of M. R. C. P. 52 (a) which reads 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."

This court has had occasion to interpret this rule in the very late decision of *Harriman* v. *Spaulding,* 156 Me. 440.

The entry will be:

Appeal dismissed.

IVAN BRAWN

vs.

JOHN LUCAS TREE EXPERT CO., INC.

Hancock. Opinion, May 11, 1961.

Summary Judgment. Rules 56 (c), (e), (f), Rule 33.

The mere denial of plaintiff's title by a defendant (who asserts no information sufficient to form a belief), raises no issue of fact under Rule 56 (e), where plaintiff under oath, in response to interrogatories, asserts his title and recites the name of his grantor, the date and record data of his instrument of title.

A confession and avoidance supported by mere hearsay does not present a genuine issue of fact. Rule 56 (e).

ON MOTION TO LAW COURT
RULE 72(c).

This is a report to the Law Court upon motion. Ruling and order sustained. Action remanded to Superior Court upon issue of damages.

Gerald E. Rudman,
Paul L. Rudman, for plaintiff.

Herbert T. Silsby, for defendant.

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

SULLIVAN, J. Plaintiff was awarded a summary judgment interlocutory in character on the issue of liability alone. Maine Rules of Civil Procedure, 56 (c), 155 Me. 559. This case has been reported to the Law Court upon motion of the defendant pursuant to Rule 72 (c), M. R. C. P., 155 Me. 573, for determination of a question of law.

Plaintiff had instituted a civil action against the defendant under the provisions of R. S., c. 124, § 11. The complaint alleges:

> "1. Plaintiff, Ivan Brawn, is the owner of a certain parcel of improved grass land and ornamental ground located at the Junction of the Verona Island - Bucksport Bridge and Main Street in Bucksport, Hancock County, Maine, and is also the owner of all buildings and ornamental trees situated thereon;
>
> "2. In February, 1960 Defendant John Lucas Tree Expert Company, Inc. without the knowledge, consent or permission of Plaintiff, entered upon Plaintiff's parcel of land and then proceeded to cut down, destroy and take therefrom two ornamental Elm shade trees;

"3. As a consequence said two shade trees were completely destroyed and the parcel of land owned by Plaintiff was greatly damaged, all of which resulted in a loss to Plaintiff in the sum - - - -"

The defendant answered:

"1. The Defendant does not have sufficient information to either affirm or deny the allegations in Paragraph 1 of the Complaint.

"2. The Defendant admits that he cut two elm trees situated on property located at the corner of Elm and Bridge Streets, Bucksport, Maine, on March 1 and 2, 1960. The Defendant denies each and every other allegation contained in Paragraph 2.

"3. The Defendant denies each and every allegation contained in Paragraph 3.

" The Defendant in its own behalf alleges:

"1. The Defendant was told in February, 1960, by a Mrs. Herrick, who resided at the Jed Prouty Tavern in Bucksport, that she was the owner of the real estate and trees described in Paragraph 2 above and who gave permission for the removal of said trees from said property.

"2. On March 2, 1960, the Plaintiff told the Defendant that said Mrs. Herrick was his sister.

"3. The Defendant is informed and believes and therefore alleges that said Mrs. Herrick, sister of the Plaintiff, was duly authorized and empowered to grant permission to the Defendant to cut and remove said elm trees."

Under Rule 33, M. R. C. P., 155 Me. 529, the defendant served the following written interrogatories upon the plaintiff who gave the subjoined answers:

"1. Does the Plaintiff have a sister named Mrs. Herrick who resided at the Jed Prouty Tavern in Bucksport, Maine, during February, 1960?"
Answer: "Yes."

"2. If so, please state her full name."
Answer: "Irene B. Herrick."

"3. State from whom the premises were purchased by the Plaintiff, the date and the book and the page in which the Plaintiff's deed is recorded."
Answer: "Premises purchased from Irene B. Herrick by deed dated November 30, 1954, recorded in Book 766, Page 280."

"4. State whether or not the premises are rented; and if so, to whom."
Answer: "Premises are rented to Ralph Rideout and to Clyde Grindell."

"5. To whom are the rents paid?"
Answer: "Ivan Brawn."

"6. Does the Plaintiff's sister, Mrs. Herrick, derive any income from said premises?"
Answer: "No."

"7. Who pays the real estate taxes on said premises?"
Answer: "Ivan Brawn."

"8. Are any utilities installed in the premises in the name of Plaintiff's sister, Mrs. Herrick?"
Answer: "Not to my knowledge."

"9. Has the Plaintiff's sister, Mrs. Herrick, ever rented the premises or negotiated the renting of the premises or part of the premises to any tenant?"
Answer: "Yes."

"10. Does the Plaintiff's sister, Mrs. Herrick, ever collect from any of the rent upon said premises?"
Answer: "At some time prior to 1960 she did."

"11. Please state whether the Plaintiff reported the income from rents on said premises in his 1958 & 1959 Federal Income Tax returns or whether the income was reported in the Plaintiff's sister's

(Mrs. Herrick) income tax return for 1958 & 1959."

Answer: "I do not know."

"12. State the Whereabouts of the Plaintiff during the time of the alleged cutting of the elm trees. If the Plaintiff was at his store premises during the time, please state how far away the Plaintiff's store is from the premises upon which certain trees are alleged to have been cut."

Answer: "I was in the store which is across the street from the premises and is about 100 feet away."

After a pre-trial conference a court order was rendered stating, by stipulation and agreement of counsel:

"- - - that the plaintiff had an adult sister by the name of Irene B. Herrick who at the time of the cutting and previous thereto was living at the Jed Prouty Tavern in Bucksport, Maine, which is not on the land on which the plaintiff claims the two elm trees were nor is it contiguous to that land;

that the cutting of the two elm trees herein involved took place March 1 and 2, 1960, and that these two elm trees measured respectively 26″ x 85′ tall and 32″ by 90′ tall;

that the land on which the plaintiff claims that these two elm trees were situated had been purchased by the plaintiff from the said Irene B. Herrick on November 30, 1954 by deed recorded in Hancock County Registry of Deeds, Book 776, Page 280, and was still owned by the plaintiff on March 1, 2, 1960;

that the said two elm trees were removed by the defendant.

- - - - - - - - - - -

"It is the contention of the defendant that these two elm trees were situated within the public right of way of either Elm or Bridge Streets, or both, in Bucksport, Maine, but it is the contention of the

> plaintiff that said trees were situated on the land owned by the plaintiff."

Defendant in its brief adverts to the pre-trial conference with the following comment:

> "At pretrial Defendant being satisfied that the variation in description of the lot declared upon and the lot admitted being cut upon in its answer were one and the same, stipulated that the land belonged to the Plaintiff. However, no stipulation was entered into with respect to whether the trees were located in the public right of way or on the land of the Plaintiff."

Plaintiff moved for a summary judgment in his favor on the limited issue of liability of the defendant upon the asserted ground that there was no genuine issue as to any material fact and that the plaintiff was thus entitled to such judgment as a matter of law. Such motion was based upon the pleadings, answers to interrogatories and the affidavit of the plaintiff.

The presiding justice ordered the clerk to enter, as a matter of law, summary judgment for plaintiff against defendant in respect to liability. The justice found no issue as to the cutting, destruction or removal of the trees. He decided that an examination of the complaint, answer, affidavit, counter affidavit and pre-trial order revealed that the defense of the defendant as to ownership of the trees by the plaintiff rested solely upon the factual premise that the trees were within the public right of way abutting the plaintiff's land without any suppletory claim by the defendant that those trees stood beyond the center line of the abutting public highway. On the authority of *Brooks* v. *Bess*, 135 Me. 290, the justice ruled that the trees, upon the case record, were, therefore, presumptively the property of the plaintiff who was the adjoining landowner. The justice resolved that the defendant's assertions as to the apparent agency of Mrs.

Herrick to authorize the cutting of the trees were not susceptible of admissible testimony by the defendant and the justice reached a like conclusion in the matter of defendant's statements concerning awareness of the nonresisting plaintiff as to the defendant's destruction of the trees.

Defendant contends that the justice erred in ordering the interlocutory, summary judgment and the case is reported for interlocutory review here.

Rule 56, M. R. C. P., 155 Me. 559, ff., provides:

> "(c) - - - Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages - - -"
>
> "(e) - - - Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. - - - When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."
>
> "(f) - - - Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continu-

ance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Of summary judgment Field and McKusick, Maine Civil Practice, say with sustaining authorities:

"- - - It is a far-reaching device which makes possible the prompt disposition of an action without a trial if there is no genuine dispute as to any material fact. It enables the court to look behind the formal allegations of the pleadings to determine whether a genuine dispute exists - - -" (P. 463).

"- - - The party seeking the summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact. Any doubt on this score will be resolved against him and the opposing party will be given the benefit of any inferences which might reasonably be drawn from the evidence. An affidavit which merely says in effect, 'what you say is not so' does not raise a genuine issue. The affidavit must set forth such facts as would be admissible as evidence. Rule 56 (e)." (P. 466.)

"Rule 56 (e) requires that affidavits on summary judgment motions shall be on personal knowledge and set forth such facts as would be admissible in evidence. Hearsay statements in affidavits will not be considered. If the only evidence available in time for the hearing is hearsay, the proper thing to do is to file an affidavit under Rule 56 (f) and seek an opportunity for an affidavit or deposition that will furnish the needed evidence in admissible form. The requirement that the affidavit shall show affirmatively that the affiant is competent to testify to the matters thereon stated is met by a statement in the jurat that it was made upon personal knowledge - - -" (P. 467).

"Rule 56 (f), adverted to above, permits an affidavit showing any reason why the opposing party cannot present affidavits to justify his position - - -

> The court may make such order as is just, the most likely one being an order for continuance." (P. 467.)

In paragraph 1 of his complaint the plaintiff alleged ownership of a specific realty. The defendant in answer stated in substance that the defendant was without knowledge or information sufficient for forming a belief as to the truth of plaintiff's allegation and by so responding defendant effected a denial. Rule 8 (b), M. R. C. P., 155 Me. 495. Later the plaintiff under oath recited in reply to the defendant's interrogatory the name of his grantor, the date and record data of his instrument of title to the real estate. By affidavit the plaintiff subsequently repeated his assertion of title. Plaintiff thus upon personal knowledge set forth facts admissible in evidence while the defendant elected to rest upon the mere denial in its pleading. Rule 56 (e), *supra.* There was no issue left as to ownership and identification of the real estate denoted in paragraph 1 of the complaint.

By paragraph 2 of his complaint the plaintiff accused the defendant of having tortiously cut and removed 2 trees from the former's real estate. Defendant by answer admitted having cut and removed 2 trees from property at the corner of Elm and Bridge Streets in Bucksport and denied all other allegations in plaintiff's paragraph 2. Defendant justified such cutting and removal in a further recitation that it had been told by a Mrs. Herrick, sister of the plaintiff, that she owned the real estate which was the situs of the trees, that she gave her permission to the defendant so to cut and remove and that the defendant upon information and belief alleged the power and authority of Mrs. Herrick to have permitted the cutting and removal of the trees. Plaintiff in answer to defendant's interrogatories and upon oath deposed that his sister, Mrs. Herrick, received no income from the realty claimed as his by the plaintiff, had paid no taxes on the property but had rented or negotiated the renting of the premises at some time prior to 1960. Plaintiff by affi-

davit swore that he had owned the property described in his complaint during February, 1960, that defendant had then cut and removed the trees from such real estate and that he had never extended permission to defendant so to cut or remove nor had he invested Mrs. Herrick or any person impliedly or expressly with authority to legalize the cutting or removal of the trees by anybody. Defendant thereupon by counter affidavit swore that it had been informed by Mrs. Herrick that the latter gave permission for the cutting and removal of the trees, that she had informed the defendant that she was owner of the premises involved, that she is a sister of the plaintiff and had apparent authority to grant permission for the cutting of the trees, that the trees had been situated some 100 feet from the business premises of the plaintiff who thus knew or ought to have known that the trees were being cut and that the defendant had no knowledge whether the trees had stood in the public right of way or on land of the plaintiff.

As to paragraph 2 of the complaint it becomes manifest upon the record that the real estate owned by the plaintiff and the property from which the defendant cut and removed the trees are one and the same premises. Defendant can not stand upon its mere denial as to that. Rule 56 (e), *supra*. The confession and avoidance advanced by the defendant consisted of hearsay as to statements of Mrs. Herrick who did not furnish an affidavit or deposition. Rule 56 (e), (f), *supra*. Defendant's assertion that the plaintiff knew or ought to have known that the trees were being severed is a disputative rationalization, was not made on personal knowledge and sets forth no facts such as would be admissible in evidence or show affirmatively that the defendant affiant was competent to testify to the matters stated. Rule 56 (e), *supra*.

The plaintiff has sworn that the trees were upon his delineated property. Defendant in an opposing affidavit has sworn that it has no knowledge whether the trees were

in the public right of way or on land of the plaintiff. Defendant's response sets forth no specific fact save defendant's ignorance of the objective reality of the situation. Such a response does not generate a genuine issue. Rule 56 (e), *supra.* Since the record is void of any issue as to the trees having stood upon the plaintiff's property it is of no moment whether the trees were stationed within plaintiff's occupancy of his land, within the wrought or upon the traveled public right of way.

> "It is well-established law that presumptively the adjoining landowner owns the soil to the center of the way. Subject to the easement of passage, he may cultivate the soil and take the herbage growing thereon. - - - -
>
> 'The public have no right in a highway excepting the right to pass and repass thereon. Stackpole v. Healy, 16 Mass., 33.
>
> 'Subject to the right of mere passage, the owner of the road is still absolute master' Stinson v. City of Gardiner, 42 Me., 248, 254.
>
> - - - - - - - - - - - - -
>
> "Nothing in this record rebuts the presumption of centerline ownership - - - The New Hampshire Court has declared: 'Generally they' (meaning trees by the roadside) 'are the property of the adjoining landowner. In the absence of evidence transferring the title out of him, it is to be assumed such trees are his property. In him is vested the right of property and of beneficial enjoyment. The public has no right to the trees or to use them, even if necessarily removed, to construct or maintain the way. For any interference with his possession or right of possession in such trees the adjoining owner has his action.' McCaffrey v. Concord Electric Company, 114 A. 395."

Brooks v. *Bess,* 135 Me. 290, 291.

In the instant case there was no error in the interlocutory ruling and order of the presiding justice.

Ruling and order sustained.

Action remanded to the Superior Court upon the issue of damages.

M. N. LANDAU STORES, INC.
vs.
WILLIE A. DAIGLE, ET AL.

Aroostook. Opinion, May 12, 1961.

Contracts. Leases. Specific Performance. Damages.

If a lease is viewed by the parties merely as a convenient memorial, or record of a previous contract to execute such lease, the absence of the lease instrument does not effect the binding force of the contract; if however, the instrument is regarded as the consummation of negotiations, there is no contract until the lease instrument is written and signed. The question is one of intention.

Actual expenses incurred by proposed lessee in reliance upon a contract to lease is a proper element of damages in breach of contract to lease.

The measure of damages upon breach of contract to lease is the difference between the rental value of the store to be altered for use of the lessee under the agreement and the rent reserved, with such special damages as may have been within the contemplation of the parties.

ON APPEAL.

These are cross appeals from an equity decree awarding damages upon breach of contract to lease. Appeals dismissed. Decree affirmed.

George B. Barnes,
Murray Lavene,
Alfred LaBonty,
Charles Barnes II, for plaintiff.

Scott Brown, for defendant.

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

WILLIAMSON, C. J. This is a bill in equity against Willie A. Daigle, the proposed lessor, and his son for specific performance of an agreement to alter and lease a store or to recover damages for breach of the agreement, and for cancellation of a mortgage given by the defendant Willie A. Daigle to his son for the alleged purpose of defrauding creditors.

The single justice entered a decree denying specific performance, awarding damages for breach of contract and ordering cancellation of the mortgage. The plaintiff appeals only on the ground that the damages awarded were inadequate. The defendants appeal on the ground there was no binding agreement to lease and hence the bill should have been dismissed. Assuming a binding agreement, the defendants do not question the amount of damages awarded or the cancellation of the mortgage to the son. In considering the cross appeals we have no further interest in the mortgage or the son's interest in the litigation. For convenience, we may refer to Willie A. Daigle, the proposed lessor, as the defendant.

First — The defendant's appeal is dismissed. The single justice decreed that "The writing entered into on October 30, 1951, constituted a final and binding agreement for a lease."

The finding stands insofar as the facts are concerned unless shown to be clearly erroneous. Compare *Harriman* v.

Spaulding, 156 Me. 440, 443, 165 A. (2nd) 47; Rule 52 (a), Maine Rules of Civil Procedure.

The first approach was made by the defendant to the plaintiff by a letter in September 1951 seeking to interest the plaintiff in renting the premises owned by the defendant in the business section of Madawaska. A reply was received from Mr. Louis Rabinow of the Rabinow Real Estate Co., who appears, as he stated in his reply, to "take care of the real estate" for the plaintiff.

After negotiations by correspondence and personal conferences in which the defendant and Mr. Rabinow, among others, were included, an agreement between the plaintiff and the defendant finally crystallized at Madawaska on October 30, 1951. The agreement was evidenced by a typewritten letter from plaintiff to defendant of October 16, 1951, with the attached "schedule of requirements," with certain agreed written changes.

The agreement, without the attached schedule, reads as follows:

"M. N. LANDAU STORES, Inc.
Executive Offices
33 West 34th Street: New York 1, N. Y.

October 16, 1951

Mr. Willie A. Daigle
Madawaska,
Maine

Dear Mr. Daigle:

We have been informed by Mr. Louis Rabinow that you are willing to enter into a lease with us, covering the store at 496 Main Street, Madawaska, Maine, recently occupied by the A & P Tea Company, at the following terms:

1. You are to alter the premises by the erection of an addition to the store and basement, approxi-

mately 35 feet in depth by ~~70~~ *80* feet in width, and you are to remodel the premises in accordance with the general schedule of requirements attached.

2. The rental shall be a minimum of ~~$6,000~~ *$7200.00* per annum, heated, plus 4% of annual sales in excess of ~~$135,000~~ *(175,000)*, but the total rental in any year shall not exceed $15,000.

3. The term of the lease shall be for 25 years from the date we are given possession of the completed premises, and we are to have the option to renew the same for an additional 25 years, in which event the minimum rental will be increased to ~~$6,600~~ *$7,800* per annum *as long as your son conducts the drug store next door, we will not have a fountain in our store.*

If the foregoing is correct, please confirm the above and we will arrange for our architect to visit the premises, for purposes of drawing plans and specifications for the alterations.

When the lease is signed we will deposit $7200.00 with a bank in Caribou or Madawaska with instructions that this sum is to be turned over to you when we take over the store for occupancy. You will apply this sum towards the first year's rent, and will pay us 4% interest on this amount.

Very truly yours,

M. N. LANDAU STORES, INC.

s/ W. Landau
William Landau

WL/rd
att.

Madawaska, Maine
Oct. 30, 1951

I agree to and accept the above terms and conditions.

s/ Willie A. Daigle" (Changes underscored)

In January 1952 the last draft of the form of a lease prepared by the plaintiff's attorney was sent to the defendant's attorney. The lease contained the terms of the October 30th agreement, somewhat amplified, as one would expect, together with minor changes and additions agreed upon by the parties.

The lease ran, however, not to the plaintiff corporation as lessee, but to "Landau-Madawaska Corporation." The defendant was informed by the plaintiff that this corporation was a wholly owned subsidiary of the plaintiff, organized in accordance with plaintiff's practice in opening a new store.

The single justice in his findings and opinion says on this point:

> "The evidence is to the effect that the defendant, Willie A. Daigle, was advised that plaintiff corporation would guarantee the rent and at the time this lease was presented to the defendant, Willie A. Daigle, the evidence is that this defendant made no comment."
>
> * * * * * * * * * * *
>
> "While it is contended that the defendant is absolved from liability because he was presented with a lease in which a subsidiary corporation was named as lessee, it seems clear from the evidence that this was not the reason which motivated the defendant in his failure to comply with the terms of the original agreement. Undoubtedly, if the plaintiff corporation had insisted that a lease should be given to the new corporation, the defendant, Willie A. Daigle, would have been under no legal duty to execute such a lease."

It developed that the cost of alterations under specifications prepared by architects employed by the plaintiff would exceed $80,000. The defendant was unable to raise such an amount. Mr. Rabinow, or his company, tried without success to obtain needed mortgage money. Negotiations ended and the defendant in the fall of 1952 leased the store to another lessee and mortgaged the premises to his son.

There is no error in the finding that the agreement of October 30, *supra,* "constituted a final and binding agreement for a lease." The defendant contends in substance that all that took place on October 30 and subsequently was no more than negotiation looking toward an agreement. The terms of the October 30th agreement, however, were sufficiently definite and certain in the opinion of the fact-finder to form a contract.

It was unquestioned that the parties intended to execute a lease. Was the lease to be the "convenient memorial" of the October 30th agreement, or was it to be the first and final agreement, or the "consummation of negotiations"? In our opinion the intention to execute a formal lease did not negative the intention that the October 30th agreement was binding.

The general rule is set forth in *Steamship Co.* v. *Swift,* 86 Me. 248, 258, 29 A. 1063, 41 A. S. 545, as follows:

> "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."

See also *Berman* v. *Rosenberg*, 115 Me. 19, 97 A. 6; Annot. 122 A. L. R. 1217, 1221, 1247; Annot. 165 A. L. R. 756.

The defendant also urges that the agreement of October 30th was made upon the condition that the contemplated changes would not cost over $35,000, and that accordingly the agreement ended when it appeared the cost would exceed the outside limit.

The single justice found for the plaintiff on the issue of fact. In brief, the defendant made an agreement to lease the store as altered under certain specifications. The fact that he could not carry out his agreement through inability to finance the required changes did not relieve him from the burden of his contract with the plaintiff. See *Grayson-Robinson Stores* v. *Iris Const. Corp.*, 202 N. Y. S. (2nd) 303 (C. A. 1960), involving specific performance.

Second — The plaintiff's appeal is dismissed. The single justice found:

> "In its claim for damages, the plaintiff corporation has introduced evidence of charges for time spent by some of its salaried officers. I find that this is not a proper element of damage. However, the plaintiff corporation is entitled to reimbursement for actual expenses made in reliance upon the contract entered into with the defendant, Willie A. Daigle. The evidence shows such disbursements, including fees paid to an architect, to be in the amount of $2,907.21.
>
> "Plaintiff also claims damages resulting from the loss of the lease of the premises. The only evidence which supports such a contention is based on conjecture. I find that the lease had no value over and above the rent to be paid."

The measure of damages is the difference between the rental value of the store to be altered for use of the lessee under the agreement and the rent reserved, with such special damages as may have been within the contemplation

of the parties. *Brown* v. *Linn Woolen Co.*, 114 Me. 266, 95 A. 1037; *Small* v. *Clark*, 97 Me. 304, 54 A. 758; Sedgwick, Elements of Damages, p. 310.

The measure of damages is stated in 1 American Law of Property § 3.52, p. 285, as follows:

> "Where the lessee has been evicted from the premises by the lessor and sues for damages for breach of the covenant of quiet enjoyment the general rule is that the measure of damages is the difference between the rental value of the premises for the remainder of the term and the rent reserved in the lease, with such special damages as may have been within the contemplation of the parties."

The same rule is applicable for breach of an agreement to erect a building for use of the lessee. *Huyler's* v. *Ritz-Carlton Restaurant & Hotel Co.*, 6 F. (2nd) 404 (D. C. Del.); *Neal* v. *Jefferson*, 212 Mass. 517, 99 N. E. 334, 41 L.R.A. N.S. 387 (prospective profits summer hotel allowed); *Sinclair Refining Co.* v. *Gutowski*, 195 F. (2nd) 637 (C. A. 6), on recovery of anticipated profits; 5 Williston, Contracts § 1405 (rev. ed.); 51 C. J. S., *Landlord & tenant* § 314, p. 978.

For convenience we dispose first of the claim for special damages. There is no question about the damages of $2907.21 for architect's fees and other expenses. The single justice refused to include in his award any charges for time spent on the Daigle agreement by salaried employees. We are unable, as was he, to trace any loss to the plaintiff directly to this cause. Damages on this score could have been reached only by guess, surmise, or conjecture — an unsatisfactory basis for the award of damages.

The main contention of the plaintiff is in the field of general damages, that is to say, in damages arising from the difference between the value of the lease the plaintiff was entitled to receive, and the rent reserved.

We have here the percentage lease, in which typically the lessee agrees to pay annually a stated minimum, plus a percentage of sales, not to exceed a fixed maximum. Such a lease is particularly adaptable, to summarize one commentator, to a new enterprise which will produce unknown returns and where it is difficult to fix a fair rental. 28 Temple Law Quarterly, 277 (1954-55). It is unnecessary here to discuss the advantages and disadvantages of percentage leases to landlords and tenants. For material on such leases and problems raised thereby see notes 61 Harvard Law Rev. 316 (1948) ; 44 Cornell Law Quarterly 251 (1959) ; 12 Oklahoma Law Rev. 293 (1959) ; Landis on Problems in Drafting Percentage Leases, 36 Boston U. Law Rev. 190 (1956).

Witnesses for the plaintiff, including Mr. Rabinow, testified that a normal basis for rental of a store of this type would be at least 5% of sales per annum. The agreement of October 30th carried an annual rental of $7200 plus 4% of sales above $175,000, or approximately 4% of sales, with a maximum of $15,000.

From 1956 to the time of hearing the plaintiff leased and operated a store in Madawaska. It was established, as we read the record, that the location of the store was inferior to the location of defendant's property, that the gross annual sales averaged approximately $275,000, and that the rental was at least $15,000 a year after deduction of taxes, insurance, repairs, and heating.

The plaintiff estimates its minimum annual loss for the lease period in this manner:

(1)	$275,000 estimated sales	
	Rent at 5%	$13,750
	Agreed rent at $7200 plus 4% of $100,000	11,200
	Loss	$ 2,550

(2)	$310,000 estimated sales	
	Rent in fact paid	$15,000
	Agreed rent at $7200 plus 4% of $135,000	12,600
	Loss	$ 2,400

The value of a lease with the rent reserved based largely on a percentage of sales, or in other words, upon a partnership of lessor and lessee within the range of minimum and maximum rent, cannot be clearly measured against the value of a lease with a flat rental without regard to volume of business. Let us suppose gross sales reached $370,000, the rental under the lease from the third party would remain $15,000, and the rental under the October 30th agreement would also be $15,000. The greater the sales the less would be the loss to the plaintiff.

The comparison, however, between percentage rentals of 5% and 4% may readily be made. The obvious annual loss is 1% of the sales, other conditions of the lease remaining constant. The single justice was not compelled to accept the evidence of the plaintiff that 5% was the point of departure to determine the loss. The real estate expert, acting in the first instance for the plaintiff, secured this lease at 4% (or very nearly 4%) and at the same time considered he was entitled to a substantial commission on a percentage basis from the defendant. Another witness on the 5% basis was an employee of the plaintiff. There was the further question whether the experience elsewhere in New England should govern in Madawaska. On plaintiff's theory the lease under the agreement was worth 25% more than the rent reserved.

From the record we are left with the belief that the plaintiff failed to show that the proposed lease did not represent fair value to both parties for the store with proposed alterations for the term of the lease.

The entry will be

Decree affirmed.

Appeals of plaintiff and defendant dismissed without costs.

ERIC F. UHL
vs.
OAKDALE AUTO COMPANY

Androscoggin. Opinion, May 15, 1961.

Trover. Minors. Marriage.
Sales. Disaffirmance.
R. S., 1954, Chap. 166, Sec. 35.

A married male upon reaching 21 years of age under R. S., 1954, Chap. 166, Sec. 35, has no right to disaffirm the purchase and sale to him of an automobile, solely on the grounds of infancy.

cf. Chap. 119, Sec. 2 which does not apply to suits brought by an infant.

ON APPEAL.

This is an appeal before the Law Court. Appeal denied.

Ronald A. Hart, for plaintiff.

Thomas E. Day, Jr., for defendant.

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

SIDDALL, J. On Appeal. This is an action of trover brought under the old rules of court by writ dated November 19, 1959. The case was heard by the court below without a jury upon an agreed statement of facts.

The plaintiff bought an Oldsmobile automobile from the defendant and turned over to the defendant as a part of the purchase price a Ford automobile which was the subject matter of the trover suit. After credit had been given for the agreed value of the Ford automobile, the balance of the purchase price was payable in monthly installments. The plaintiff at the time of the transaction was a married male under the age of twenty-one years of age. Later, the Oldsmobile was repossessed by the assignee of the conditional sales contract and turned over to the defendant. The Ford car was repaired and sold by the defendant. After attaining his majority the plaintiff brought an action of trover against the defendant for the value of the Ford car. The court ruled that under the provisions of R. S., 1954, Chap. 166, Sec. 35, the plaintiff could not disaffirm the sale, and found for the defendant. Under the new Maine Rules of Civil Procedure, then in force, the plaintiff appealed. The only issue presented by the appeal is whether or not the plaintiff upon attaining his majority had the right to disaffirm the sale of the Ford car.

That portion of R. S., 1954, Chap. 166, Sec. 35 pertinent to the issue in this case reads as follows:

> "A married person, widow or widower of any age may own in his or her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, mortgage, convey and devise the same by will without the joinder or assent of husband or wife; but such conveyance without the joinder or assent of the husband or wife shall not bar his or her right and interest by descent in the estate so conveyed."

The plaintiff contends that the foregoing statutory provision does not remove the right of disaffirmance of a contract on the part of a married male under the age of twenty-one years, and he cites the recent case of *Spaulding* v. *New England Furniture Co.*, 154 Me. 330, 147 A. (2nd) 916.

This was an action brought under the old rules of court by a married male minor to recover money paid by him upon a conditional sales contract. The case was heard by a referee who found for the plaintiff. Objections to the acceptance of the referee's report were filed by the defendant. The objections were overruled, and the report was accepted by the court below. The defendant filed exceptions. Under the old rule 21, objections to the acceptance of a referee's report must specifically set forth the grounds of objections, and these only shall be considered by the court. The question of the applicability of the statute was not raised in the objections filed by the defendant in that case. The sole issue before this court on the pleadings, as asserted by both parties in their briefs and arguments, was whether the articles involved in this case were "necessaries" within the meaning of the Uniform Sales Act, R. S., 1954, Chap. 185, Sec. 2, and the general law of infants. The case was argued and decided upon that issue alone, and the decision has no bearing on the issue raised in this case.

A review of the history of the statute in question may be helpful. At common law, upon marriage, a husband and wife, in legal contemplation, became one person, and that person was the husband. A married woman was incapable of binding herself by contract or of acquiring or disposing of property. The first statutory modification of the common law occurred in 1844. (P. L., Chap. 117.) Under this legislation a married woman was given the right to hold property in her own name. By P. L., 1852, Chap. 227, a married woman seized and possessed of property, real or personal, was given the power to lease, sell, convey, and dispose of the same, and to execute all papers necessary therefor in her own name, as if she were unmarried. At the time this act was in force, the legislature passed an act (P. L., 1852, Chap. 291, Sec. 3) which provided that "Any married woman *under the age of twenty-one years* shall have, and may exercise, all the rights, privileges and powers

enumerated in the several acts now in force, securing to married women their rights in property in the same manner and with the same effect as though she were of full age." These legislative provisions, and others, relating to the rights of married women, were consolidated in R. S., 1857, Chap. 61. The pertinent portion of Sec. 1 of that statute reads as follows:

> "A married woman, of any age, may own in her own right, real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, as if sole, and without the joinder or assent of her husband;"

This provision, in the same language, with the exception of the omission of the words "as if sole" is found in all subsequent revisions of our statutes to and including R. S., 1944, Chap. 153, Sec. 35.

The provisions of R. S., 1944, Chap. 153, Sec. 35 were amended by P. L., 1951, Chap. 375, Sec. 2 by the addition of language by which the section applied to a "married person, widow, or widower." Sec. 35 was also amended by P. L., 1953, Chap. 43, Sec. 4, by adding the word "mortgage" to the other provisions of the section. With these two amendments, the pertinent provisions of the legislation are as they appear in that portion of R. S., 1954, Chap. 166, Sec. 35, above set forth.

In 1914 this court decided the case of *Fields* v. *Mitchell,* reported in 112 Me. 368, 92 A. 292. In that case the plaintiff, a married female under the age of twenty-one years, conveyed certain premises to the defendant's predecessor in title. After becoming twenty-one years of age, the plaintiff brought a real action to recover the real estate. The issue in the case was whether the plaintiff could disaffirm the sale and recover the real estate after arriving at the age of twenty-one years. The decision called for the construction

of R. S., 1903, Chap. 63, Sec. 1 (now, as amended, R. S., 1954, Chap. 166, Sec. 35). On page 370 the court said:

> "Since that date [1852] in this State all married women have possessed the same rights regarding the sale of their property whether under twenty-one years of age or over. In the revision of 1857, these statutes were condensed, but the meaning was preserved in these words: 'A married woman, of any age, may own in her own right, real and personal estate acquired by descent, gift or purchase' &c., R.S., 1857, Chap. 61, Sec. 1. And the same language unmodified and unamended has been retained in the subsequent revisions. R.S., 1871, Chap. 61, Sec. 1; R.S. 1883, Chap. 61, Sec. 1; R.S., 1903, Chap. 63, Sec. 1. A study therefore of the original Act from which the present statute is derived leads to the inevitable conclusion that the sale of real estate by a married infant is not voidable on the ground of infancy."

R. S., 1954, Chap. 166, Sec. 35, was in derogation of the common law and must be strictly construed. The legislation did not purport to remove *all* disabilities of a married male under twenty-one years of age. We are concerned solely with the question of whether or not the plaintiff, in view of this legislation, can, on the ground of infancy, legally disaffirm the sale of personal property made by him to the defendant.

In the *Fields* case the issue was whether a married female under the age of twenty-one years of age could disaffirm the sale of real estate. In this case the issue is whether a married male under the age of twenty-one years of age may disaffirm the sale of personal property. The principle involved in both cases is the same. We hold that under the statute the plaintiff had no right to render void the sale of the Ford automobile by disaffirmance after becoming of age, solely on the ground of infancy.

As bearing on the question of legislative intent in interpreting the provisions of R. S., 1954, Chap. 166, Sec. 35, the plaintiff refers to R. S., 1954, Chap. 119, Sec. 2. This latter statute provides that no action shall be maintained on any contract made by a minor, with certain exceptions immaterial here, unless the contract is ratified in writing after the minor arrives at the age of twenty-one years. This legislation was originally enacted in 1845. (P. L., 1845, Chap. 166.) It does not apply to suits brought *by* an infant. *Whitman* v. *Allen,* 123 Me. 1, 5, 121 A. 161. This statute is modified by R. S., 1954, Chap. 166, Sec. 35 in suits brought *against* a married person under the age of twenty-one years in those cases in which the infant may make legal binding contracts by virtue of the provisions of said section 35.

The ruling of the court below that the plaintiff could not avoid the sale to the defendant was correct.

The entry will be

Appeal denied.

STATE OF MAINE
vs.
RICHARD F. HUFF

Cumberland. Opinion, June 5, 1961.

Criminal Law. Embezzlement.
R. S. 1954, Chap. 132, Sec. 7.
Evidence. Best Evidence. Experts.

In an action of larceny by embezzlement it is error for the presiding justice to refuse to charge the jury in substance that felonious intent is not proved if respondent in good faith entertained an honest and well founded belief that he had a right to do what he did.

A respondent is entitled to an instruction which states in substance that respondent is not guilty if the jury finds respondent did not convert money, the property of another, to his own use.

It is error for the court to refuse an instruction that a Town Ordinance relating to clerk fees was null and void, because of R. S. 1954, Chap. 91, Sec. 28, where the ownership of fees is directly in issue.

Testimony of a State Auditor beyond his competence as a witness should be excluded.

Where a proper foundation is laid, an expert or qualified accountant is usually permitted to summarize information contained in voluminous records, thereby relaxing the best evidence rule.

ON EXCEPTIONS AND APPEAL.

This is a criminal action before the Law Court upon appeal and exceptions. Appeal denied. Exceptions 2, 3, 4, 5, 6, 13 sustained. Exceptions 1, 7, 8-12 inc.; 14-22 incl.; 23, 24 overruled.

NEW TRIAL ORDERED.

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

Arthur Chapman, Jr., Co. Atty., for state.

Basil A. Latty,
Carl G. Usher, for defendant.

WEBBER, J. The respondent here was convicted of embezzlement of municipal funds under the provisions of R. S. Chap. 132, Sec. 7. The applicable portions of the statute are:

> "Sec. 7. Larceny by embezzlement or fraudulent conversion of property; receiver liable. If * * * a public officer (or) collector of taxes * * * embezzles or fraudulently converts to his own use * * *any money in his possession or under his control by virtue of his office * * *, he is guilty of larceny * * *."

The respondent occupied simultaneously the offices of treasurer, tax collector, and town clerk for several years in the town of Gorham. In 1955 and 1956 the respondent made five payments to himself by checks drawn upon the bank account in which funds of the town were maintained. The indictment charges in effect that the appropriation of these five sums by the respondent constituted embezzlement.

The respondent asserts as his principal defense that his own funds, fees which belonged to him in his capacity as town clerk, were commingled with those of the town and that he withdrew only such funds, the same being his own property. He further asserts that if the funds withdrawn are shown to have been funds of the town, then in any event he entertained in good faith an honest and well-founded belief that such funds were in fact his own.

The respondent brings forward his appeal and twenty-four exceptions. The appeal and his exception to the refusal of the presiding justice to direct a verdict raise the same issue and may be first considered.

A review of the evidence discloses that the jury could find on the basis of evidence properly admitted that the respondent, in his capacity as treasurer but without warrant from the selectmen as required by law, issued the five checks on which the indictment is based; that these checks, drawn upon the bank account in which town funds were maintained, were made payable to himself; that they were deposited in his personal bank account and used by him for his own purposes and in discharge of his personal obligations; that insofar as any fees which came into his hands as town clerk were deposited in the bank account maintained by the town for its town funds, they were so commingled with funds of the town produced by the collection of taxes as to retain no separate identity as fees; and that the total deposits made by the respondent into the town account were substantially less than the total sums for which he issued treasurer's receipts. In this connection it must be borne in mind that no treasurer's receipts were issued for fees received by the respondent as town clerk. On this evidence the jury could reasonably and properly conclude that if the respondent had deposited his fees in the town account as he testified he had done, his deposits would necessarily have exceeded his treasurer's receipts by the amount of such fees; that the respondent misappropriated and failed to deposit funds which belonged to the town and was short by a substantial amount; that the only funds remaining in the town account when he drew the five checks in question were town funds; that when he made these payments to himself he was in truth and in fact knowingly converting town funds to which he had no right; and that on the basis of the facts and existing circumstances he could not rationally have entertained an honest and well-founded belief that he had any right to the money. The jury could find his felonious intent from his acts and conduct and the surrounding circumstances. A conviction was thereby warranted and the respondent takes nothing by his appeal and his first exception.

EXCEPTIONS 2 AND 6. The presiding justice gave this instruction to the jury: "If you found, or if you find, that he withdrew town funds, that is, funds belonging to the town collected from taxes, or other purposes in connection with a town clerk's duties, and he converted such funds to his own use, you, of course, would have the duty to find the respondent guilty." To this instruction the respondent seasonably noted his exception. On its face the instruction fails to include the essential element that felonious intent must be shown beyond a reasonable doubt. *State* v. *Smith,* 140 Me. 255. We look elsewhere in the charge to see whether the necessity of proof of felonious intent is fully and adequately covered. Although there are references to intent, we do not find any clear and unambiguous instruction upon this important element of proof. Apparently in an effort to remedy the omission, the respondent requested that the following instruction be given: "The State must prove beyond a reasonable doubt that the respondent had a felonious intent to convert the property of the town of Gorham to his own use, and if you find that the respondent, in good faith, honestly believed that he had a right to do what he did, then the State has not proved his felonious intent, even though by law he did not have a legal right to do so." As was stated in *State* v. *Smith, supra,* at page 271, this instruction is a not inaccurate statement of the applicable law "providing the belief is 'honest and well founded.' " If the respondent had substituted for the words "honestly believed" the words "entertained an honest and well founded belief," the requested instruction would have rested squarely on the language suggested in Smith. We think that at least the substance of this requested instruction should have been given under the circumstances. The second and sixth exceptions must be sustained.

EXCEPTIONS 3 AND 4. The respondent requested the following instruction which was refused: "If you find that Richard Huff did not convert money, the property of the

town of Gorham, to his own use, then you should find him not guilty." This instruction takes into account the essential fact that the crime involved is not withdrawing funds from the town account without warrant, but rather is the embezzlement or fraudulent conversion of the town funds with the felonious intent essential thereto. We do not find elsewhere in the charge any instruction which precisely and unconditionally covers as does the requested instruction the situation which would exist if the jury found that the respondent converted funds in the town account without warrant and even with a felonious intent, but in fact the funds did not belong to the town. The requested instruction or its substance should have been given and the third exception must therefore be sustained. The fourth exception deals with a requested instruction which is virtually an amplification of the one above quoted and the same principles apply.

EXCEPTION 5. The following instruction was requested and refused: "I instruct you as a matter of law that the fees of the town clerk of Gorham were always the property of the holder of that office, and the ordinance of the town of Gorham appropriating those fees to the town of Gorham was null and void and of no legal effect."

R. S. 1954, Chap. 91, Sec. 28 provided specifically for certain fees to be received by the clerks of cities and towns. The scheduled fees were the property of the clerk. This statute was in effect during the years involved in the instant case and remained in effect until by P. L. 1957, Chap. 405, the revision of the law relating to municipalities was enacted which is now R. S. Chap. 90A. We note with interest that Sec. 48 of the present law includes the following: "A municipality may provide for a salary to be paid to the clerk as full compensation, in which case the fees accrue to the municipality." This significant provision was not a part of the law prior to 1957.

The respondent was first elected town clerk in 1952. In his first year of office his salary was fixed by the town for the three offices he held at $3,000 per year with a provision that the town would retain all clerk fees. In the following year the salary was increased to $3500 but, perhaps through inadvertence, no reference to the retention of clerk fees was included in the vote. Thereafter the salary was reduced to $2,000, perhaps in recognition of the lawful right of the clerk to retain his fees.

We are satisfied that until the enactment of the above-quoted provision now contained in Chap. 90A, an attempted vote of the town seeking to appropriate to itself the statutory fees of the clerk was in contravention of the statute and therefore null and void. Since the respondent placed in issue the ownership of the fees in his first years in office by asserting he was only taking what was lawfully his, he was entitled to have the jury instructed substantially in accordance with his request. The fifth exception must be sustained.

EXCEPTION 7. This exception relates to a requested instruction which was refused. In view of the foregoing holding on exceptions 2 to 6 inclusive, it is unnecessary to discuss this exception in detail. We are satisfied that the respondent was not entitled to the instruction in the form proposed and if the requested instructions heretofore discussed had been given to the jury, in our view the substance of this instruction would not have been necessary.

EXCEPTIONS 8 TO 12 INCLUSIVE. These exceptions involve rulings on evidence in which we note no error on the part of the presiding justice and no prejudice to the rights of the respondent. Since no important rules of law are involved, it seems unnecessary to discuss these rulings in detail.

EXCEPTION 13. A witness who was qualified as an expert auditor and accountant was asked by the attorney for

the State on direct examination: "Q. Mr. Emery, as a result of your auditing did you find that the town of Gorham owed Mr. Huff an amount of money equal to those five checks you have in your hand?" Over the respondent's objection, witness was permitted to answer and stated, "A. No, I found that there was no such sum of money owed Mr. Huff." The respondent gave as the basis of his objection that any testimony the witness might give along the lines suggested by the question would be based upon incomplete records, "written hearsay", and would call for the legal conclusion of a layman. The objection should have been sustained. The question called for a mixed conclusion of fact and law which was beyond the competence of the witness.

EXCEPTIONS 14 TO 22 INCLUSIVE. These exceptions involve rulings by the presiding justice on proffered evidence in which we note no error and no prejudice to the respondent. Since no questions of law of particular significance are involved it is unnecessary to discuss these exceptions in detail.

EXCEPTIONS 23 AND 24. The auditor, Mr. Emery, testifying for the State in rebuttal was permitted over the respondent's objection to testify in one instance that for the fiscal year ending February 5, 1956 the treasurer's receipts totalled $472,969.45 and his bank deposits $468,557.86, and in the second instance that for the fiscal year ending February 4, 1957 the receipts totalled $704,910.56 and the deposits $688,406.96. The only reason offered by the respondent in support of his objection was that this was not proper rebuttal. This being the sole ground of objection, the presiding justice properly admitted the evidence. The respondent had testified in his own defense that all of his town clerk fees were deposited in the town account. He further admitted that if this were the fact the deposits for the years in question should have exceeded the treasurer's receipts. The rebuttal testimony directly and properly attacked the veracity of the respondent on this material issue.

In view of the fact that this case will be retried, it may be noted that the respondent might have urged that no proper foundation had been laid for the testimony. In this connection it is noted that courts quite uniformly permit relaxation of the best evidence rule where records are voluminous and involve intricate details so that an inspection thereof would seriously and unnecessarily delay and inconvenience the court and jury. In such a case an expert and qualified accountant or auditor is usually permitted to summarize information contained therein. However, the justification for the relaxation of the rule should be first established. The records which form the basis of the summary by the expert witness should be in court or at least available to the opposing party for inspection. No such relaxation of the rule is warranted where there is no preliminary showing as to the nature or volume of the records used by the witness and no evidence suggesting the difficulty or impossibility attending the production of the records in court and their examination and analysis as evidence by the court and jury. *People* v. *Gerold,* 265 Ill. 448, 107 N. E. 165; *State* v. *Phillips,* 175 Kan. 50, 259 P. 2d 185, 189; Anno. 66 ALR 1206; 20 Am. Jur. 398, Sec. 449; Wigmore on Evidence, 3rd Ed., Vol. IV, Page 434, Sec. 1230 (and cases cited in text and supplement).

Accordingly the entry will be

Appeal denied.

Exceptions 2, 3, 4, 5, 6, 13 sustained.

Exceptions 1, 7, 8 to 12 inc., 14 to 22 inc., 23, 24 overruled.

New trial ordered.

FIRST PORTLAND NATIONAL BANK AS TRUSTEE UNDER THE WILL OF CHARLES R. CRESSEY *vs.* ALICE F. RODRIQUE, ET AL.

Cumberland. Opinion, June 9, 1961

Wills. Trusts. Perpetuities. Constructions. R. S., 1954, Chap. 160, Sec. 27. Powers.

R. S., 1954, Chap. 107, Sec. 4 authorizes the Supreme Judicial Court to determine the construction of wills; and in cases of doubt, the mode of executing a trust. While the court has refrained, as a matter of judicial policy, from prematurely deciding issues, the power of court should be exercised where the distribution of the residue is inextricably interwoven with a present issue of distribution of income which has accumulated and which will be received during the continuance of the trust, and (2) the judiciary is faced with an imminent problem, which indicates the necessity and desirability of immediate answers.

The rule against perpetuities voids a grant of property wherein the vesting of an estate or interest is postponed beyond the life or lives in being 21 years and nine months thereafter. Estates or interests dependent upon such grants are void.

Where an estate is limited on alternative contingencies, one of which offends the rule while the other does not, the invalid provision does not affect the validity of the other if the event happens upon which the taking effect of such other is contingent.

There is no conflict between the doctrine of "alternative contingencies" and P. L., 1955, Chap. 244 (R. S., 1954, Chap. 160, Sec. 27 as amended).

It is the law of this state that upon default of a power of appointment by a donee, a court of equity will exercise the power, if, according to the provisions of the will, such power is made imperative upon the donee.

A power is made imperative if it appears from the instrument as a whole that an obligation to exercise the power was contemplated by the donor of the power.

Where the donees of an implied trust are sufficiently identified and there has been a default of an exercise of a power, the property should be divided equally among the beneficiaries.

ON REPORT

This is a complaint for interpretation and construction of a will before the Law Court on report. M.R.C.P. 72(a). The cause is remanded to the court below for the entry of a decree in accordance with the opinion. Council fees and expenses are allowed to all counsel, the amount thereof to be fixed by the justice below, such costs and expenses to be pro rated between the assets in the trusts set up under the provisions of the Second and Fourth paragraphs of the will.

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

OPINION: DUBORD, J.

Drummond & Drummond, for plaintiff.

Arthur D. Welch, Portland, Me.
Waterhouse, Spencer & Carroll, Biddeford, Me.
William B. Mahoney, Portland, Me.
Vincent L. McKusick, Portland, Me.
Daniel E. Crowley, Biddeford, Me.
Gerald C. Nason, Biddeford, Me.
Edward F. Dana, Portland, Me.
M. Donald Gardner, Portland, Me.
Miss Sigrid E. Tompkins, Portland, Me.
for defendants.

DUBORD, J. This cause is before us on report in accordance with the provisions of M.R.C.P. 72 (a).

The complaint was instituted in the Superior Court within and for the County of Cumberland by the First Portland National Bank, which later changed its name to First Na-

tional Bank of Portland, as successor trustee under the will of Charles R. Cressey, late of Portland, Maine.

The complaint seeks an interpretation and construction of the will and codicil of Charles R. Cressey, together with an inter vivos trust agreement entered into between Alice F. Cressey, widow of Charles R. Cressey and the residuary beneficiaries under the will of Charles R. Cressey. The complaint requests the court for instructions as to present distribution of the income from the assets now held in trust and for final distribution of the assets upon the death of the surviving widow.

Charles R. Cressey executed his last will and testament, which is now before us for consideration on March 12, 1926, and he executed a codicil thereto on July 14, 1927. The changes in the will made by the codicil have no bearing upon the present issues.

Charles R. Cressey's first wife died and he subsequently married Alice Faustina O'Neil.

Charles R. Cressey was survived by his widow and four children by a prior marriage: George F. Cressey, Helen C. Stanwood, Marcia C. Passage and William R. Cressey, as well as by a foster daughter, Eleanor Roberts.

Marcia C. Passage died May 5, 1937; Helen C. Stanwood died May 3, 1944; George F. Cressey died February 2, 1946; and William R. Cressey died August 12, 1958.

In this action the personal representatives of all four children of the testator are named as parties defendant. Two of the children, Marcia C. Passage and William R. Cressey, died leaving no issue surviving. Helen C. Stanwood was survived by two children, Carolyn S. Whiting and George Philip Stanwood, both of whom are named as parties defendant. George F. Cressey was survived by one child, W. Churchill Cressey, who is named as a party defendant.

All three of these grandchildren of the testator themselves have children who are named as parties defendant. These great grandchildren are minors. George F. Cressey 2nd, is the son of W. Churchill Cressey. Anne C. Whiting and Webster S. Whiting are children of Carolyn S. Whiting, and George K. C. Stanwood and Diana M. Stanwood are children of George Philip Stanwood. These great grandchildren are also named as defendants and are represented by a guardian ad litem.

All unborn issue of George F. Cressey and all unborn issue of Helen C. Stanwood are named as defendants and are represented by a guardian ad litem. The foster daughter, Eleanor Roberts, who is still living was also made a defendant as well as the surviving widow, Alice F. Cressey, now Alice F. Rodrique. All defendants appeared in the action and are represented by counsel.

Prior to the marriage between Charles R. Cressey and Alice Faustina O'Neil, they entered into an ante-nuptial agreement under the provisions of which Charles R. Cressey agreed with Alice Faustina O'Neil that his estate would be bound to her for an annual payment of $1500.00 during her lifetime, in lieu of her rights by descent; and the said Alice Faustina O'Neil under the provisions of said agreement waived all other rights in the estate of her intended husband. In like manner, Charles R. Cressey released his intended wife of all claims against her estate.

The issues appear to revolve around the provisions of the second and fourth paragraphs of the will of Charles R. Cressey and the inter vivos trust previously referred to, which was executed on September 3, 1936.

The second paragraph of the will of Charles R. Cressey read as follows:

> "SECOND: All of the shares of the capital stock of Cressey & Allen, which I may own at the time

of my decease, I give and bequeath to my son George, to have and to hold in trust nevertheless, upon the following terms and conditions: To manage, control and vote the said stock as he deems best; and from the net income arising from said stock to pay annually to my wife, Alice Fostina Cressey, during the term of her natural life the sum of Fifteen Hundred Dollars ($1500), payable in quarterly installments of Three Hundred Seventy-Five ($375) each, and to pay the balance of said annual income as follows: To my son William, the income from one hundred (100) shares of said capital stock; and the income then remaining to pay in equal portions to my daughters, Helen Cressey Stanwood and Marcia Cressey, and my said sons William Cressey and George Cressey. I direct that my Trustee, if he for any reason deems it advisable, shall have the power and authority to sell and dispose of the said shares of capital stock so held in trust by him; and the proceeds thereof shall be reinvested and held by him during the lifetime of my wife, in trust according to the terms above set forth. At the decease of my said wife if the trust shall have been in operation and effect for a period of twenty-five years, or if the stock of Cressey & Allen shall have been sold by my Trustee, it (the Trust) shall thereupon terminate and the principal of said trust fund shall be distributed as follows:—first; to my son, William one hundred (100) shares of the capital stock of said Cressey & Allen or if the same shall have been sold the equivalent money value thereof; second; the remaining portion of said trust fund shall be distributed in equal portions to my said children, Helen, Marcia, William and George, issue of a deceased child to take its parent's share by right of representation; in the event that any of my said children shall have died prior to the termination of said trust leaving no children living or issue of a deceased child, his or her portion of said trust fund on the termination of said trust, and the income from the trust during its continuance shall be divided equally among his or

her brothers and sisters; but in the event that the decease of my said wife shall take place before the said trust shall have been in operation and effect for a period of twenty-five years and the principal of trust shall at her death consist of the shares of capital stock of Cressey & Allen, the said trust shall, except as hereinafter provided, continue until the said twenty-five years shall have elapsed, the amounts heretofore paid to my said wife being thereafterward divided equally among my said children, Helen, Marcia, William and George; at the expiration of the said twenty-five years the trust shall terminate, unless sooner terminated as hereinafter stipulated, and the principal of the trust fund shall be distributed to the said parties and in the manner provided for its distribution at the death of my wife the same occurring after the twenty-five year period; but in the event that my said Trustee shall after the decease of my said wife and prior to the expiration of the twenty-five year period, deems it advisable to sell and dispose of the said shares of capital stock so held in trust by him, the trust shall thereupon immediately terminate and the proceeds thereof shall be distributed to the said parties and in the said manner as hereinabove provided."

The fourth paragraph reads as follows:

"FOURTH: All the rest, residue and remainder of my property, whether real, personal or mixed, and wheresoever situate, of which I may die seized and possessed, I give, devise and bequeath to my son, George, for him to distribute between his sisters, Helen and Marcia, and our former ward, Eleanor Roberts, who was brought up in our family, and his brother William and himself in such amounts and proportions as he deems just and proper . . . . . My said son shall have full and complete authority to make the distribution called for in this clause, including the right and power to convey real estate by good and sufficient deed without other or further authorization. His judg-

> ment as to the method and amount of said distribution shall be final and conclusive on all parties."

Without discussing in detail at this time the provisions of the 1936 trust agreement, in substance all of the beneficiaries under the will of Charles R. Cressey assigned to the testamentary trustee all of their interest in the estate, and particularly their interests in the assets covered under the provisions of the fourth paragraph of the will, in order to insure there might be sufficient income to pay to the surviving widow the annual amount of $1500.00 as provided in the ante-nuptial agreement.

By the second paragraph of the will, the testator created a trust, the corpus of which consisted solely of 655 shares of the capital stock of Cressey & Allen, which the testator owned at the time of his death. All 655 shares of this stock were sold in 1948 and so the corpus of the trust created under the second paragraph of the will now consists of the proceeds of the sale.

By the terms of Charles R. Cressey's will (and also under the 1936 trust), George F. Cressey, son of Charles R. Cressey, served as trustee until his death in 1946. Thereupon the First Portland National Bank, now First National Bank of Portland was appointed as successor trustee.

For purposes of administration the trust assets have been kept in three separate trusts by the First National Bank of Portland:

(1) A so-called Article SECOND Trust A-1, the corpus of which consists of the proceeds from the sale of 100 shares of Cressey & Allen stock; (2) a so-called Article SECOND Trust A, the corpus of which represents the proceeds of the remaining 555 shares of Cressey & Allen stock; and (3) a so-called Article FOURTH Trust B, the corpus of which is the residue of Charles R. Cressey's estate, held in trust under the terms of the 1936 trust agreement. Accumulated income of the individual trusts is also held by the trustee.

Serious disputes have now arisen relating to the disbursement of income which has already accumulated from the assets in the trusts created under the will of Charles R. Cressey, as supplemented by the 1936 trust agreement, distribution of future income during the lifetime of the surviving widow, and final distribution of the assets following the death of the widow.

While all parties are in agreement as to the right of the surviving widow to receive the amount of $1500.00 annually during her lifetime, conflicting contentions and arguments are made by the various defendants relating to other issues. It is contended by some that the provisions of the second paragraph of the Charles R. Cressey will are invalid, because they are in violation of the rule against perpetuities. Other defendants contend there is no such violation.

All of the defendants, with the exception of the surviving widow, join in the prayers of the plaintiff that this court, at this time, give to the trustee the instructions which it has requested.

The first issue for our determination, therefore, is whether or not we will do so.

Briefly the trustee asks the court to determine to whom and in what proportions it should pay the income accumulated under Article SECOND Trust A, Article SECOND Trust A-1, and Article FOURTH Trust B. It also requests a determination concerning payment of the annual net income received each year during the lifetime of Alice F. Rodrique, the widow; and finally the trustee requests instructions concerning the distribution of the principal upon termination of the three trusts.

Under the provisions of Section 4, Par. X, Chapter 107, R. S., 1954, the Supreme Judicial Court is authorized to determine the construction of wills; and in cases of doubt, the mode of executing a trust.

While there is a variance in the decisions of this court as to when the facts of a given case are such as to elicit answers to propounded questions, the law appears to be well settled that in a proper case, this court will not refrain from answering questions relating to construction of wills and the administration of testamentary trusts even though actual litigation has not arisen.

The first decision of this court upon the issue appears to be that in *Baldwin, Admr.,* v. *Bean, et al.,* 59 Me. 481. In that case the court said:

> "It is an old maxim, that an ounce of prevention is worth a pound of cure; and this is as true in law as in medicine. To prevent litigation is better than to end it. If by a bill in equity the parties in interest can all be brought before the court at one time, not only may a multiplicity of suits be avoided, but a just result much more certainly obtained. * * * * * * Influenced by these considerations, we think the statute, conferring upon this court jurisdiction in equity to determine the construction of wills, ought to be liberally interpreted; and that in all cases of doubt, the parties should be allowed to have the opinion of the court, whether any actual controversies have arisen or not."

The next case is *Burgess* v. *Shepherd,* 97 Me. 522, 55 A. 415, wherein the court, while recognizing the doctrine laid down in *Baldwin* v. *Bean, supra,* declined to answer upon the theory that the plaintiff executor did not have such interest in the subject matter as to entitle him to answers to his questions.

In *Haseltine* v. *Shepherd, et al.,* 99 Me. 495, 59 A. 1025, can be found an excellent review of prior decisions of this court upon the question.

The court, citing with approval *Baldwin* v. *Bean, supra,* had this to say:

"In the light of the many decisions cited, we think there can no longer be any doubt but that the court has jurisdiction to construe a will upon the bill of a devisee, and to determine the character of the estate received by him under a devise, and the extent of his powers thereunder, as between himself and other devisees who claim, or may claim, adversely to him. It is not necessary that the claim should be controversial and litigious. It is sufficient, if doubts exist, out of which litigious claims may arise between devisees. Many of the bills referred to have been styled 'amicable bills.' They were cases where doubts existed as to the relative rights of the devisees under a will, as between themselves, and where an adjudication in advance would tend to prevent controversy.

"The benign purpose of the statute, as expressed by Judge Walton in *Baldwin* v. *Bean,* is to prevent litigation, to avoid a multiplicity of suits, or to remove clouds that may rest upon titles, that their owners may be enabled to deal with the property more understandingly, and if need be to sell it for its true value. Chief Justice Peters in *Richardson* v. *Richardson,* 80 Maine, 585, said that a bill under this statute is a privileged suit, and that the ear of the court should be open to it. The purpose of the statute thus happily stated has seemed to guide the court in all of its adjudications from *Baldwin* v. *Bean* until the present time.

"It should be said however that the court will not feel itself bound to answer all questions which can possibly be asked by a devisee. It must appear that the language of the will is such that the parties may reasonably have doubts concerning its true construction. Other parties should not be subjected to the trouble and expense of appearing in court, or the possible hazard of not appearing, in cases where there is no doubt. Again the party asking the questions must have interest in having the questions answered."

The case of *Huston, et al.* v. *Dodge, et al.,* 111 Me. 246,

88 A. 888, has been cited in support of the position that the issues in the instant case are not ripe for answer.

In that case the court said:

> "This court has jurisdiction under R. S., ch. 79, sect. 6, Par. VIII (now Chapter 107, Section 4, Par. X) upon a bill by testamentary trustees, to instruct them as to the proper mode of executing their trust, and to construe a will so far as necessary for that purpose. A trustee has no interest in the construction of the will under which he is acting except as it affects his powers and duties in the administration of his trust. *Burgess* v. *Shepherd,* 97 Maine, 522. And we do not think it wise, nor within the intent of the statute, to assume jurisdiction to advise trustees, and to construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if the trustee needs present advice to know how to meet the contingency, it will be given to him. Then the parties interested in the issue can be heard under the conditions and circumstances as they may exist at that time. They should not be prejudiced. Nor should there be any judgment until there is occasion for it."

The law enunciated in this decision was followed in *Connolly* v. *Leonard,* 114 Me. 29, 95 A. 269; and in *McCarthy* v. *McCarthy,* 121 Me. 398, 117 A. 313.

In *Moore, et al.* v. *Emery, et al.,* 137 Me. 259, 271, 18 A. (2nd) 781, the court in declining to answer had this to say:

> "With a unaminity seldom found elsewhere in the law, courts have consistently refused during the existence of a particular estate to construe wills in order to determine future rights, and it makes no difference whether the event which may give rise

> to a future controversy is certain to happen, as the death of a life tenant, or depends on a state of facts which is contingent and uncertain."

Here follows a long line of decisions of various jurisdictions including *Huston* v. *Dodge, supra,* and the court went on to say:

> "A glance at these cases will indicate the reluctance of courts to construe a will in order to decide any question which does not relate to some certain and immediate problem facing either a beneficiary or a fiduciary of an estate."

As late as our opinion in *Fiduciary Trust Co.* v. *Brown, et al.,* 152 Me. 360, 131 A. (2nd) 191, in which we cited *Huston* v. *Dodge, supra,* we declined to answer certain of the questions which had been propounded, and restricted our answers to the rights of only one of the beneficiaries.

In *Rogers* v. *Walton,* 141 Me. 91, 39 A. (2nd) 409, the court, after concluding to answer the questions which had been propounded, distinguished the *Baldwin* v. *Bean* and *Haseltine* v. *Shepherd* cases from *Moore* v. *Emery, supra,* with the following statement:

> "The statute giving to the equity court jurisdiction to construe wills should be liberally interpreted to the end that litigation may be prevented, multiplicity of suits avoided, and title to property, both real and personal, promptly settled. *Baldwin* v. *Bean,* 59 Me. 481; *Haseltine* v. *Shepherd,* 99 Me. 495, 59 A. 1025. The plaintiff, as executrix of the will of David Walton who was a beneficiary under the will of his mother, certainly had the right to bring such a bill. To be sure the question of the disposition of the corpus of the trust is not a matter of immediate concern to the trustees. But the reason for the rule laid down in *Moore* v. *Emery,* 137 Me. 259, 18 A., 2d. 781, that the court will not construe a will in order to determine future rights has no application here. The right of the plaintiff at a future time to share in the corpus of the

> estate is inextricably interwoven with her claimed present right to the income, and she has besides an immediate problem in deciding whether this right to a share in the principal of the trust should be included as an asset in the inventory of the estate of David Walton. We are met with one other requirement which gives us some concern. This is laid down in *Haseltine* v. *Shepherd,* supra, page 504, in the following language: 'It must appear that the language of the will is such that the parties may reasonably have doubts concerning its true construction.' We do not quite understand how such doubt can exist here. The language seems reasonably plain to this court even though it does not to the parties, or at least to the defendants, who have refused to make payments of the income to the executrix of their brother's estate. But we concede that their claim is honest that the will is ambiguous; and in the interest of ending a controversy and determining the rights of the parties, we shall not be too rigid in limiting our authority to act on the prayer of this bill."

The latest decisions of this court upon the point in issue are *Gannett, et al.* v. *Old Colony Trust Co., Trustees, et al.,* 155 Me. 248, 153 A. (2nd) 122, and *Swasey, et al.* v. *Chapman, et al.,* 155 Me. 408, 156 A. (2nd) 395.

In both of these cases, it was the conclusion of this court that the questions should be answered.

In *Gannett* v. *Old Colony Trust Co., supra,* we said:

> "That the court has on occasion refrained as a matter of judicial policy from prematurely deciding issues has been recognized. *Fiduciary Trust Co.* v. *Brown,* 152 Me. 360. It has never been questioned, however, that the court has power to act in an appropriate case before a contingency occurs. *Haseltine* v. *Shepherd,* 99 Me. 495, 503. We are satisfied that this is such a case."

In *Swasey* v. *Chapman, supra,* we said:

> "There are sound reasons for deciding these and certain other issues raised herein at the present time. *Fiduciary Trust Co.* v. *Brown, et al.*, 152 Me. 360, 131 A. (2nd) 191; *Gannett, et al.* v. *Old Colony Trust Co.*, 155 Me. 248, 153 A. (2nd) 122."

The questions we are asked to answer are listed in detail in the complaint, but the basic questions may be outlined as follows:

(1) Whether or not any interest created under the second paragraph of the will is void under the rule against perpetuities and, if so, what are the consequences of such violation or violations; (2) who, and in what proportions, are entitled to receive the net income from and after August 12, 1958, the date of William R. Cressey's death from Article SECOND Trust A, from Article SECOND Trust A-1, and from Article FOURTH Trust B, after the annual payment to the surviving widow of $1500.00; and (3) who, and in what proportions, are entitled to receive the principal from the aforesaid three trusts upon the death of the surviving widow?

Upon careful consideration of the matter, we are convinced that the reasons which actuated our refusal to answer some of the questions propounded in *Fiduciary Trust Co.* v. *Brown, supra,* and which prompted similar decisions in other cases, are not applicable to the present case for the reason that the distribution of the residue is inextricably interwoven with the present issue of distribution of income which has accumulated and which will be received during the continuance of the trust; and for the reason that the fiduciary is faced with an imminent problem, which indicates the necessity and desirability of immediate answers. We, therefore, conclude that the propounded questions should be answered, and we pass to the primary issue which next requires a determination, and that is whether or not any or all of the interests created

under the second paragraph of the will of Charles R. Cressey are void as in violation of the rule against perpetuities.

The classic formulation of the Rule against Perpetuities is that of Professor Gray:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

The rule is more fully expressed in the Model Rule Against Perpetuities Act, recommended by the National Conference of Commissioners on Uniform State Laws:

> "No interest in real or personal property shall be good unless it must vest not later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies." I Scott on Trusts, § 62.10, Page 540.
>
> "The rule against perpetuities was established to prevent post mortem control of property. It forbids the creation of estates which are to vest, or come into being, upon a remote contingency, and where the vesting of an estate or interest is thereby unlawfully postponed.
>
> "The rule against perpetuities concerns only remote future and contingent estates and interests. It applies equally to legal and equitable estates, to instruments executing powers, as well as to other instruments.
>
> "What then is a perpetuity?
>
> "It is a grant of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void, and estates or interests which are dependent on them are void.

> "The rule against perpetuities has no application to vested estates or interests. It concerns itself only with the vesting, the commencing of estates, and not at all with their termination. It makes no difference when such a vested estate or interest limited terminates." *Pulitzer* v. *Livingston,* 89 Me. 359, 363, 364, 365.

Application of the rule against perpetuities has confused and perplexed members of the Bench and Bar for generations. Professor W. Barton Leach of Harvard Law School was not exaggerating when he said:

> "The Rule against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself." 67 Harv. L. Rev. 1349.

It is contended by only two of the defendants, the estate of William R. Cressey and Eleanor Roberts, that the provisions of the second paragraph of the will of Charles R. Cressey are in conflict with the rule against perpetuities. All other defendants say there is no violation and they advance in support of their contention, the theory adopted in *Springfield Safe Deposit & Trust Company* v. *Ireland* (Mass.) 167 N. E. 260, to the effect that where an estate is limited on alternative contingencies, one of which offends the statute against perpetuities while the other does not, the invalid provision does not affect the validity of the other if the event happens upon which the taking effect of such other is contingent.

A study of the provisions of the second paragraph of the will now under consideration indicates that the four named children of the testator and their issue (or their brothers and sisters) were given an interest which comes into possession upon the happening of two alternative conditions, either (1) upon the death of the widow, if the trust has been in effect for twenty-five years, (or if the

Cressey & Allen stock shall have been sold,) or, (2) if not, upon a later event, either when twenty-five years shall have elapsed, or the stock shall have been sold.

It is clear that the second contingency is in violation of the rule because all lives in being at the death of the testator could have been extinguished immediately by death and still the trust might continue for more than twenty-one years.

If the termination of the trust is to be determined by contingency number one, the death of Alice, the estate would vest in interest and possession upon the death of the widow, a life in being at the time of the death of the testator. It is argued by those who support the validity of the provisions of the second paragraph of the will that the first contingency is valid because the widow is still living and that it will be her death that will mark the time of termination of the trust and the vesting of the various interests.

Although the issue presented has been determined in other jurisdictions in accordance with the contentions of those who would sustain the validity of the trust now before us, the question appears to be one of first impression before this Court.

The facts in *Springfield Safe Deposit & Trust Co.* v. *Ireland* 268 Mass. 62, 167 N. E. 261, are strikingly similar to those in the instant case. In that case, the testator, an attorney at law, died in 1891. By his will he gave his wife a legal life estate in his entire property. Upon his wife's death he established a trust of all his estate, to pay the net income to his daughter Jeannie Gordon (Ireland) during her life, and

> "at her decease, in equal shares to her children then living, the lawful issue of any her child then deceased taking by representation their parent's share: and in the month of January 1922, or of the

> first January thereafter, after the decease of said Jeannie Gordon, to convey in fee simple, transfer and pay over the same, in equal shares, to her then living children and the lawful issue of any her child then deceased, such issue taking by representation their parent's share, as tenants in common."

The Massachusetts Court in discussing the alternative contingencies upon which the trust would terminate summarized them as follows:

> "It was the apparent purpose of the testator to have the trust end and the principal of the trust conveyed and distributed in the month of January, 1922, if his daughter were then dead; but if she were then alive, that she should continue to receive the income, and the termination of the trust should be postponed to the January following her death."

Thus, the two contingencies in the *Springfield* case were (i) the death of Jeannie Gordon, and (ii) the expiration of the period from 1891 to January 1922. The later to occur of the alternative contingencies was the one that would operate to determine the time of the ending of the trust. The life tenant in the *Springfield* case, namely, Jeannie Gordon (Ireland) survived until 1928. The Massachusetts Supreme Judicial Court held that the remainder interest to be distributed upon the termination of the trust was valid under the rule against perpetuities because it was the valid alternative contingency which had eventuated.

The full statement of the Court in the *Springfield* case on the "alternative contingencies" point was as follows:

> "But the testator created an alternative contingency by which, in the event of the daughter continuing to live beyond the first designated date, the estate would vest in the January following her death in 'her then living children and the lawful issue of any her child then deceased.' Upon the

> happening of this wholly distinct and separate alternative event the estate would vest within a period not more than twelve months from the date of death of the testator's daughter—a limitation which, if standing alone, would not be too remote. The principle governing a case where a testator makes a gift over which would be void for remoteness if one contingency happens and would be valid if another independent alternative contingency happens, is stated by Gray, J., in Jackson v. Phillips, 14 Allen, 539, 572, 573: 'If therefore the gift over is limited upon a single event which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period. But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness.' The daughter having survived the date of the void limitation, the estate vested under the valid alternative contingency in Gordon Ireland in January, 1929, approximately eleven months after the date of his mother's death."

The Gordon Ireland referred to in the foregoing quotation from the *Springfield* case was the only son of the life tenant of the trust, Jeannie Gordon (Ireland).

Based upon the opinion in the *Springfield* case, counsel reasons there is no violation of the rule against perpetuities because the widow who is the life annuitant, has in fact survived the date of the void limitation and the trust will terminate and all interests vest not later than her death.

The Massachusetts Supreme Judicial Court as recently as 1952 restated and reaffirmed the "alternative contingencies" rule in *Sears* v. *Coolidge,* 329 Mass. 340, 342-43, 108 N. E. (2nd) 563, 565. See also, 64 A.L.R. 1077; *In Re: Griscom's Estate* (Pa.) 9 A. (2nd) 344, *Merchants National Bank* v. *Curtis* (N. H.) 97 A. (2nd) 207.

See also Vol. VI, American Law of Property, § 24.54 to the effect that:

> "Where a gift is made upon either of two expressed contingencies, one of which must occur, if at all, within the period of perpetuities, and the other of which may not, the gift is valid if the first contingency occurs although it is invalid if the second contingency occurs."

We think the doctrine enunciated and propounded in the *Springfield* case is a salutary one and we adopt it as the law in this jurisdiction. We, therefore, hold that the provisions of the second paragraph of the will of Charles R. Cressey do not violate the rule against perpetuities.

It is argued by counsel for the Estate of William R. Cressey that this doctrine should not be made a part of our decisional law, and that if such was the law before the enactment of Chapter 244, Public Laws of 1955 (§ 27, c. 160, R. S., 1954, as amended), there was no need of such a statute. We conceive of no conflict between the doctrine we have now adopted and this statute.

With the thought in mind that the rule against perpetuities does not apply to vested estates or interests, counsel who support the validity of the provisions of the second paragraph, furnished this court with an exhaustive study of decisions explaining the difference between vested and contingent interests. In view of the decision we have already announced upon this issue, we find it unnecessary to discuss the nature of the interests devised in the will under our consideration.

Neither is it necessary for us to discuss the effect, if any, of the inter vivos trust executed by all interested parties in the year 1936, as an affirmation of the legality and validity of the provisions of the second paragraph.

It has already been indicated that prior to the marriage between the testator and Alice Faustina O'Neil (now Alice F. Rodrique) a valid ante-nuptial agreement was executed between the parties whereby Charles R. Cressey agreed that his entire estate would be bound to his intended wife for an annual payment of $1500.00 during her lifetime. To effectuate this agreement, the testator provided under the second paragraph of his will that from the income of his Cressey & Allen stock, this annual payment should be made to his widow. Apparently, circumstances developed after the death of the testator whereby the income from the Cressey & Allen stock appeared insufficient to meet the testator's obligations. Thereupon, all interested parties, with the desire of giving effect to the wishes and legal obligations of the testator, entered into an agreement of trust on September 3, 1936, the main purpose of the agreement apparently being to charge the entire estate, including the residue, with the payment to the widow of the amount for which the estate was liable.

A detailed explanation of this agreement appears to be unnecessary. However, the agreement recognizes the validity of all of the provisions of the will and there was agreement that the assets represented by the residue should not be distributed during the lifetime of the widow. There is nothing in the trust agreement directly referring to current distribution of the income from the assets in the residue. However, it is of importance and interest to note, as an indication of the intention of the parties to the trust agreement, that prior to the appointment of the present trustee in 1946, this income had been distributed. Moreover, by a supplemental agreement dated January 20, 1945, the then sole remaining beneficiaries apparently lent their approval

to current distribution of the income from the residue. This income has now been accumulated since 1946. It is our opinion that, subject always to prior payment of the annual amount due the widow, that accumulated income from the residue should be distributed to those who are entitled thereto, and in like manner future income be distributed.

Before we are able to answer some of the questions, it is necessary that we determine the intention of the testator.

The recorded opinions of this Court are replete with decisions to the effect that it is a fundamental rule of consideration which is paramount to all others, and which should never be overlooked, that the intention of the testator as declared by the will itself shall be allowed to prevail, unless some principle of law is thereby violated. See *Wentworth* v. *Fernald,* 92 Me. 282, 42 A. 550; *Green* v. *Allen,* 132 Me. 256, 170 A. 504.

> "In construing wills for the purpose of determining this question as well as all others, the intention of the testator is to have a controlling influence in the interpretation of the clause or phrase especially involved in the inquiry, provided no settled rule of law or principle of sound public policy is thereby violated. This intention must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object of the testator; and all parts of the will must be construed in relation to each other so as to give to every provision its proper field of operation, and to every word its natural and appropriate meaning. Furthermore, in case of ambiguity, 'it has long been well settled and indeed it is a principle so consonant to reason that the only wonder is that it should ever have been questioned, that all the surrounding circumstances of a testator,—his family, the amount and character of his property, may and ought to be taken into consideration in giving a construction of the pro-

> visions of this will.' " *Bodfish* v. *Bodfish*, 105 Me. 166, 170; 73 A. 1033.

See also, *Barnard* v. *Linekin*, 151 Me. 283, 286, 118 A. (2nd) 327.

Applying the foregoing rules to the will of Charles R. Cressey, we have no difficulty in determining his intention and the objects of his bounty. It is clear that in setting up the provisions of the trust created under the second paragraph of his will, he had in mind that his Cressey & Allen stock should remain in his blood descendants.

While for the purpose of administration, the assets passing under the second paragraph are divided into two trusts, in reality there is only one trust. The will clearly indicates that the four children of the testator were to share in these assets, and that, in the event, of the death of any of them without issue, their interest would pass to their brothers and sisters, or to the issue of such brothers and sisters to take by right of representation.

The significant clauses in the second paragraph are as follows:

> "In the event that any of my said children shall have died prior to the termination of said trust leaving no children living or issue of a deceased child, his or her portion of said trust fund on the termination of said trust, and the income from the trust during its continuance shall be divided equally among his or her brothers and sisters"; and, "issue of a deceased child to take its parent's share by representation."

Counsel for the estate of William R. Cressey argues that if William R. Cressey had a vested interest in the 100 shares, his estate will be entitled to the 100 shares of Cressey & Allen stock, or the equivalent money value thereof. The answer to this contention is that if the interest was vested, then it was subject to divestment upon his death without issue.

We answer the first query as follows:

Marcia C. Passage and William R. Cressey, having died without issue, the owners of a present interest in the trust created under the second paragraph are the children of George F. Cressey and Helen C. Stanwood. W. Churchill Cressey is the son of George F. Cressey. Carolyn S. Whiting and George Philip Stanwood are children of Helen C. Stanwood. Consequently, W. Churchill Cressey is entitled to one-half of all of the income of the trust; and Carolyn S. Whiting and George Philip Stanwood are each entitled to one-quarter of the income, subject, of course, to prior payment of the amount due the widow.

At the termination of the trust, if W. Churchill Cressey is still living, he will be entitled to one-half of the corpus; and in the event of his death prior to the termination of the trust, then his son, George F. Cressey, 2nd, if living, will take the interest of W. Churchill Cressey in the income and principal, subject to proportionate diminution in the event there are other living children born to W. Churchill Cressey before the death of the widow.

In like manner if Carolyn S. Whiting dies before the death of the widow, her interest in the income and principal will go to her children, Anne C. Whiting and Webster S. Whiting, if living, these shares to be subject to proportionate diminution in the event there are other living children born to Carolyn S. Whiting before the death of the widow.

Again, in like manner, if George Philip Stanwood dies before the death of the widow, his interest in the income and principal will pass to his children, George K. C. Stanwood and Diana M. Stanwood, if living, in equal shares, subject to proportionate diminution in the event other living children are born to George Philip Stanwood before the death of the widow.

In the event of the extinguishment by death of the entire line of succession of either George F. Cressey or Helen C. Stanwood, before the widow's death, then the interest of the line extinguished will pass to the living issue in the other line; and in the event of the remote contingency of the complete extinguishment of both lines, before the termination of the trust, the assets bequeathed under the second paragraph will pass as intestate property.

The estates of William R. Cressey, George F. Cressey, Helen C. Stanwood and Marcia C. Passage, are not entitled to receive any of the income from the trust created under the second paragraph of the will, nor are they entitled to receive any of the corpus of said trust.

The foregoing answer disposes of questions arising under the second paragraph of the will. The remaining questions relate to the provisions of the fourth paragraph of the will.

Under the provisions of the fourth paragraph of the will of Charles R. Cressey, he gave all of the residue of his estate to his son, George F. Cressey "for him to distribute between his sisters, Helen and Marcia, and our former ward, Eleanor Roberts, who was brought up in our family, and his brother William and himself in such amounts and portions as he deems just and proper."

It was further provided that the judgment of George F. Cressey as to the method and amount of the distribution should be final and conclusive on all parties.

We have already seen that in order to insure the annual payment to the widow as provided in the ante-nuptial agreement, that the children of Charles R. Cressey, and Eleanor Roberts conveyed in trust to George F. Cressey all of the assets in the residue.

We find the following excerpts in the trust agreement entered into in 1936:

"WHEREAS, it is the intention of the said George F. Cressey, William R. Cressey, Marcia Cressey Passage, Helen Cressey Stanwood and Eleanor Roberts aforesaid, to waive the benefits of said power of appointment and to convey their singular and several interests in said properties both real and personal to said George F. Cressey, but nevertheless in trust for the benefit of said Alice Faustina Cressey to secure to her for and during the term of her natural life the payment of said Fifteen Hundred Dollars in four equal instalments as is in said prenuptial agreement specified, and thereafterwards that the remainder of said property be distributed by said George F. Cressey under said power of appointment by distribution thereof effective as of the day of the death of said Alice Faustina Cressey according to the terms, conditions, and limitations of Clause Fourth of said Will."

"It being the intention of the parties to consolidate all the remaining property of the estate of said Charles R. Cressey into one trust, for the benefit primarily of said Alice Faustina Cressey, and on her death, for the benefit of Helen Cressey Stanwood, Marcia Cressey Passage, Eleanor Roberts, William R. Cressey and George F. Cressey, but, it is provided that on the death of said Alice Faustina Cressey the said rest, residue and remainder of said estate, shall revert to said George F. Cressey, Trustee or his successors under said Will, for him to distribute to said Helen Cressey Stanwood, Marcia Cressey Passage, Eleanor Roberts and William R. Cressey, and to him, said George F. Cressey in such amounts and proportions as the said George F. Cressey deems just and proper but subject always to the terms, conditions, limitations and restrictions contained in Article "Fourth" of said Will."

"And he, said George F. Cressey, in his capacity as Trustee hereunder, and in consideration of the premises, does accept the aforesaid conveyances in trust and the trust conditions, herein and hereof

> and covenants and agrees that he, said George F. Cressey, will faithfully and impartially discharge the duties imposed upon him as Trustee by this instrument and said prenuptial agreement, and as well, those assumed by him herein relative to these grantors, under and by virtue of the terms hereof, and said Will, except that he will make no distribution of said properties during the lifetime of said Alice Faustina Cressey."
>
> "And the said George F. Cressey, Trustee under said Will, does hereby further covenant and agree that he will make no distribution of the properties, which were of the estate of said Charles R. Cressey, deceased, testator, except as herein provided, and referred to in Articles "Second" and "Fourth" of the Will of said Charles R. Cressey, during the lifetime of the said Alice Faustina Cressey, and, we, the grantors of the first and of the second parts herein hereunto subscribing for ourselves, our heirs, administrators, executors and assigns, do hereby covenant and agree that we individually and/or severally, will not during the lifetime of said Alice Faustina Cressey, make demand upon said George F. Cressey, Trustee under said Will for distribution of the properties, bequeathed, and devised unto us or either of us under Articles "Second" and "Fourth" of said Will."

In construing the provisions of the fourth paragraph of the will of Charles R. Cressey which relates to the residue, we start out with the premise that the residue devised and bequeathed to George F. Cressey did not constitute a gift to him, but was made for the benefit of the appointees named in the will. See *Fitzsimmons* v. *Harmon,* 108 Me. 456, 81 A. 667.

The real problem is to determine who is entitled to the property, and the income thereof during the lifetime of the widow, in default and exercise of the power of appointment by George F. Cressey.

Various courts appear to have taken different routes to arrive at essentially similar results on this question.

In some jurisdictions, in default of the exercise of a testamentary power, a court of equity will exercise the power, either for the benefit of the named beneficiaries or for the beneficiaries of a resulting trust where the original beneficiaries are indefinite.

There seems to be no reported Maine decision squarely in point, but there are several decisions analogous to it; and it would seem that it is the law in this State that upon default of a power of appointment by the donee, a court of equity will exercise the power, if, according to the provisions of the will, such power is made imperative upon the donee.

> "All of the cases concede that a power is one in trust when the subject of the power is certain, when the objects are certain, and when the power is imperative. In strictness, a mere power is never imperative; it is permissive in character, an authority personal to the donee which imposes no obligation upon him; yet a duty or trust may be imposed in terms of a mere power.
>
> "A power is deemed imperative not merely when expressly made so; but if it appears from the instrument as a whole that an obligation to exercise the power was contemplated by the donor of the power, . . ." 80 A.L.R. 503-504. See also 41 Am. Jur., Powers, § 92, Page 871.

This court has held that, where the donees are insufficiently defined so as to allow an exact execution of the implied trust, the court will attempt to do equity by imposing a resulting trust in favor of the decedent's heirs. In the case of *Fitzsimmons* v. *Harmon*, 108 Me. 456, 81 A. 667, the court held that where the gift had been made to a donee to be distributed among "relatives" the terms of the bequest did not declare a trust sufficiently definite to be executed,

and that, therefore, there would be a resulting trust in favor of the heirs-at-law. Again, in the case of *Haskell* v. *Staples,* 116 Me. 103, 104; 100 A. 148, the gift of the residue was to a Mr. Staples "to be by him distributed and disposed of as he pleases." The court held that because of indefiniteness of beneficiaries a resulting trust occurs by implication of law to either the testator's residuary legatees or next of kin. See also *Buzzell* v. *Fogg,* 120 Me. 158, 113 A. 50.

In the case before us it is clear that there is no need of imposing a resulting trust by implication of law, because the gift was made for the benefit of certain named individuals, who were the children and the ward of the testator. Consequently, the reasons set forth in previous opinions of this court place before us a trust sufficiently definite as to beneficiaries as to allow for execution thereof by the court.

Undoubtedly the power given to George F. Cressey was an imperative one, made with the intention on the part of the testator that the power should be exercised within a reasonable time. If it had not been for the intervening trust agreement which postponed distribution and the exercise of the power until the death of the widow, presumably, if George had not exercised the power within a reasonable time, a court of equity would have had authority to compel him to do so.

In other jurisdictions the courts proceed upon the theory that the failure of the donee of a power to exercise such power, is a breach of trust; and that by reason of this breach of trust the appointive property passes back to the donor or his estate to be held in constructive trust for the benefit of the group of persons who were the presumable appointees.

In still other jurisdictions it is held that there is an implied gift, in default of appointment, to the presumable appointees. This theory is predicated upon the implication that, since the donor of the power had a general intent to

benefit the class designated as appointees and that, therefore, had it occurred to the donor that the power might not be exercised he would have provided for a gift over in default to the designated class equally.

This third theory is the one which has been adopted in the Restatement of the Law under the title "Gifts in Default of Appointment," Property, § 367.

George F. Cressey, the donee of the power, having died prior to the termination of the trust, the question before us is to determine in what proportion the residue should be divided.

The decided cases appear to hold that upon default of an exercise of a power of this type, the property should be divided equally among the named beneficiaries.

> "Where there is no express gift over in default of appointment the inference is that the donor intended the members of the class to take even though the donee should fail to exercise the power. The inference is that he did not intend that they should take only if the donee should choose to exercise the power. The inference is reinforced where the donor uses mandatory language, as where he directs the donee to exercise the power. Even where he used no such language, the members of the class will ordinarily be entitled to the property. The cases are numerous in which it has been held that the members of the class are entitled to the property in equal shares where the donee of a power to appoint among them fails to exercise the power." I Scott on Trusts, § 27.1 Page 217.
>
> "As a general proposition, it seems clear that the appointive property should pass, in such a situation, to the designated class of permissible appointees. The donor of the special power of appointment has (1) a general intent to benefit the members of the specified class of permissible appointees and (2) an intent that the apportioning of the appointive property within the class shall

> be within the discretion of the donee of the power. The fact that the donee has failed to apportion the property within the class should not defeat the donor's intent to benefit the class. Accordingly the appointive property should pass to the class and an equal division of it among the members of the class seems to be the closest approximation to the intent of the donor." Vol. V, American Law of Property, § 23.63, Page 645.

Whether we adopt the first or the third theory, we reach the same result. We, therefore, conclude that upon the termination of the trust the estates of George F. Cressey, Helen C. Stanwood, Marcia C. Passage, and William R. Cressey are each entitled to one-fifth of the principal of the residue and Eleanor Roberts, or her estate, in the event she is then deceased, to the other fifth.

There are other factors which induce this decision. In the first place, George F. Cressey the original donee of the power is dead and the law appears to be that the donee's death terminates the power granted to him, where no one else is authorized to execute it by the grantor. 72 C.J.S., Powers, § 17. Moreover, in spite of the fact that a strict interpretation of the trust agreement entered into by the children of Charles R. Cressey and Eleanor Roberts would seem to indicate that any successor trustee was to be endowed with the same powers possessed originally by George F. Cressey, it is our opinion that the signers of the 1936 trust had no such intention; and certainly it was not the intention of the testator that a successor trustee, unnamed in the will, and now a corporate fiduciary, should have the power to determine many years after his death, who should be the objects of his bounty.

We, therefore, hold that upon the termination of the trust, the residue should be divided in five parts between the estates of the children of Charles R. Cressey and Eleanor Roberts, or her estate in the event of her prior decease.

At the termination of the trust, the trustee shall turn over, in the foregoing proportions, any personal property in its possession to the legal representatives of the estates of the four children of Charles R. Cressey, and to Eleanor Roberts or the legal representative of her estate; and shall convey by suitable instrument of transfer any real estate remaining in the trust, to the designated devisee or devisees in the wills of the children of Charles R. Cressey, or to their proper heirs at law, and to Eleanor Roberts, if she is alive, or to her designated devisee or devisees, or her heirs at law in the event of her death.

In answer to the question as to whether or not income from the residue should be accumulated or currently distributed, we have already indicated our answer, which is that distribution should be made in five equal shares to Eleanor Roberts and to the estates of the four children of Charles R. Cressey, subject always to prior payment of the annual amount due the widow. It is our opinion that any reference to distribution on the part of the parties to the trust agreement of 1936 had reference, not to a postponement of distribution of income, but to distribution of the principal assets in the residue at the time of the death of the testator.

All actions of the trustee in the administration of the trust or trusts are herewith approved and confirmed.

Counsel for all parties are to be commended for excellent briefs which have been of great help to this court.

The cause is remanded to the Court below for the entry of a decree in accordance with this opinion. Counsel fees and expenses are allowed to all counsel, the amount thereof to be fixed by the Justice below, such costs and expenses to be prorated between

the assets in the trusts set up under the provisions of the second paragraph of the will and the trust set up under the provisions of the fourth paragraph of the will.

CANAL NATIONAL BANK, EXEC. UNDER WILL OF MARION P. HARMON

vs.

MURIEL B. CHAPMAN, ET AL.

Cumberland. Opinion, June 12, 1961

Wills. Trusts.
Incorporation by reference.

Property may pass under a will to an inter vivos trust subsequently amended, even though such amendments to the trust enable the testator to make testamentary dispositions without executing codicils and such trust amendments are not made with the formalities required for the execution of wills. Such dispositions can be sustained upon the ground that the inter vivos trust as it exists at the time of death is a fact of independent significance.

Where the instrument of modification (trust, as amended) was not in existence at the time of the execution of the will, it cannot be incorporated by reference.

ON REPORT.

This is an action for instructions before the Law Court upon report. Case remanded for judgment in accordance with this opinion. Cost and reasonable counsel fees to be determined by the single justice to be paid from the estate.

Robert F. Preti, for plaintiff.

Herbert A. Crommett
Arthur A. Peabody, for defendant.

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

WILLIAMSON, C. J. On report. This is an action by the Canal National Bank of Portland, executor under the will of Marion P. Harmon, for construction of a "pour over" provision in the will. The issue is whether the property under paragraph Sixth of the will passes into an inter vivos trust as amended subsequent to the execution of the will, or passes into an inter vivos trust as it existed when the will was executed, or passes by intestacy.

The facts are not in dispute. The testatrix, who is also the settlor of the trust, executed her will on September 24, 1948, and died on January 31, 1960. Paragraph Sixth of the will reads:

> "*SIXTH:* I hereby give, bequeath and devise all and any other rights and credits, cash on hand, monies in banks or on deposit, any notes, obligations and securities of any and all kinds to THE CANAL NATIONAL BANK OF PORTLAND as well as any shares in any loan and building associations, the same to be added to and made a part of the Trust Fund created by me under a Trust Agreement with said Bank dated August 24, 1934, as well as any Supplemental Agreement or amendments thereof, in which Agreement provisions are made for additions to said fund."

The trust agreement of August 24, 1934 between the settlor and the plaintiff bank as trustee was a revocable and amendable inter vivos or living trust. At the time of the execution of the will the trust had been amended in 1942 and again on the day of the execution of the will in 1948.

On September 23, 1955, the trust was again amended with changes in the ultimate disposition of the trust property after the death of the settlor. The amendment was signed and sealed by the settlor and the trustee before one witness. In short, the amendment was not made with the formalities required for the execution of a will under the Statute of Wills (e.g. "subscribed in his presence by 3 credible attesting witnesses"—R. S., c. 169, § 1).

It is unquestioned that the property held in the trust has been of substantial value since its inception in 1934, and likewise that property of substantial value passes under paragraph Sixth of the will. Indeed, in argument, without objection, it was indicated that at the death of the testatrix the trust amounted roughly to $120,000 and the estate to $93,000.

> "The cardinal rule to be applied in the construction of a will is that the intention of the testator when clearly expressed in the will must be given effect, provided it be consistent with legal rules."
>
> * * * * * *
>
> "The intention of the testator is that which existed at the time of the execution of the will."
>
> *First Portland Nat'l Bank* v. *Kaler-Vaill, et al.*, 155 Me. 50, 57, 58, 151 A. (2nd) 708.

The testatrix beyond doubt intended under paragraph Sixth to add property to the trust as it existed at her death. We can think of no sound reason why the testatrix would have intended in 1948 that property should be added to the trust as it then existed, and not to the trust as it might later be amended. One trust and only one trust was intended, and this was the trust created by her in 1934 and continuing after her decease.

The doctrine of incorporation by reference is not applicable under the circumstances. First: The 1955 amendment to the trust was not in existence in 1948 when the will was executed. By definition, therefore, it could not have been

incorporated by reference in the will. *First Portland Nat'l Bank* v. *Kaler-Vaill, et al., supra; Sleeper* v. *Littlefield,* 129 Me. 194, 151 A. 150. Second: The testatrix intended, as we have discussed above, to add property not to the trust existing by virtue of the 1934 agreement as amended when the will was executed, but to the trust existing on her death in 1960. Lastly, the testatrix intended to create not a testamentary trust, but to add property to an existing continuing non-testamentary trust, revocable and amendable in her lifetime.

Our decision is reached through the operation of the doctrine of the fact of independent significance. Here we have in the inter vivos trust as amended after the execution of the will such a fact. The 1934 trust as amended in 1955 is itself of unquestioned validity. The case arises as we have seen not with reference to the validity of the trust, but with reference to the validity of the provision of the will for "pouring over" assets from the estate to the trust.

The trust from 1934 until the death of the testatrix at no time was a mere shell without the body of a trust. The trust with substantial assets has had since 1934 and continues to have an active independent life of its own. We are not concerned here, for example, with a trust with nominal or no assets in the settlor's lifetime which in substance is created by will. There is not the slightest suggestion that the trust will wither away unless nourished by the gift under paragraph Sixth. On the separate entity of the inter vivos trust see *Swetland* v. *Swetland,* 102 N. J. Eq. 294, 140 A. 279; *In re York's Estate,* 95 N. H. 435, 65 A. (2nd) 282; *Re Locke* (or Matter of Rausch) 258 N. Y. 327, 179 N. E. 755, 80 A.L.R. 98, which, however, do not involve amendments after the will.

There are situations not uncommon in the settlement of estates which bear a strong analogy to the case before us. In *Lear* v. *Manser,* 114 Me. 342, 96 A. 240, we held valid

a gift in trust "to such person or persons, or to such institution as shall care for me in my last sickness." The identification of the beneficiary was considered sufficiently certain and capable of proof.

The "receptacle cases" so-called, are also in point. In *Merrill* v. *Winchester,* 120 Me. 203, at 216, 113 A. 261, the following provision was sustained:

> " 'To said Clossen C. Hanson I give in trust for himself and wife and children as may suit the needs and wishes of each, the libraries in my house in rooms below and above and all books, magazines, papers, etc. and all articles of personal property in said house not herein otherwise disposed of; and also all personal property of every kind in my stable and buildings, not heretofore mentioned.' "

In *Gaff* v. *Cornwallis,* 219 Mass. 226, 106 N. E. 860, the court upheld the gift of the contents of a drawer. The opportunity, for example, of adding or removing books from libraries or contents from a drawer after the execution of a will is obvious.

In each of the cases noted there is a fact of independent significance, that is to say, a fact of significance apart from its effect upon the disposition of property under the will. The "pour over," the future identification, the "receptacle" are alike in this respect.

The "pour over" problem has not been decided specifically by our court. *Bragdon, Trustee* v. *Worthley, et al.,* 155 Me. 284, 153 A. (2nd) 627, involved only the distribution of the burden of taxation between an estate and an inter vivos trust. Under the will the testatrix gave the residue to the trustee of the trust. In fact the trust had been amended after the execution of the will and prior to the death of the testatrix. No question, however, of the propriety of the bequest and devise under these circumstances to the trustee

under the trust as amended and existing at the date of death was before the court.

It is urged that in *First Portland Nat'l Bank* v. *Kaler-Vaill, et al., supra,* we disapproved of the doctrine of the fact of independent significance. The court did no more in Kaler-Vaill than deny that the fact of a will by the testator's widow made after the testator's death was a fact of independent significance in construction of his will. Here the *fact* of the amended trust came from *the act* of the settlor-testatrix and trustee.

In *Second Bank-State Street Trust Co.* v. *Pinion* (Mass.) 170 N. E. (2nd) 350, decided in 1960, a "pour over" from an estate to an amendable, revocable inter vivos trust amended after the execution of the will was upheld. The court said, at p. 352:

> "We agree with modern legal thought that a subsequent amendment is effective because of the applicability of the established equitable doctrine that subsequent acts of independent significance do not require attestation under the statute of wills."

The Restatement (2nd) Trusts (1959) adopts a like view:

> "§ 54. *Creation of Trust by Will*
>
> A trust cannot be created by a will unless the intention to create a trust and the identity of the beneficiaries and of the trust property and the purposes of the trust can be ascertained
>
> (a) from the will itself; or
>
> (b) from an existing instrument properly incorporated in the will by reference; or
>
> (c) from facts which have significance apart from their effect upon the disposition of the property devised or bequeathed by the will."

Comment i, p. 136 reads:

> "If in his will the testator manifested an intention that the property bequeathed should be held upon the terms of the trust as they should be at the time of his death, the disposition is valid on the ground of resorting to a fact of independent significance. It cannot be supported on the ground of incorporation by reference, since the instrument which was to govern the testamentary disposition, namely the instrument of modification, was not in existence at the time of the execution of the will. On the other hand, it can be upheld on the ground of resorting to a fact of independent significance, since the inter vivos trust, as it exists at the time of the settlor's death, is such a fact. It is immaterial that the trust was modified after the execution of the will; it is sufficient that it exists independently of the testamentary disposition at the time of the testator's death."

Scott, Trusts (2nd ed.) § 54.3, pp. 375, 377 states:

> "Where a settlor creates a trust inter vivos subject to modification, and by a will subsequently executed disposes of property in accordance with the terms of the inter vivos trust as modified from time to time, and thereafter modifies the inter vivos trust, three views are possible as to the testamentary disposition. It may be held that the property passing under the will should be disposed of in accordance with the terms of the inter vivos trust as modified; it may be held that it should be disposed of in accordance with the terms of the trust as they were at the time of the execution of the will; it may be held that the disposition made in the will fails altogether. . .
>
> "It is submitted that the first view, namely that the property is to pass in accordance with the terms of the trust as modified, is the sound one. It is true that this result cannot be supported on the doctrine of incorporation by reference, since the instrument of amendment is not executed until after the execution of the will. It can be upheld,

> however, upon the ground that the terms of the disposition by will are determined by facts of independent significance, and the inter vivos trust, as it exists at the testator's death, is such a fact. It is true that the testator is thereby enabled to change the testamentary disposition without executing codicils to his will. This is, however, what he does where he bequeaths the contents of a room or of a safe-deposit box, since he can modify the contents from time to time by removing or adding articles. The same thing is true where he bequeaths property to persons in his employ at the time of his death, since he can change the beneficiaries by hiring and firing. Indeed, there seems to be no greater objection than there is to the whole doctrine which permits a testator originally to make a disposition by reference to a living trust, the terms of which are not stated in the will. The test is not whether the facts are subject to the control of the testator, but whether they are facts which have significance apart from the disposition of the property bequeathed."

We find no solid ground for refusing to give effect to the intention of the testatrix. The trust is adequately identified in the will. The provisions of the trust for amendment were duly carried out. The amendments and indeed the trust as amended are facts of independent significance. The "pour over" under paragraph Sixth from estate to trust as it existed at the death of the testatrix is valid and the executor should make distribution to itself as trustee thereunder.

The entry will be

> *Remanded for judgment in accordance with this opinion. Costs and reasonable counsel fees to be determined by the single justice to be paid from the estate.*

CARMELITA M. FLOOD, LESTER M. FLOOD,
NEIL N. FLOOD, *pro ami*, RITA M. FLOOD, *pro ami*
vs.
BELFAST AND MOOSEHEAD LAKE RAILROAD CO.

Waldo. Opinion, June 12, 1961

Proof.
Grade Crossing. *Negligence.* *Imputed Negligence.*
Children. *Husband - Wife.*

Where the record sufficiently shows that a collision took place upon defendant's railroad tracks, there arises a presumption that defendant was operating the train. It is unnecessary to prove by railroad officials what was so likely to be a fact and so easily disproved if it were not.

Where a wife passenger in an automobile with her husband driving, is injured in a collision, the husband's negligence is not imputable to the wife where there is no evidence of joint control.

Where children passengers in the back seat of an automobile with their father driving are injured in a collision, the father's negligence is not imputable to the children where the children were not infants unable to care for themselves.

Failure of a train to give warning as it approaches the crossing in violation of R. S., 1954, Chap. 45, Sec. 73 is evidence of negligence.

Last clear chance not applicable to instant case.

ON EXCEPTIONS.

This is a negligence action before the Law Court upon exceptions. Exceptions overruled in the case of Lester M. Flood (driver). Exceptions sustained in cases of Carmelita Flood, Neil N. Flood, *pro ami*, and Rita M. Flood, *pro ami* (wife and children).

Anthony J. Cirillo,
Abraham J. Stern, for plaintiffs.

Hillard H. Buzzell,
Clyde R. Chapman, for defendant.

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

WILLIAMSON, C. J. These four tort actions under the old rules arise from a grade crossing collision in which a freight train struck an automobile. The plaintiffs are Lester M. Flood, the driver of the car, his wife Carmelita, his daughter Rita, then about 9 years old, and his son Neil, then about 13 years old. The cases, tried together before a jury, reach us on exceptions to the direction of a verdict for the defendant in each case.

Under the familiar rule, the main issue is whether there was sufficient evidence which, if believed, would warrant a jury in finding in each case negligence on the part of the railroad and freedom from contributory negligence on the part of each plaintiff. *Jordan* v. *Portland Coach Co.*, 150 Me. 149, 107 A. (2nd) 416; *Ward* v. *Merrill*, 154 Me. 45, 141 A. (2nd) 438.

There are two issues neither of which, in our view, controlled the decision of the presiding justice, which we shall dispose of for convenience at the outset.

First: The defendant seriously urges that the evidence would not warrant a finding that the Belfast and Moosehead Lake Railroad Co. operated the freight train. It does not deny that it operated the train, but argues that the plaintiffs did not prove the fact.

The time of twelve jurors and the court was unnecessarily taken with listening to testimony with objections by the defendant designed to prove this simple fact. The record sufficiently shows that the accident took place on the defendant's track. It does not demand, nor could it well demand, more proof that it was a railroad company operating a railroad.

Under these circumstances there plainly arises a presumption that the defendant was operating the train. Common sense requires such a presumption. Surely it would have been strange had the plaintiffs called, let us say, the president of the railroad, or its chief engineer, or other officials with records, to prove what was so likely to be the fact and so easily disproved by the railroad if it were not.

If more evidence were needed to bring a reasoning mind to this conclusion, it may be found in the record. The plan admitted by agreement showed the track of the "Belfast Moosehead Lake Railroad." The defendant itself introduced pictures of the railroad. A witness from the vicinity saw the name of the defendant railroad on the engine in question. *Lake Erie & W. Railway Co.*, v. *Carson* (Ind.) 30 N. E. 432; *East St. Louis Connecting Railway Co.* v. *Altgen,* 210 Ill. 213, 71 N. E. 377; *Peabody* v. *Oregon Railway & Navigation Co.,* 21 Ore. 121, 26 P. 1053, 12 L.R.A. 823; *Brooks* v. *Mo. Pac. Ry. Co.,* 98 Mo. App. 166, 71 S. W. 1083; 74 C.J.S., Railroads § 374.

Second: The defendant in its brief says:

> "... his (driver's) negligence was imputable to his wife on the theory of a joint enterprise, since the evidence disclosed that they were going to Pittsfield to obtain groceries and his negligence was imputable to the children on the ground that he was their guardian and that his negligence was imputable to them."

The argument is not sound. There is no evidence of joint control of the automobile. The husband was the driver; his wife a passenger. The children were not infants unable to care for themselves. There was no imputed negligence under the circumstances. *Illingworth* v. *Madden,* 135 Me. 159, 166, 192 A. 273; *Gravel* v. *LeBlanc,* 131 Me. 325, 162 A. 789; *Ham* v. *Railroad Co.,* 121 Me. 171, 177, 116 A. 261; *Whitman* v. *Fisher,* 98 Me. 575, 57 A. 895; *State* v. *B. and M. R. R. Co.,* 80 Me. 430, 15 A. 36.

Without reaching into detail, the jury could have found as follows: Distances and directions are given approximately. The collision took place at a grade crossing near Winnecook station between Burnham and Unity about noon on a misty, foggy, wet day in February 1956. The track runs north and south and the highway east and west. Neil characterized the visibility, or lack of visibility, in his testimony:

"Q. You looked up in that direction?

"A. Yes. It was kind of misty and foggy.

"Q. On account of the mist and fog you might not have been able to see the train which was there?

"A. Yes."

The plaintiff driver, who lived 400 feet east of the track, started with his family westerly to cross the track on his way to Pittsfield. On the front seat were the driver, his wife Carmelita in the middle, and his daughter Rita on the right, and in the rear of the car was his son Neil. The road was icy and slippery. There were railroad signs of "R.R." or "Railroad Crossing" a few feet westerly of the driver's home and also a few feet from the track. There were no gates or automatic signals at the crossing.

The track runs on a straight course for 1500 feet north of the crossing which is visible for the entire distance. At about 1000 feet from the crossing is a whistle and bell sign. From 200 feet easterly of the track an approaching train would be visible from 400 or 500 feet north of the crossing.

The plaintiff testified in substance that while proceeding at 10 miles per hour he looked toward the north for approaching trains when he was 300 feet from the crossing, saw nothing, and continued at the same speed without stopping; that he heard no bells or whistles; that when his car was on the track his son called, "Daddy, the train," and his

wife said, "Step on it"; that the wheels spun and he was unable to escape.

His wife, admitting she was no judge of distances, said she looked for the train apparently at about the place her husband looked; that she heard neither bell nor whistle, and that the first warning came from the son Neil when the car was on the track. Rita at no time saw the train. Neil, on the rear seat, with visibility impaired as stated, first observed the train when the car was on the track. There was further evidence from persons in the neighborhood that they heard neither bell, whistle, nor horn.

The train consisting of a locomotive with 14 freight cars came to a stop with the rear of the train 280 feet south of the crossing.

There were admitted in evidence by agreement as part of the plaintiffs' case, statements given by the engineer and fireman on the train to a member of the State Police who investigated the accident. Neither the engineer nor the fireman took the stand. The engineer, who was on the right side of the engine, gave his speed between 20-25 miles per hour. The fireman said, "The horn and bell was going from whistling post, thousand feet from crossing"; that when the train was about 50 feet north of the crossing he observed the plaintiffs' car about 110 feet easterly with a woman "looking at us"; that he thought the car would stop and said nothing to the engineer.

The jury, as we have seen, could have found that no bell was rung, or whistle blown, or horn sounded by the train at the whistle marker, or as it continued to the crossing. Failure to give such a warning would be a violation of statute and accordingly evidence of negligence. R. S., c. 45, § 73. The jury could also on this issue have considered the speed of the train, particularly in view of the poor visibility. In short, it was for the jury to determine whether the train as it came upon the crossing and struck the

car was being operated negligently or in the exercise of due care.

The issue of contributory negligence must be explored with reference to each plaintiff. We are mindful that the train has the right of way, and that a collision at a crossing is prima facie evidence of negligence on the part of the driver of a car. *Hesseltine* v. *Railroad Company,* 130 Me. 196, 154 A. 264.

The driver, in our opinion, must be held to have been contributorily negligent as a matter of law. It was his duty to look and listen as he approached the crossing, and to see and hear what a reasonably prudent man under the circumstances should have seen and heard. From a distance of 300 feet from the crossing it does not appear that he took even a second glance. In the light of his speed, and of the mist and fog, due care required that he continue to keep watch in approaching the track. If he had been observant, we are convinced he would have seen the train in time to have stopped his car short of the track, or to have increased his speed sufficiently to have passed safely beyond.

The driver's case is not saved by application of the "last clear chance" doctrine. The rule is stated in *Kirouac* v. *Railway Co.,* 130 Me. 147, 149, 154 A. 81, as follows:

> "The plaintiff may still recover in spite of his agent's negligence, if there came a time prior to the collision, when his driver could not, and the defendant's motorman could, by the exercise of due care, have prevented the accident. . . . If the negligent operation of the truck continued to the moment of the collision, or for such a period of time that the motorman could not thereafter by the exercise of due care have stopped his car before the crash, there can be no recovery."

See also *Jordan* v. *Maine Central Railroad Co.,* 139 Me. 99,

27 A. (2nd) 811; *Collins* v. *Maine Central Railroad Co.*, 136 Me. 149, 4 A. (2nd) 100.

In our opinion the evidence would have warranted a finding of due care on the part of Mrs. Flood and the children. Mrs. Flood was a passenger in the car, and had no control over its operation by her husband. She was under a duty of course to exercise due care for her own safety. Did she act as the reasonably prudent person under the circumstances? The extent to which she could properly rely upon the driver, and the extent to which she should have watched for approaching trains and have warned the driver of dangers, involve questions of fact for the jury in resolving the issue of due care on her part. Like considerations apply in the cases of the children. Was the nine year old negligent in not seeing and not warning? Would we expect a different standard of conduct of a reasonably prudent thirteen year old passenger in the rear seat of a car driven by his father? Again, these are questions for the jury.

In reaching this conclusion, we in no way intimate that a jury would or should find for Mrs. Flood and the children. The issue here is simply whether the plaintiffs are entitled to have a verdict of the jury. Illustrative railroad crossing cases on contributory negligence in different settings of fact are: *Hesseltine* v. *Railroad Company, supra; Ham* v. *Railroad Co., supra.*

The entry will be

In the cases of Carmelita Flood, Neil N. Flood, pro ami, and Rita M. Flood, pro ami, exceptions sustained.

In the case of Lester M. Flood, exceptions overruled.

BERNARD M. WILLIAMS, ET AL.
vs.
STATE HIGHWAY COMMISSION OF
THE STATE OF MAINE

Somerset. Opinion, June 27, 1961.

Eminent Domain. Interest.
Possession.

R. S., 1954, Chap. 23, is silent as to "interest" in condemnation proceedings save as interest may be imputed from "damages".

The true rule in condemnation matters is that the price ought to be paid at the moment the purchase is made, when credit is not especially agreed upon.

The state upon a taking and vesting of title acquires all the incidents of proprietorship such as entry, use, occupation, rents and profits, with a right of immediate possession; the tenants become tenants at sufferance, chargeable with use and occupation.

ON APPEAL.

This is an appeal from part of a judgment under M. R. C. P. 73. Appeal denied.

Carl R. Wright, for plaintiff.

Charles P. Nelson,
L. Smith Dunnack, for defendant.

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

OPINION: SULLIVAN, J.

SULLIVAN, J. On appeal of the defendant from part of a judgment under *Rule 73, Maine Rules of Civil Procedure, 155 Me. 574.*

The State Highway Commission by eminent domain had taken the real estate of the plaintiffs on June 20, A. D. 1958. *R. S., c. 23,* § *21.* A joint board had determined the damages caused by such taking. From that decision plaintiffs had appealed to the Superior Court where plaintiffs secured a judgment including an award of interest from June 20, A. D. 1958, the date of condemnation, to June 2, A. D. 1960, the day of the jury verdict.

The plaintiffs from June 20, A. D. 1958 to June 2, A. D. 1960 had uninterruptedly enjoyed possession and use of the real estate expropriated and all income therefrom. The structures upon the land consisted of a large portion of a store, a gasoline station and a "Dairy Treat". Defendant protests that in addition to such advantages the plaintiffs were not entitled to interest upon the value of the property taken and by this appeal defendant seeks to vindicate the rectitude of that contention.

In application of *Article I, Section 21 of the Constitution of Maine* the Legislature enacted *R. S., c. 23,* § *20* which provides that the State Highway Commission may take over and hold for the State real estate to effect state and state aid highways.

R. S., c. 23, § *21* defines the condemnatory process. The Commission determines the public exigency and causes the property to be surveyed, described and a plan of it drafted. The description is recorded in the local registry of deeds, a print of the plan filed in the office of the County Commissioners, a newspaper notice is published and mortgagees of record are informed by registered mail. After reciting the foregoing duties and injunctions *R. S., c. 23,* § *21* summarily and unequivocally pronounces a legislative fiat:

> "The recording of the said description shall vest the fee of the described property in the state."

The Commission or any interested person may thereupon petition the joint board of the State Highway Commission and County Commissioners for a determination of damages with right of appeal for any party aggrieved. *R. S., c. 23, § 23; P. L., 1959, c. 317, § 8.*

Since the authoritative Legislature has so compactly and expressively disposed that the recording by the Commission vests the fee of the condemned property in the State, there can be no durable doubt of a dislocation and transposition of title. And the Legislature reaffirmed that certitude in a statutory postlude when it proceeded to adopt *R. S., c. 23, § 24*:

> "The commission may vacate any land—which have been taken—for highway purposes under the provisions of this chapter, by executing and recording a deed thereof, and such action shall *revest* the title to the lands—so vacated in the persons, their heirs and assigns, in whom it was vested at the time of taking, *and the value at the time of vacation may be pleaded in mitigation of damages in any proceedings therefor on account of such taking.*
>
> The governor and council on recommendation of the commission *may sell and convey on behalf of the state* the interests of the *state in property taken*—and deemed no longer necessary for the purposes hereof, and they *may lease such interests in such property pending such sale or the advantageous use of such property for highway purposes. The proceeds of such sales or leases, shall,* as far as practicable, *be credited to the fund from which payment was made for the land.*" (Italics ours)

R. S., c. 23, § 24 thus treats of a *vacating* by Commission deed and of a *revesting* of the title in the former owner with a credit to the Commission at the amount of the value upon vacation in proceedings not already adjudicated as to damages for the taking. It is clearly presupposed that title

in fee has vested in the State prior to *R. S., c. 23,* § *24* becoming operative. *(R. S., c. 23,* § *21).* The Legislature obviously affords such *vacating* and the resultant *revesting* as a condition subsequent. *Williston on Contracts, Vol. 3,* § *667, P. 1915; Tiffany Real Property, Abr. Ed.* § *133, P. 122.*

Nor is the Commission limited to vacating by a *revesting* deed but may make recommendation to the Governor and Council who may thereupon sell and convey to any purchaser, property taken and deemed no longer necessary for highway purposes. The Governor and Council may upon Commission advice lease the property pending sale or advantageous use for highway purposes.

On June 20, A. D. 1958 the State acquired full and complete ownership of the realty taken from the plaintiffs, that day. *Jordan* v. *Record, 70 Me. 529, 531.* All incidents of proprietorship such as entry, use, occupation, rents and profits thus inured at once to the condemner. The State became entitled forthwith to institute against the plaintiffs a possessory action. *R. S., c. 172; P. L., 1959, c. 317,* § *311 ff.; Rule 80A (a), (b), (c), M.R.C.P., 155 Me. 590.* The plaintiffs had become tenants at sufferance, *Cunningham* v. *Holton, 55 Me. 33, 37,* and were chargeable thereafter for use and occupation. *McFarland* v. *Stewart, 142 Me. 265.*

Correlatively the plaintiffs on June 20, A. D. 1958 had become divested of their title in their property and had accordingly, with the statute of limitations, *R. S., c. 112,* § *113,* already running, become competent to petition for a determination of their damages and to achieve remuneration. *Constitution of Maine, Article I, Section 21; R. S., c. 23,* §§ *20, 21, 23.* The acts just cited are silent as to interest save as interest may be imputed by the term, damages.

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and in-

cludes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate "is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306. That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. See, also, United States v. Rogers, 255 U. S. 163, 169." *Jacobs* v. *United States, 290 U. S. 13, 16.*

See annotation *36 A.L.R. 2d 337, 413, 418, 246, 428, 434; Nichols on Eminent Domain 3rd ed. Vol. 3, § 8.63; Orgel on Valuation under Eminent Domain, Vol. 1, § 5;* and authorities cited. "—The true rule (of damages in eminent domain) would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the pulbic would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; *and this delay must be compensated by interest.*" (italics ours)

Parks v. *Boston, 15 Pick (32 Mass.) 198, 208.*

Interest was an element of or was incidental to plaintiffs' damages.

Defendant's position here is that possession and benefits therefrom to the plaintiffs, without more, precluded plaintiffs' recovery of all interest. The plaintiffs had a legitimate claim for interest during the interval when they were deprived of their property and of its monetary value. The presiding Justice was correct under the circumstances in assessing interest as he has done.

R. S., c. 23, § *21* is an amended rendition of *R. S., 1944, c. 20,* § *13* to which *P. L., 1951, c. 321,* §*2, Sec. 7-G* added significantly and without qualification the provision hitherto quoted:

> "The recording of the said description shall vest the fee of the described property in the state."

Substantially the same sentence is contained in *R. S., c. 1,* § *8,* the act authorizing Governor and Council to take land for forts, arsenals, etc. Such sentence has existed in *R. S., c. 1,* § *8* and its predecessor acts backward through several statutory revisions of our laws. However, *R. S., c. 1,* § *8* differs notably in its operation from *R. S., c. 23,* § *21* in that in the former instance a condemnee is afforded no right to damages until the land is entered upon and possession taken for the purposes of construction or use. See, *R. S., c. 1,* § *6; R. S., c. 89,* §§ *38, 39, 41, 42, with amendments.* No such restriction moderates the effect of *R. S., c. 23,* § *21* and that particular is very meaningful of the intention of the Legislature to render a taking under *R. S., c. 23,* § *21* a summary condemnation with immediate confiscation of title and synchronized liability for compensation.

R. S., c. 37, § *19* authorizing the taking of land for game management areas, etc. is quite the counterpart in its terms of *R. S., c. 23,* §§ *20, 21, 23* but has not yet received judicial construction.

There are numerous other condemnation acts in this jurisdiction all of which we have examined. They differ

sufficiently from *R. S., c. 23, §§ 20, 21, 23* so as to be distinguishable and of slight import in the present controversy. Nor are the decided cases interpreting those other statutes applicable.

Appeal denied.

JOSEPH F. MASSELLI AND JULIETTE G. MASSELLI
vs.
DANIEL FENTON AND FLORENCE R. FENTON

Androscoggin. Opinion, June 27, 1961.

Rule 72 (c). Interlocutory Rulings.
Contracts. Intent.
Equity. Specific Performance.

Equitable relief in the nature of specific performance cannot be had where the negotiations entered into between the parties never developed into a contractual relationship. Whether the parties entered into a contract or were merely negotiating is a question of intention.

ON REPORT.

This is an interlocutory ruling before the Law Court on report. Case remanded to Superior Court for further proceedings upon issues tendered by the original writ and general denial.

Clifford & Clifford, for plaintiff.

Berman, Berman and Berman,
Simon Spill, for defendant.

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

OPINION: TAPLEY, J.

TAPLEY, J. On report under *Rule 72 (c), Maine Rules of Civil Procedure, 155 Me. 479, 573.*

> "Report of Interlocutory Rulings. If the court is of the opinion that a question of law involved in an interlocutory order or ruling made by it in any action ought to be determined by the Law Court before any further proceedings are taken therein, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein."

The plaintiffs, Joseph F. and Juliette G. Masselli, instituted an action at law against defendants, Daniel and Florence R. Fenton, alleging the creation and continuance of a private nuisance. The action was entered at the September Term, 1959 of the Superior Court, within and for the County of Androscoggin, previous to the effective date of the Maine Rules of Civil Procedure. Defendants presented a motion for leave to file supplemental pleadings seeking equitable relief against the plaintiffs on a claim arising out of the transaction which was the subject matter of the original action by the plaintiffs relating to the property concerned in the original action. Leave was granted to file supplemental pleadings. The defendants filed their supplemental pleadings raising an issue equitable in its nature. A hearing was had before a single justice on the supplemental pleadings after a pre-trial conference. At the pre-trial conference the following stipulations and agreements were entered into:

> "1. That a certain contract executed only by the defendants, a cashier's check for $1,000 and the correspondence between counsel for the respective parties, comprising 36 exhibits and which have been numbered 1 to 36 inclusive are all admitted in

evidence and comprise the whole evidence for consideration by the court.

2. That the plaintiffs have waived any tender of the sum of $7500 representing the balance of the alleged purchase price and which the defendants will be ordered to pay into court if it is found that they are entitled to a conveyance.

3. That Simon Spill, Esq. at all times had full power and authority to act for and bind his clients, the defendants, in negotiating and completing the alleged contract now in issue.

4. That no issue is presented as to the time of tender of said check for $1,000.

5. That if final decision on the alleged contract be for the defendants, judgment is to be for the defendants, on all matters involved in docket #2597; but if final decision on the alleged contract be for the plaintiffs, the court will order severance of issues and remand docket #2597 for further proceedings in the Superior Court solely upon the issues tendered by plaintiffs' original writ and a general denial thereto."

Defendants, in their motion for equitable relief, allege that following a pre-trial conference on the original action, the parties, through their respective attorneys, by correspondence, negotiated for the purchase and sale of the realty concerned in the original nuisance action and that as a result of said negotiations it was agreed plaintiffs' action against the defendants be dismissed. It is alleged that plaintiffs agreed to sell to the defendants the property for the sum of $8500. and that the plaintiffs refused so to do, therefore the defendants are seeking specific performance and damages. The evidence in the case, as presented to the presiding Justice, is comprised of correspondence. The Justice below found no valid existing contract upon which defendants could base their demand for specific performance and ordered the cause "remanded for further pro-

ceedings in the Superior Court solely upon the issues tendered by the plaintiffs' original writ and a general denial thereto."

The aggrieved parties, on motion and with consent of the presiding Justice, bring this interlocutory order to this court for review under procedure prescribed by Rule 72 (c) of Maine Rules of Civil Procedure. In the view we take of this case, the issue is not whether the statute of frauds is satisfied but, rather, did the parties intend that the contractual relationship be evidenced by a formal written contract? The evidence is comprised of written correspondence between the respective attorneys. Does the substance of the correspondence constitute a valid legal and enforceable agreement between the parties, or does it fall within the category of negotiations preparatory to the execution of a contract? The various letters speak of purchase price, down payment, exclusion of certain personal items, a question regarding an easement and other matters which are commonly concerned in negotiating for the sale of real estate in preparation of incorporating agreed conditions and terms into a written agreement to sell and buy. There are some portions of these written communications which are germane in determining whether the parties intended the correspondence to constitute a valid and enforceable contract. In a letter, Attorney Clifford, representing the proposed seller (Masselli) wrote to Attorney York, one of the attorneys representing the buyer (Fenton):

> "We would enter into a contract to buy and sell as of June 15th when the balance of the purchase price was paid.
>
> "* * * * I also think it would be desirable to have all the parties execute a buy and sell agreement containing these terms."

Later Attorney Spill, who came into the case for the Fentons, wrote to Attorney Clifford, saying:

"I am of the opinion, and I think correctly, that this deal can go through without any question by the drafting of an agreement to buy and sell, your client to execute and deliver to the Fentons or their nominee a good and sufficient warranty deed with merchantable title, free and clear of any and all incumbrances, including contents, as agreed for the figure which you and Brother York agreed upon. * * *.

"So far as I am concerned, and I am sure this would be true of Bob, any standard agreement for purchase and sale would be satisfactory and whether you hold the money or Bob holds the money would be immaterial to me.

"I am right in the middle of this and where both of you have got as far as you did, it seems regrettable to me that this cannot be consummated. * * * * *

"* * * * * * I can assure you that once this agreement to buy and sell has been executed, your clients will have sold their property and the deal put through on or before June 15th."

Again, Spill writes to Clifford and says:

"Confirming my telephone conversation to you on the above-captioned matter, may I suggest that you draft the agreement of purchase and sale and mail it to this office."

Attorney Clifford drafted a contract, sent it to Attorney Spill and said, in part:

"In accordance with your letter of March 5th, I have proceeded to draft a proposed contract and am enclosing a single copy of it for your approval.

"I understand that as soon as you get back, you will review it and if it appears to you to be all right, I will have the Massellis execute duplicate originals and forward same to you for the Fentons' execution."

Attorney Spill, in due time, examined the contract for sale and then wrote Attorney Clifford suggesting certain changes in the submitted written contract. One of the changes was in the nature of an amendment in the following language:

> "Consummation of this agreement shall take place in York County or Cumberland County on notice by either of Sellers' attorneys, Robert York, Esq., Old Orchard Beach, Maine, or Simon Spill, Esq., Biddeford, Maine, to the office of Clifford & Clifford, Lewiston, Maine."

After preliminary negotiations, an agreement to buy and sell was drafted. This agreement was signed by defendants and presented to the Massellis for their signatures. They refused to execute the agreement and thereupon the matter came to a conclusion.

In this case the intentions of the parties are the determining factor. Did the parties intend that the written correspondence constitute the contract between them, or was their intention such that the correspondence was in its nature exploratory to the end that the negotiations carried on between the attorneys for the parties would result in a written contract which would bear testimony of their legal obligations? The rule to be applied to the factual aspects of this case is found in *Mississippi and Dominion Steamship Company, Limited* vs. *Swift, et al., 86 Me. 248-258, 259*:

> "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party neither had nor signified such an intention to close the contract until it was fully

> expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the onsummation (sic) of the negotiation, there is no contract until the written draft is finally signed.
>
> "* * * * * * * If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

See *M. N. Landeau Stores, Inc.* vs. *Daigle, et al.*, 157 Me. 253. A most comprehensive treatment of the subject is found in *122 A. L. R., 1217* and *165 A. L. R., 756.*

> "The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce and material terms cannot be left for future settlement." *17 C. J. S., Contracts, Sec. 49, Page 390.*

Preliminary negotiations as to the terms of an agreement do not constitute a contract. *Citizens' Committee of the North End* vs. *Hampton, 114 (2nd), 388 (Conn.).*

When the instrument leaves certain terms and conditions to be agreed upon and contemplates the execution of a final contract, it is not a contract that can be specifically enforced. *Patch, et al.* vs. *Anderson, et al., 151 P. (2nd), 644 (Cal.).*

> "Whether the parties are merely negotiating the contract, or entering into a present contract, is

> purely a question of intention." *Cohen, et al.* vs. *Johnson, et al., 91 F. Supp., 231-235.*

In *Mid-Continent Petroleum Corporation* vs. *Russell, 173 F. (2nd) 620,* the court said, on *page 622*:

> "Mere preliminary negotiations respecting the terms of an agreement do not constitute an obligatory contract. Preliminary negotiations leading up to the execution of a contract are to be distinguished from the contract itself. No contract is complete without the mutual assent of the parties to all essential elements of the agreement. The minds of the parties must meet and unite on all essential elements before an effective contract is created."

We have carefully examined the evidence and find that it bears testimony of the fact that the negotiations carried on between the parties never developed into a contractual relationship.

The findings and interlocutory order of the presiding Justice were not error.

Case remanded to Superior Court for further proceedings upon issues tendered by plaintiffs' original writ (Docket #2597) and a general denial thereto.

HUNNEWELL TRUCKING, INC.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR
STATE OF MAINE

Kennebec. Opinion, July 1, 1961.

Sales & Use Tax *Interstate Commerce.*
Materials in Storage.

Materials and supplies including motor vehicle parts, tires and other materials purchased outside the State of Maine and brought into this State for use upon motor trucks engaged in interstate business are taxable under the Sales and Use Tax Law. R. S., 1954, Chap. 17, Sec. 2 and 4 (as amended).

The imposition of such a tax does not unconstitutionally burden interstate operations.

Personal property in interstate transit is protected from local taxation by the U. S. Commerce clause but where there has been a break in transit for the convenience and business profit of the taxpayer, the property becomes subject to local taxation.

ON APPEAL.

This is a tax appeal to the Law Court. Appeal dismissed.

Hough & Guy, for plaintiff.

John W. Benoit,
Ralph W. Farris, Sr., for State.

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

DUBORD, J. This is an appeal, filed under the provisions of Section 33, Chapter 17, R. S., 1954 (as amended), and M.R.C.P. 80 (B), from the imposition of a use tax by the State Tax Assessor upon personal property owned by the appellant.

At the time of the imposition of the tax, the appellant was engaged in interstate commerce by motor truck between the States of Maine, New Hampshire, Massachusetts, and Connecticut. The pertinent statutes involved are certain portions of § 2, and § 4 (as amended), and § 10 I, Chapter 17, R. S., 1954.

Section 4 (as amended), reads as follows:

> "**Sec. 4. Use tax.** A tax is imposed on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale on and after July 1, 1957, at the rate of 3% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the assessor, showing that the seller has collected the sales or use tax, in which case the seller shall be liable for it."

The words "storage" and "use" are defined in § 2, Chapter 17, as follows:

> " 'Storage' includes any keeping or retention in this state for any purpose, except subsequent use outside of this state, of tangible personal property purchased at retail sale."
>
> " 'Use' includes the exercise in this state of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale."

Section 10 I, reads as follows:

> "**Sec. 10. Exemptions.** No tax on sales, storage or use shall be collected upon or in connection with:
>
> "**I. Exemptions by constitutional provisions.** Sales which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state."

According to the agreed statement of facts the appellant purchased outside of the State of Maine, and brought in to the state certain materials and supplies (not including fuel) for use upon its motor trucks. More specifically these materials and supplies included motor parts, tires and other materials all to be used on the motor vehicle trucks by the appellant in its business in interstate commerce. All these materials, parts and supplies were placed in the Portland, Maine terminal of the appellant for the sole and exclusive purpose of being affixed to the motor trucks and used in the normal course of the business of the appellant. It is stipulated that no sales tax was paid upon these materials in the state or states of purchase.

Relying upon the provisions of the statutes previously referred to, the State Tax Assessor imposed a use tax against the appellant. From this assessment, the appellant filed an appeal claiming that the imposition of this tax constitutes an unconstitutional burden upon the interstate operations of the appellant.

The State Tax Assessor made the assessment upon the theory that the goods upon which the tax was assessed had come to rest in the State of Maine after importation therein, and had become part of the common mass of property within the State of Maine. *Henneford et al.* v. *Silas Mason Co., Inc., et al.*, 300 U. S. 577, 57 S. Ct. 524.

A study of the most recent decisions of the Supreme Court of the United States upon the point indicates that there is adequate precedent for the action of the State Tax Assessor.

In the case of *Nashville, Chattanooga, St. Louis Railway* v. *Wallace* (1933), 288 U. S. 249, 53 S. Ct. 345, an interstate rail carrier purchased large quantities of gasoline outside the State of Tennessee and brought it into the state in its tank cars unloading it into storage tanks where it remained

until withdrawn and used to operate the company's engines in interstate commerce. The storage was a preliminary step to use. The State of Tennessee levied an excise tax on the storage of the gasoline. The court said:

> "The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce, and lost its immunity as such from state taxation.
>
> "The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than appellant's storage tanks in Tennessee.
>
> "We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce.
>
> "It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes.
>
> "Hence there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky,* 279 U. S. 245. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are com-

> pletely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce, and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations."

A basic case on the applicability of a use tax on transactions involving interstate commerce is *Southern Pacific Company* v. *Gallagher* (1939), 306 U. S. 167, 59 S. Ct. 389. In that case the State of California imposed a use tax upon materials used by the Southern Pacific Railroad Company in its interstate operations. The material to which the use tax applied had been purchased outside the state and brought into California in interstate commerce. The material was stored only for such a period as was necessary before it could be installed into the interstate transportation facilities of the company and there begin its function as a part of the interstate operations. The court considered two lines of authority noting as follows:

> "There is agreement upon the principle involved. Appellant (railroad company) states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. - - - -. If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not, in effect, upon commerce, and forbidden.
>
> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid.

> "The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce.
>
> "The principle illustrated by the Helson case forbids a tax upon commerce or consumption in commerce. The Wallace case and precedents analogous to it permits state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories.
>
> ". . . State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere."

Certain of the items purchased out of state by Southern Pacific Company had been ordered "under specifications suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination." Of this the court said:

> "If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage', no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At

> that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun." *Southern Pacific Company* v. *Gallagher, supra.*

It is of significance and importance to note that the California Use Tax Act which was under interpretation contained clauses very similar to those in the Maine Sales and Use Tax Law.

See also *Pacific Telephone & Telegraph Company* v. *Gallagher,* 306 U. S. 182, 59 S. Ct. 396.

See Annotation in 129 A. L. R. 222, 224, wherein it is stated:

> "In their application to tangible personal property carried into the state and there brought to rest permanently, or merely halted for a moment before resuming its interstate course or character, taxes upon the privilege of use, storage, or consumption within the state have generally been held not to impose an unconstitutional burden on interstate operations or instrumentalities."

See also Annotation in 171 A. L. R. 283, relating to cases where immunity from the imposition of taxes is lost by reason of a break in transit. The general rule is quoted on page 284 as follows:

> "It is universally agreed that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the states through which it passes. Where, however, the interstate transit is broken or interrupted in a particular state, the question arises whether the property may thereupon be subjected to local taxation therein. In this situation the principle has been adopted by the Supreme Court of the United States and adhered to by the lower Federal courts

> and the courts of the various states that if the break in the interstate journey was caused by the exigencies or conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the continuity of the transit remains unimpaired, and the immunity of the goods from state or local taxation is consequently unaffected; but if the interruption in the journey occurred for purposes connected with the business convenience or profit of the taxpayer, or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation."

On page 292, we find the following statement:

> "In many instances it has been held, in the light of the particular statutes involved and facts and circumstances shown, that a break in the movement of an interstate shipment of personal property occurred through reasons related to the convenience or business profit of the taxpayer or owner, with the result that the immunity of the goods from taxation in the state where such interruption occurred was lost."

In the case before us the break in transit was not caused by exigencies over which the taxpayer had no control, but was purely for the convenience or business profit of the appellant.

Thus, the State Tax Assessor was correct in ruling that immunity from taxation was lost.

Appellant relies strongly upon the decision in *Helson, et al.* v. *Kentucky, supra.* A study of this decision indicates that the facts in the Helson case are not at all like those in the case before us. In the *Helson* case, the State of Kentucky had a law which imposed a tax on the use of gasoline within the state. Appellants were an Illinois corporation operating a ferry between Kentucky and Illinois.

Gasoline was purchased in Illinois and used up on appellant's ferries. It was conceded that 75% of the gasoline was actually consumed within the limits of the State of Kentucky. The court ruled that the imposition of the tax was in violation of the commerce clause. However, it would appear that the gasoline upon which the tax was imposed never came to rest within the limits of the State of Kentucky and thus the tax was a direct impost on interstate commerce.

Other cases cited by the appellant are either not in point or else considered as in effect disapproved by *Southern Pacific Company* v. *Gallagher* and *Pacific Telephone & Telegraph Company* v. *Gallagher, supra,* as well as numerous other decisions which can be found listed in the Annotation in 129 A. L. R. 222, 227.

It is our considered opinion that the State Tax Assessor has properly administered and applied the pertinent sections of the statutes and that the assessment is valid.

The entry will be:

Appeal dismissed.

MAINE LUMBER CO., INC.
J. W. PENNEY & SONS, CO.
vs.
INHABITANTS OF TOWN OF MECHANIC FALLS
(Two cases)

Androscoggin. Opinion, July 10, 1961.

Taxation. Abatement. Lists.

Under R. S., 1954, Chap. 91A, Sec. 34, the taxpayers, after notice by the assessors, must furnish a true and perfect list of their poll and estates in order to qualify for an abatement unless he can satisfy them that he was "unable" to do so. "Reasonable excuse" or "good cause" does not meet the statutory standard of "inability."

The requirement of "inability" under the statute is jurisdictional and must be sustainable as a matter of law.

ON REPORT.

This is an appeal from an abatement award before the Law Court upon report. Judgment for the Inhabitants of the Town of Mechanic Falls, with costs.

Herbert A. Crommett,
Robert F. Preti, for plaintiff.

Frederick G. Taintor,
Frank B. Foster, for defendant.

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

WILLIAMSON, C. J. On report. These appeals by taxpayers from abatements of tax by county commissioners to the Superior Court present identical questions of law on like facts. For convenience we will refer to one case. The sole issue raised on report is "whether or not, on the Record,

the County Commissioners had jurisdiction to consider the Appeal from the refusal of the Assessors to make an abatement." For appeal, see R. S., c. 91-A, §§ 50-55; for report, see Rule 72, Maine Rules of Civil Procedure.

The taxpayer applied to the assessors of the town of Mechanic Falls for an abatement from the 1960 assessment. On the refusal of the assessors to make an abatement, the taxpayer applied to the county commissioners, and then dissatisfied with the small amount of abatement granted, appealed to the Superior Court.

The dispute arises from the failure of the taxpayer to file with the assessors at or before the time set therefor the list of property as required under R. S., c. 91-A, § 34, as follows:

> "**Sec. 34. Taxpayers to list property, notice, penalty, verification.**—Before making an assessment, the assessors shall give seasonable notice in writing to all persons, liable to taxation in the municipality, to furnish to the assessors true and perfect lists of their polls and all their estates, not by law exempt from taxation, of which they were possessed on the 1st day of April of the same year."
>
> * * * * * * * * * * * * * *
>
> "If any person after such notice does not furnish such list, he is thereby barred of his right to make application to the assessors or the county commissioners for any abatement of his taxes, unless he furnishes such list with his application and satisfies them that he was unable to furnish it at the time appointed."

A list of property was in fact filed with the assessors at the time of the abatement hearing, and subsequently a copy was furnished to the county commissioners at the time of the application or appeal from the action of the assessors. The county commissioners took jurisdiction of the application and rendered the decision from which the appeal arises

The reason given for the failure to file the list of property with the assessors is stated in an affidavit to the county commissioners, which reads in part:

> "An independent appraiser was hired by said Town, who conferred with the appropriate employee of said Appellant and who was given all of the pertinent information with regard to assets as the Appraiser felt necessary; thus leading the Appellant to believe that said written list would not be necessary."

The county commissioners granted the prayer of the taxpayer that they receive certain schedules or exhibits "so that your Appellant (taxpayer) will not be prejudiced by the question of whether or not prior lists submitted have in fact been submitted within the meaning of the Statutes for the State of Maine." The parties agree that the assessors gave seasonable notice in writing under Sec. 34, *supra.* The time appointed for furnishing the list necessarily must have been before the assessment was made from which the abatement was requested. *Perry, Petrs.* v. *Inhabitants of Lincolnville,* 145 Me. 362, 75 A. (2nd) 851.

Neither the assessors nor the county commissioners had jurisdiction to entertain an application for the abatement of the taxes unless the taxpayer "satisfies them that he was unable to furnish it at the time appointed." The taxpayer argues first, that in granting the prayer for relief, the county commissioners found as a matter of fact that the taxpayers had been "unable" to file a list within the prescribed time, and secondly, that there is nothing in the record to show that the taxpayer failed to file a list in accordance with the requirements of statute or the demands of the assessors. There is no statement of findings bearing out the contentions and no inferences can be drawn from the known facts or from the exercise of jurisdiction by the county commissioners that the failure of the taxpayer to file the list within the time appointed was brought about by its

inability to do so. If the county commissioners had so found that the taxpayer was unable to file the list before the abatement by the assessors, such a finding in our opinion would not have been sustainable as a matter of law. The taxpayer was mistaken in the legal effect of what transpired, but that does not change failure to file into inability to file.

The taxpayer further contends that the investigation by the appraiser employed by the assessors rendered the filing of the list unnecessary and that therefore the filing of the list by the taxpayer was not required to justify jurisdiction in the assessors and in the county commissioners. Such, however, is not the effect of the acts of the assessors through their specially employed appraiser. The statute requires that a property list be filed and without such list being filed there can be no applications to the assessors or the county commissioners. *Perry, Petrs.* v. *Inhabitants of Lincolnville, supra.*

The case falls within the principles set forth in *Edwards Mfg. Co.* v. *Farrington,* 102 Me. 140, 66 A. 309, in which a petition for writ of mandamus to compel assessors to take action on an application for abatement of tax was denied. Under the law as it then existed, no list was required from a nonresident. The court said, at p. 143:

> "It has been adjudicated that the petitioning company was and is to be regarded as an inhabitant of Augusta for taxing purposes. The company practically admits that it did not furnish the assessors with the statutory list of its taxable property at the time appointed, though due notice was given. It is therefore barred from its otherwise statutory right to make application for abatement either to the assessors, or to the county commissioners, or to this court, unless it can satisfy the tribunal that it 'was unable to offer it (the list) at the time appointed.' "

In this case the argument was made:

> "It is practically conceded in the petition itself, including exhibits, that the only excuse the petitioner has to offer to either tribunal for its omission to furnish the list seasonably, is that it had supposed it was not an inhabitant of Augusta for taxing purposes, and that the assessors and the city for many years had regarded it as a non-resident and had so treated it in assessing taxes upon its property and indeed did so in the assessment of 1904. The argument is that, beside believing that no list was required by law, the company was led to believe by the assurances and action of the assessors that no list was required by them, hence it should not be held barred from making application for abatement."

As the court further pointed out, " 'reasonable excuse,' or 'good cause,' " is not sufficient to excuse failure to file the list. The "statute requires proof that the applicant 'was unable' to furnish the list." See also *Dead River Co.* v. *Assessors of Houlton,* 149 Me. 349, 355, 103 A. (2nd) 123; *Terminal Company* v. *City of Portland,* 129 Me. 264, 151 A. 460; *Squire & Co.* v. *Portland,* 106 Me. 234, 76 A. 679; *Inhabitants of Orland* v. *County Commissioners,* 76 Me. 460; *Inhabitants of Fairfield* v. *County Commissioners,* 66 Me. 385; *Lambard* v. *County Commissioners,* 53 Me. 505.

It follows under the decided cases that the county commissioners had no jurisdiction to entertain the application for abatement of the tax and that the assessment by the assessors for the taxable year 1960 stands.

Under R. S., c. 91-A, § 55, "if no abatement is granted, judgment shall be rendered in favor of the municipality, and for its costs, to be taxed by the court." Accordingly the entry in Superior Court in each case will be

Judgment for the Inhabitants of the Town of Mechanic Falls with costs.

JOSEF JEDZIEROWSKI
vs.
MERLE L. JORDAN

Cumberland. Opinion, July 13, 1961.

Limitation of actions. False Imprisonment.

The cause of action for false imprisonment under R. S., 1954, Chap. 112, Sec. 93 "accrues" when the plaintiff regains his liberty by release upon recognizance, notwithstanding the criminal prosecution in which the arrest took place continued within the limitation period.

(An action commenced more than two years after the release upon recognizance is too late.)

ON APPEAL.

This is an action for false imprisonment before the Law Court upon appeal. Appeal denied.

Henry Steinfeld, for plaintiff.

Robert W. Donovan, for defendant.

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

WEBBER, J. This was an action for false arrest and imprisonment. On appeal from an order dismissing the complaint, the sole issue is whether or not the action is barred by the applicable statute of limitations.

Defendant police officer arrested the plaintiff without warrant on July 6, 1958. Imprisonment continued until July 7, 1958 when plaintiff was released upon his own recognizance. On July 24, 1958 the plaintiff was found not guilty of the charge lodged against him. The action in the instant case was instituted by plaintiff on July 20, 1960.

In our consideration of the issue before us, we may assume that both the arrest and the subsequent imprisonment were unlawful.

R. S., Chap. 112, Sec. 93 provides in part: "Actions for * * * false imprisonment * * * shall be commenced within 2 years after the cause of action accrues." No contention is made that the words "false imprisonment" as used in the statute do not include false arrest. It has often been held that false arrest is but one means of committing false imprisonment. The word "false" is synonymous with "unlawful." *Burlington Transportation Co.* v. *Josephson* (1946), 153 F. (2nd) 372, 375; *Harrer* v. *Montgomery Ward & Co.* (1950), 124 Mont. 295, 221 P. (2nd) 428, 433; *Hepworth* v. *Covey Bros. Amusement Co.* (1939), 97 Utah 205, 91 P. (2nd) 507, 509; *Alsup* v. *Skaggs Drug Center* (1949), 203 Okla. 525, 223 P. (2nd) 530, 533; *Alter* v. *Paul* (1955), 101 Ohio App. 139, 135 N. E. (2nd) 73, 74.

When did the cause of action accrue? If on July 7, 1958 when the plaintiff was released on his personal recognizance, then this action comes too late. If on July 24, 1958 when as a criminal respondent he was discharged by the court, then obviously this action is not barred by limitations.

In a careful and exhaustive written decision, the learned justice below examined and reviewed all of the cases which have now been brought to our attention. He concluded as do we that the cause of action accrued for purposes of the statutory period of limitations when the plaintiff regained his liberty by release upon recognizance.

The exact issue has not heretofore been presented to this court. In *Therriault, Drapeau* v. *Breton,* 114 Me. 137, involving suits for false imprisonment, the court held that damages would be limited to injuries sustained by plaintiffs to the time of their release by defendant police officers from unlawful arrest.

In *Mobley* v. *Broome* (1958), 248 N. C. 54, 102 S. E. (2nd) 407, the issue was precisely that which is before us in the instant case. The statute of limitations barred an action for false imprisonment after one year. The court said at page 409 of 102 S. E. (2nd):

> "In the case at hand, the plaintiff's right of action for false imprisonment accrued at the time of his unlawful arrest. His cause of action was complete when he was released from custody by the giving of bond, and limitations then began running. His cause of action for false imprisonment was completely barred at the end of one year therefrom, by virtue of (the statute). This is so notwithstanding the criminal prosecution in which the arrest took place continued within the limitations period. The pendency of the criminal prosecution in no wise affected or tolled the running of the statute of limitations."

The same rule was applied in *Belflower* v. *Blackshere* (1955), 281 P. (2nd) (Okla.) 423, and cases cited therein. See also 35 C. J. S. 714, Sec. 49.

Appeal denied.

RAY W. SMITH, ET AL.
vs.
STATE OF MAINE
ACTING BY AND THROUGH THE STATE HIGHWAY COMMISSION

ROLAND WARE
vs.
STATE OF MAINE
ACTING BY AND THROUGH THE STATE HIGHWAY COMMISSION

Kennebec. Opinion, July 13, 1961.

M.R.C.P. Eminent Domain.
Appeal. Courts. Rule 86.
Words and Phrases.

Under M.R.C.P. the Superior Court is always open for civil procedure and terms of court, as such, are abolished.

In condemnation appeals the pre-rules requirement that an appellant "at the first *term* of the court following the expiration of the said 30 days (after receipt of notice of award) shall file a complaint" became amended so as to conform to the New Rules and eliminate reference to terms, thereby requiring complaints to be filed within 30 days after receipt of notice of award. P. L., 1959, Chap. 317, Sec. 8.

In the instant case a complaint filed timely under the old law but too late under the new law yet filed under the new law during the transition period is saved by M.R.C.P. Rule 86.

In effectuating the transition between the old law and the new, the Legislature and the Courts were unquestionably intent upon affording and administering practical justice.

cf. "cause" and "proceeding."

ON REPORT.

This case is before the Law Court upon report. Interlocutory order of presiding justice sustained. Case remanded for further proceeding.

Bird & Bird, for plaintiff.

L. Smith Dunnack,
Charles P. Nelson, for defendant.

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

SULLIVAN, J. These cases are reported in accordance with Rule 72 (c), Maine Rules of Civil Procedure, 155 Me. 573, following a denial by a Superior Court Justice of motions by the State Highway Commission for the dismissal of plaintiffs' appeals from awards of damages rendered by a statutory, joint board composed of County Commissioners and Members of the Highway Commission.

In October, 1958 the Commission pursuant to R. S., c. 23, Sec. 21 had condemned and had taken real estate of the plaintiffs for highway purposes. In November, 1959 the joint board had entertained the issue of damages and had rendered their decisions on November 24, A. D. 1959. The joint board by registered mail dated December 3, A. D. 1959 had notified the plaintiffs of the awards. Ray W. Smith signed his registry receipt on December 8, A. D. 1959. That of Donald O. Smith was signed by one Ruth Smith on December 7, A. D. 1959. Roland Ware executed a return receipt on December 7, A. D. 1959. With each registered letter the Commission had unfortunately enclosed a copy of R. S., c. 23, Sec. 23 as that statute read prior to the amendment effective December 1, A. D. 1959, P. L., 1959, c. 317, Sec. 8.

On December 14, A. D. 1959 the Smiths filed their notices of appeal with the Commission. On December 17, A. D. 1959 Roland Ware did the same. Complaints dated January 5, A. D. 1960 were filed by all of the plaintiffs in the Superior Court on January 8, A. D. 1960, more than 30 days after the signing of the return receipts for the registered

mail. The Commission thereupon moved the Superior Court to dismiss the plaintiffs' appeals because the plaintiffs had failed to file their complaints with the Superior Court within 30 days after receipt by them of the notices of the damage awards.

An issue is accordingly generated by the amendment of R. S., c. 23, Sec. 23.

Previous to December 1, A. D. 1959, R. S., c. 23, Sec. 23 (P. L., 1951, c. 321, Sec. 2), read in pertinent respect as follows:

> "Any person aggrieved by said decision of the joint board may appeal therefrom to the superior court in the county where the land is situated within 30 days after the date of the receipt of the notice of award. The appellant shall file notice of his appeal with the state highway commission at Augusta by registered mail within the time above limited, *and at the 1st term of the court following the expiration of the said 30 days shall file a complaint* setting forth substantially the facts upon which the case shall be tried like other cases." (Italics ours.)

On and after December 1, A. D. 1959, R. S., c. 23, Sec. 23 (P. L., 1959, c. 317, Sec. 8), became amended:

> " - - - The appellant shall file notice of his appeal with the state highway commission at Augusta by registered mail within the time limited, *and, when such appeal is taken shall file a complaint* setting forth substantially the facts upon which the case shall be tried like other cases with the right in either party to a jury trial." (Italics ours.)

The Maine Rules of Civil Procedure had become operative on December 1, A. D. 1959 and had abolished terms of the Superior Court as to civil actions in so far as such terms signify anything more than the time for holding regular sessions of court. The Superior Court is now al-

ways open for civil procedure. Rules 6 (c), 77 (a), 86, M. R. C. P., 155 Me. 493, 584, 596; R. S., c. 113, Sec. 39; P. L., 1959, c. 317, Sec. 170.

From December 1, A. D. 1959 the Maine Rules of Civil Procedure:

> " - - - govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."
>
> Rule 86, *supra.*

R. S., c. 23, Sec. 23 as amended by P. L., 1959, c. 317, Sec. 8 is applicable to:

> " - - - all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular action pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."
>
> P. L., 1959, c. 317, Sec. 420.

It is to be perceived that the decision of the joint board in these cases was rendered upon November 24, A. D. 1959 at a time antecedent to December 1, A. D. 1959. The period of appeal did not begin to be tolled in any case until December 7, A. D. 1959. Notices of appeal were seasonably given to the Commission by all plaintiffs. Complaints were filed with the Superior Court according to the provisions of R. S., c. 23, Sec. 23 before the amendment to that act. The 1st term of the Superior Court to follow under the former procedure would have commenced upon the first Tuesday of February, A. D. 1960, on February 2nd, R. S., c. 106, Sec. 11, VI. Complaints by the requirements of R. S., c. 23,

Sec. 23 as amended by P. L., 1959, c. 317, Sec. 8 were filed in court subsequently to the 30 day limitation and were too late.

Decisive of our conclusions in the cases at bar must be the fair and expressed intendment of the Legislature and of this Court in the language of P. L., 1959, c. 317, Sec. 420 and of Rule 86, M. R. C. P., 155 Me. 596 which were coincidental in their effect and quite identical in their terms. *Hunter* v. *Totman,* 146 Me. 259, 265.

Both the Act and the Rule treat of "further proceedings in actions then pending." Were these civil pursuits of the plaintiffs on December 1, A. D. 1959 "actions"? They would not have been considered to have been such before December 1, A. D. 1959. R. S., c. 10, Sec. 21; *Hayford* v. *Bangor,* 103 Me. 434, 437.

December 1, A. D. 1959 was zero day by dint of P. L., 1959, c. 317, Sec. 420 and of the incipient Maine Rules of Civil Procedure, Rule 86. Both the Legislature and this Court were circumspectly mindful of the confusion attendant upon the extensive adaptation to new precepts and of human fallibility and inadvertence. Departures and innovations in long established remedial procedures may be the occasion of severe curtailment or deprivation of justiciable rights because of some complication of circumstances and of mental lassitude or inertia in the lay as well as in the professional mind.

In pristine pleading and process logic had been revered and had served too often to the disregard of right. Means had sometimes been preferred to end, form to substance. The primary object and the justification for the civil reform of 1959 was its promotion of less occult, simpler, speedier and more practical justice. Many old logical inhibitions were nullified. Access to hearings and trials was made more direct and surer.

In their apprehension that some situation such as the plight of the plaintiffs here might evolve in the period of transition from the old order to the new and that some litigant upon whom a severe loss might fall would be confronted with some hazardous choice as to the rectitude of one or the other of two procedural alternatives in a pending cause the Legislature and this Court resourcefully provided a saving neutralizer by P. L., 1959, c. 317, Sec. 420 and by Rule 86, M. R. C. P., *supra.*

> "This rule (86) is taken from Federal Rule 86. The second sentence is important. There are bound to be difficulties in the changeover, and the 'except' clause gives a broad discretionary power to mold the new procedure to pending actions." Maine Civil Practice, Field and McKusick, Note to Rule 86, P. 626.

Parties as these plaintiffs with court controversies in progression on December 1, A. D. 1959, it must be conceded, were entitled to their day in court in the absence of truly compelling reasons to the contrary. The Legislature and this Court in their solicitude can hardly be deemed to have differentiated in fine technicality and ultra refined nomenclature between a "cause" and a "a proceeding in the nature of an appeal to procure an estimate of the damages by the court in review of the estimate made." *Hayford* v. *Bangor,* 103 Me. 434, 437.) Granting that there is a veritable distinction between such a "cause" and such a "proceeding" there can be but slight important difference and both Legislature and Court by statute and by rule were unquestionably intent upon affording and administering practical justice.

> "The problems incident to the transition will soon become academic, but there are bound to be difficulties during the period of changeover. The guiding rule should be that no litigant is hurt by reliance in good faith upon either the old or the new procedure in an action commenced before the

effective date of the rules. Often there will be genuine uncertainty as to the proper course to follow, and even if the lawyer has done something which seems plainly erroneous, the court should not permit justice to be defeated by a procedural slip." Maine Civil Practice, Field and McKusick, Sec. 86.1, P. 626.

In the opinion of this court it would work injustice to dismiss the complaints of the plaintiffs in these cases.

Interlocutory orders of the presiding Justice sustained.
Cases remanded to the Superior Court for further and appropriate proceedings upon plaintiffs' complaints.

STATE OF MAINE
vs.
CLAYTON BROOKS HALE

Waldo. Opinion, July 13, 1961.

Criminal Law. Review. New Trial. Criminal Rules. Venue. Secret Indictment. Arrest. Extradition. Speedy Trial. Constitutional Law.

Prior to 1959, the review of criminal cases was by exceptions, and in felony cases, by appeal from the denial of a motion for new trial seasonably addressed to the presiding justice. P. L., 1959, Chap. 317, Sec. 69, does *not* change the methods of review in criminal cases.

No conclusive presumption of prejudice arises from the publication of inaccurate newspaper statements. For purposes of change of venue, actual prejudice must be shown and the decision is left to the sound discretion of the presiding justice.

Under R. S., 1954, Chap. 148, Sec. 7, one charged with crime is not entitled to know of the existence of an indictment until he has been arrested.

One is not entitled to "speedy" arrest *or* extradition while a fugitive.

The right to "speedy trial" is a personal privilege which may be waived.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon motion and exceptions. Motion for new trial addressed to Law Court dismissed. Exceptions overruled. Judgment for the State.

Richard W. Glass, for plaintiff.

Harold J. Rubin, for defendant.

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

WEBBER, J. The respondent was tried by a jury and convicted of the offense of "indecent liberties" with the person of a fourteen year old boy in Waldo County. His exceptions to certain rulings of the presiding justice raise issues to be determined here.

Before considering the exceptions, we must dispose of one other contention not technically before us. Respondent has addressed a motion for a new trial directly to the Law Court. No such motion was addressed to the presiding justice. It is well understood that prior to 1959, the review of criminal cases by the Law Court was by exceptions and, in felony cases, by appeal from the denial of a motion for a new trial seasonably addressed to the presiding justice. *State* v. *Bobb,* 138 Me. 242. As of December 1, 1959 the present rules of civil procedure became effective and in an effort to bring the statutes into reconciliation with these rules, the Legislature in 1959 enacted numerous amendments to existing statutes. These amendments are found in P. L., 1959, Chap. 317. Sec. 69 of that chapter, dealing

with the jurisdiction of the Law Court, included with other changes the insertion of the word "criminal" before the phrase "cases in which there are motions for new trials upon evidence reported by the justice." We are satisfied that this amendment which on its face created a remedy in criminal cases not available prior thereto was inadvertent and unintended by the Legislature. Our close relationship with the Legislature in attempting to create consistency between statutes and procedural rules promulgated by the court makes it possible for us to hold unequivocably that no change in the review of criminal cases was contemplated or intended. We are satisfied that the Legislature had in mind motions for new trial directed to the presiding justice and appeal therefrom as provided by R. S., Chap. 148, Sec. 30. We conclude that the methods of review available in criminal cases prior to the enactment of P. L., 1959, Chap. 317, Sec. 69 remain unchanged.

In view of the possibility of confusion resulting from the amendment, we have carefully examined the record in order to ascertain whether any injustice has resulted to the respondent from the employment of a technically insufficient vehicle of review. In the first instance, counsel for the respondent readily admits, and our examination confirms, that there is ample evidence which, if believed, would support a verdict adverse to the respondent. Counsel contends, however, that the jury was subjected to improper pressure to return a verdict in that they retired at 2:45 P. M. to begin their deliberations and returned a verdict at 2:35 A. M. No motion for a mistrial was made in connection with this issue. Although, as already noted, the matter is not technically before us, we have scrutinized the record to ascertain whether or not any injustice has resulted from the failure of the respondent to follow the proper avenues for review. It is apparent that there was no abuse of discretion on the part of the presiding justice. The trial lasted throughout five full days and ended on the sixth day.

Witnesses were brought from other states. The presiding justice was quite justified in giving consideration to the hardship and expense of a retrial both for the state and the respondent. At no time did the jury ask to be discharged from the case or suggest that it was hopelessly deadlocked. On the contrary, it is obvious that the jury was engaged in examining and appraising the evidence until it finally reported. Significant is the fact that at 2:15 A. M. the jury returned to the court room and requested the reading of portions of the evidence by the reporter. Within twenty minutes thereafter, the jury arrived at an unanimous verdict. We find here not the slightest suggestion that the verdict was the product of anything but the calm, deliberate and careful consideration by the jury. If the issue had been properly tendered, we could not have held otherwise.

The first of the two issues actually before us for consideration arises from an exception to the denial of a motion for a change of venue. The facts are not in dispute. A little more than a month before the trial and following the arrest and arraignment of the respondent, a weekly newspaper published in Belfast and having some circulation in Waldo County published an account of the proceedings. In the course of the article, otherwise factually true, there was included this statement: "Authorities allege they have a signed confession, he (the respondent) made at the time." It is agreed (1) that the statement was untrue, and (2) that none of the "authorities" charged with the investigation and prosecution of this case had made or authorized any such statement. This was at once a source of concern both to the county attorney and to the counsel for respondent. The latter immediately wrote to the county attorney but his primary interest was to learn whether or not such a written confession existed. The county attorney was dismayed by the falsity of the statement attributed to the "authorities." He interviewed the editor and informed

him that the statement was erroneous. The editor at once stated that a retraction would be published. He was aware, however, that the respondent had made some sort of confession and the county attorney in the course of the conversation confirmed the fact that an oral confession had been obtained. The editor then of his own volition published a retraction of the previous article as it related to a written confession but added the following: "Glass (the county attorney) alleged, however, that an oral confession was made to State Police and county law enforcement officers in Augusta by the Rev. Hale."

This statement at least has the virtue of being the truth and finds ample support in the evidence. Counsel for respondent takes the interesting position that the first and admittedly false statement did not justify a change of venue, but the later story, subsequently demonstrated to be true, was so prejudicial as to compel the relocation of the trial in another county.

News media are fully protected in their right to report the facts of any case as they occur. Difficulty arises, however, whenever there is a publication of what amounts to surmise and conjecture as to what may be offered and admitted as legal evidence at a later trial. We deplore, as do all courts, the giving of statements for publication in advance of trial by public officials as to the nature of what they deem to be evidence in their hands. We have in mind especially the disclosure by prosecuting officials of alleged confessions and admissions which may or may not ultimately pass the rigorous test of admissibility. Any incident which involves what is often termed "trying the case in the newspaper" or other news media imposes a great and unnecessary burden on courts which are charged with the duty of providing an atmosphere in which a respondent may receive a fair and impartial trial.

Unfortunate as we may deem such incidents to be, we cannot grant that there arises any conclusive presumption of prejudice from such published statements or that there must automatically be a change of venue whenever there is such an occurrence. The law in this respect is wise and realistic. It requires that actual prejudice be shown and leaves decision to the sound discretion of the presiding justice. *State* v. *Bobb, supra.* In the case before us the learned justice below took all of the usual precautions to eliminate the possibility of prejudice. Counsel upon their argument agreed that there was full and complete examination of each member of the jury and no person subsequently empaneled evidenced any prejudice or hostility whatever toward the respondent. There is no suggestion of spectator hostility in the court room or any public demonstrations anywhere before, during or after the trial. That no prejudice against the respondent found its way into the jury room seems to be further evidenced by the fact that in the face of very strong evidence of guilt, the jury deliberated for twelve hours before returning a verdict. We must conclude that there was not a scintilla of evidence of prejudice in this case and therefore no abuse of discretion on the part of the presiding justice. See *Commonwealth* v. *Geagan* (1959—Brink's Robbery), 339 Mass. 487, 159 N. E. (2nd) 870, 881.

We turn now to consideration of the respondent's exception to the denial by the justice below of a motion to quash the indictment. This motion was predicated on respondent's contention that he had been denied a "speedy trial." On the evidence before him, the justice could properly find that on September 11, 1958 the respondent at Augusta in the office of the State Police Department and in the presence of several witnesses made an oral confession of his guilt; that on that occasion he was advised by the county attorney that he would be arraigned on the following morning; that he was not then placed under arrest but was permitted to

return to his home in Belfast; that on the same evening he was advised by his own attorney that he would be arraigned in Belfast the following morning; that he was further informed by his then counsel that although he could not advise his client to flee, it was his opinion that the authorities probably would not pursue the client if he left the state and stayed away; that the respondent left Maine some time during the night; that a secret indictment was returned by the grand jury against the respondent at the October term of court, 1958 and a capias issued at that and each subsequent term of court; that the respondent was thereafter in California, Hawaii and other places outside of Maine until he returned to Belfast for about two and one-half days in February, 1960; that on April 22, 1960 the respondent was arrested in Boston, Massachusetts, and returned to Maine where he was arraigned and admitted to bail until his trial began on June 6, 1960; that during respondent's absence from this state the sheriff had general knowledge of his whereabouts but made no effort to communicate with him.

Respondent contends that he was never informed that an indictment was pending against him and therefore had no opportunity to demand a "speedy trial." We must first consider what is the responsibility of the authorities in such a case as this.

R. S., Chap. 148, Sec. 7 states in part: "No * * * officer of the court, unless by order of the court, shall disclose that an indictment for felony has been found against any person not in custody or under recognizance until he is arrested, except by issuing process for his arrest; * * * ." The statute was an effective bar to any disclosure that an indictment was pending.

The respondent relies heavily on *Couture, Applt.* v. *State of Maine,* 156 Me. 231. We think the rule adopted in that case must be rather closely limited to such a situation as

there existed. In *Couture* the prisoner was in custody and was in the process of serving a sentence imposed for another offense. The effect of his incarceration by the sovereign was to sever his ordinary means of communication, to make him utterly dependent upon officials charged with his prosecution, and to render it impossible for him to ascertain by any of the usual methods the existence of a pending indictment. Upon these facts we held that "there was a duty on the part of officials to inform the respondent that an indictment was pending against him." In *Couture* the statutory requirement of secrecy had no application.

Respondent Hale was a fugitive from justice. He knew the nature of the crime he had committed and he knew the nature of the formal charge which would have been made against him had he not fled the state. By the terms of the quoted statute he was not entitled to know of the existence of an indictment until he had been arrested. He received a "speedy trial" after his arrest. He was not entitled to a speedy arrest or extradition while he was a fugitive.

"To constitute one a fugitive from justice, as administered in a given state, two things are essential, to wit: (1) that he, having been in that state, has left it and is within the jurisdiction of another; and (2) that he incurred guilt before he left the former state and while he was bodily present in that state." *Taft* v. *Lord* (1918), 92 Conn. 539, 103 A. 644, 645. It has been quite uniformly held that a fugitive from justice cannot treat the time during which he is absent from the state as a period during which he is denied a speedy trial. *State* v. *Swain* (1934), 147 Or. 207, 31 P. (2nd) 745; *Shepherd* v. *U. S.* (1947), 163 F. (2nd) 974.

Art. I, Sec. 6 of the Constitution of Maine provides in part for the right of one accused of crime to have "a speedy, public and impartial trial * * * by a jury of the vicinity." This provision has been implemented by statute in R. S., Chap. 148, Sec. 9, the applicable portions of which state:

> "Any person imprisoned under indictment shall be tried or bailed at the next term after the finding thereof, *if he demands it,* * * * ; 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." (Emphasis ours.)

The right to a speedy trial is a personal privilege which the respondent may waive. Delays caused by acts of the respondent himself constitute such a waiver. *State* v. *Slorah,* 118 Me. 203; *State* v. *Boynton,* 143 Me. 313; *Couture, Applt.* v. *State of Maine, supra.* We now hold that the delay which occurred while this respondent was a fugitive from justice outside the state, even though he had no knowledge of the pendency of an indictment, was the result of his own acts and constituted a waiver of his right to trial during that period. In the instant case the respondent was tried within a relatively short time after he was apprehended in another state and returned to Belfast. He received a "speedy trial" within the meaning of the Constitution of Maine and the quoted statute.

Motion for new trial addressed to Law Court dismissed. Exceptions overruled. Judgment for the State.

IRVING ELIASBERG, INC., ET AL.
vs.
W. EMLEN ROOSEVELT, ET AL.

York. Opinion, July 25, 1961.

Equity. Easements. Licenses.

A conveyance of land and buildings "together also with the right to use the elevator and loading platform (of an adjacent building of the grantor) in accordance with separate written agreement made between the parties" does not create an easement in the elevator and loading platform binding subsequent grantees of the "adjacent building" where the separate written agreement provides only that in the event of a sale to third parties, the original grantor "will obtain for the said (grantee) a right to the use of the elevator and loading platform."

There is no easement running with the land where the parties intended that permission to use the elevator should end with the sale of the property.

The obligation of a grantor to obtain from a third party grantee of adjacent property an agreement for the continued use of an elevator by the original grantee does not create an easement running with the land.

ON REPORT.

This is a declaratory judgment action before the Law Court upon report. Case remanded to the Superior Court for action in accordance with this opinion.

Lincoln Spencer,
Waterhouse, Spencer & Carroll, for plaintiffs.

Linnell, Perkins, Hinckley, Thompson & Thaxter,
Sidney W. Thaxter,
Charles P. Barnes, for defendants.

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

WILLIAMSON, C. J. This is an action by a landowner and his lessee (1) for a declaratory judgment of their rights in and to the use of an elevator and a loading platform in an adjoining building owned by the defendants, (2) for an injunction against the removal or destruction of the elevator and loading platform or money damages for such removal or destruction, and (3) damages to plaintiffs for loss from the flooding of the cellar from rain and surface water resulting from the demolition in part of the building housing the elevator.

The case is reported to us for decision on complaint, answer, and evidence legally admissible. In the event damages are recoverable, it is agreed the amount shall be fixed finally by the presiding justice after hearing.

In 1956 the plaintiff, Irving Eliasberg, Inc., a New York Corporation (hereinafter sometimes called "Eliasberg"), purchased from Passamaquoddy Properties, Inc. (hereinafter sometimes called "Passamaquoddy"), certain buildings formerly belonging to Goodall-Sanford, Inc. and which were part of what the parties graphically term a "manufacturing complex." Building No. 4, a brick structure, owned by Eliasberg, was served by the elevator and loading platform in question located in an adjoining wooden building known as Building No. 5, being a part of a group of wooden buildings called the "white buildings."

The elevator is used for freight and serves two floors and the basement of Building No. 4, and two stories of Building No. 5, with doors on opposite sides opening to each building. Aside from the common doors there is no connection between the buildings, and Building No. 5 can be removed without damage to Building No. 4.

The loading platform in Building No. 5 is used for receiving and shipping goods by the plaintiff tenant Sher Woven Label Co., Inc.

Demolition of the "white buildings," including Building No. 5, commenced in March 1960 and continued during the summer. By agreement demolition of the elevator was discontinued pending litigation.

The decision in our view of the facts turns upon the intention of the parties expressed in the "Letter Agreement," set forth below, in light of the situation of the parties at the time the agreement was made. *Monk* v. *Morton,* 139 Me. 291, 30 A. (2nd) 17; *Katz et al.* v. *New England Fuel Oil Co., et al.,* 135 Me. 452, 199 A. 274; *Power Company* v. *Foundation Company,* 129 Me. 81, 149 A. 801.

The following excerpts from deeds and agreements are of importance.

1. Deed of Building No. 4 from Passamaquoddy to Eliasberg, dated May 15, 1956, and recorded May 25, 1956, reads in part:

> "And together also with the right to use the elevator and loading platform in Building No. 5 in accordance with separate written agreement made between the parties.
>
> "EXCEPTING AND RESERVING to and for the benefit of the grantor, its successors, grantees and/or assigns, and the benefit of the Trustees of the Grossman Family Educational Trust and Sanford Properties, Inc., their successors, grantees, and/or assigns, the right to enter upon the foregoing premises for the purpose of using, maintaining, repairing and replacing and as access to any and all pipes, wires, meters and other equipment, apparatii and appurtenant fixtures, including elevators, shafts and other conveyancers wherever the same may be located in, upon or within the foregoing premises and serving other premises now or formerly owned by Goodall Worsted, Sanford Mills and/or Goodall-Sanford, Inc., and for the purpose of relocating any of the foregoing to such location or area as will not in the bona fide

judgment of the grantee unreasonably interfere with the use of the premises by the grantee or its tenants, and the cost of such relocation and repairs necessitated thereby to be borne by the grantor, its successors and/or assigns."

2. Letter Agreement between Passamaquoddy and Eliasberg, dated May 15, 1956, being the "separate written agreement" referred to in 1. above, and recorded June 7, 1956, reads in full:

"LETTER AGREEMENT

"On this 15th day of May, 1956, PASSAMAQUODDY PROPERTIES, INC., a Maine corporation with offices in Sanford, Maine, conveyed by Deed to Irving ELIASBERG, INC., a New York corporation with offices at 350 Fifth Avenue, New York City, New York, a certain parcel of land, together with the buildings thereon, all in accord with the Purchase and Sale Agreement executed by and between the said parties on March 17, 1956.

"For One ($1.00) Dollar and other good and valuable consideration, Passamaquoddy Properties, Inc. hereby grants unto IRVING ELIASBERG, INC. the right to use in common with others the elevator and loading platform in the Southerly section of Building No. 5, which Building is located in the Goodall Division of what was formerly known and referred to as Goodall-Sanford Mills, Inc., in Sanford, Maine (See Plan attached to Deed) provided that IRVING ELIASBERG, INC. shall be responsible for damage to persons or property caused by it or its agents in the operation of said elevator, and further provided that the expense of maintaining and operating said elevator shall be shared proportionately by the said IRVING ELIASBERG, INC. with any other user or users of said loading platform and elevator and that with respect thereto IRVING ELIASBERG, INC. shall maintain liability insurance policies satisfactory to the said PASSAMAQUODDY

PROPERTIES, INC. and wherein the said PASSAMAQUODDY PROPERTIES, INC. shall be specifically named.

"PASSAMAQUODDY PROPERTIES, INC. further covenants and agrees that at such time as it conveys to third parties the said land and buildings wherein the elevator and loading platform are located, it will obtain for the said IRVING ELIASBERG, INC. a right to the use of that elevator and loading platform in common with others as herein provided for, subject to IRVING ELIASBERG, INC. agreeing to pay its proportionate share of maintenance and expense in connection therewith.

Assented to:

PASSAMAQUODDY PROPERTIES, INC.
By Bernard Grossman

Assented to:

IRVING ELIASBERG, INC.
By Irving Eliasberg Pres

STATE OF MAINE

County of York, ss. May 15, 1956
Personally appeared Bernard Grossman, Treasurer of PASSAMAQUODDY PROPERTIES, INC. and acknowledged the foregoing to be his free act and instrument in his said capacity and the free act and instrument of PASSAMAQUODDY PROPERTIES, INC.

Before me, George S. Willard Notary Public
Justice of the Peace (L.S.)"

3. "Bill of Sale and General Conveyance" from Passamaquoddy to its sole stockholder Grossman's of Maine, Inc., of all assets including Building No. 5 under the terms of a plan of complete liquidation of Passamaquoddy dated December 31, 1958, and recorded March 31, 1959.

This transfer covered all of Passamaquoddy's property and assets of every kind, nature, and description "subject to all of the debts, contracts and other obligations of Passamaquoddy to or with third persons whether such debts, contracts, or other obligations are liquidated, contingent, or arising after the date hereof."

4. Deed from Grossman's of Maine, Inc. to Lawrence L. Reeve of a substantial part of its property in the "manufacturing complex" including Building No. 5 and the other "white buildings" dated March 31, 1959, and recorded March 31, 1959, reads:

> "The hereinbefore described premises are hereby conveyed subject to and together with the benefit of all rights of way, grants, agreements, and easements now of record and in effect, together with all reservations and rights of the Grantor therein.
>
> "Reserving and excepting, however, to or for the benefit of the Grantor, its successors, and/or assigns, so long as the Grantor, its successors and/or assigns, have interests as Mortgagee, . . the right . . . to enter upon the premises . . for the purpose of using, maintaining, repairing and replacing any and all pipes, wires, meters and other equipment, apparatii and appurtenant fixtures, whereever the same may be located, in, upon or within the foregoing premises, and serving other premises now or formerly owned by Goodall Worsted, Sanford Mills and/or Goodall-Sanford, Inc., and for the purpose of relocating any of the foregoing to such location or areas as will not unreasonably interfere with the use by Grantee (or successors and/or assigns) of said premises, the cost of such relocation, if any, to be borne by the Grantor, its successors and/or assigns; the within reservation and exception shall include the right to accomplish the purposes hereinbefore set forth."

5. Agreement as to "Partial Releases" between Grossman's, Inc. of Maine, mortgagee, and Lawrence L. Reeve,

mortgagor, dated March 31, 1959, and recorded March 31, 1959. On the same day Reeve made two mortgages to the mortgagee in the total amount of $400,000. The agreement provided that the "white buildings" (which included Building No. 5) could be torn down and removed "without the same constituting waste and a breach of said mortgages."

The agreement further provides:

> "The tearing down and removal of said white buildings, by or on behalf of MORTGAGOR (or successors and/or assigns) or by MORTGAGEE, its successors and/or assigns, shall involve, if necessary, the repair, replacement and/or relocation, as the case or cases may be, of any and all pipes, wires, meters and other equipment, apparatii and appurtenant fixtures, which have been affected by such tearing down and removal, serving other premises now or formerly owned by Goodall Worsted, Sanford Mills and/or Goodall-Sanford, Inc., to the end that such facilities shall continue to be operative, notwithstanding such tearing down and removal."

6. Lawrence L. Reeve entered into an Indenture of Trust with the defendant W. Emlen Roosevelt and Ward T. Hanscom, Trustees (hereinafter sometimes called the "Stenton Trust"), dated December 3, 1959, and recorded December 10, 1959, and he conveyed the property acquired from Grossman's of Maine, Inc. to the Stenton Trust by deed dated December 21, 1959, and recorded December 28, 1959. "This conveyance is made subject to and together with the benefit of all rights of way, grants, agreements, and easements now of record and in effect, and subject to all reservations and rights of Grossman's of Maine, In—. as particularly set forth in said above mentioned deed." (4. above).

The main question for decision is whether the defendant trustees, owners of Building No. 5, may remove and destroy

the elevator of their own volition. The loading platform apparently is used with the elevator. In other words, has Eliasberg such an interest in the elevator that it may prevent its removal or destruction? Eliasberg contends that it has an easement on Building No. 5 for the use of the elevator, and that while the elevator is operative, the defendant owner of Building No. 5 has no right to destroy it, at least unless it is replaced. The defendants on their part argue that Eliasberg had a license terminable on the sale of the premises by Passamaquoddy (or Grossman's of Maine, Inc.) and that this is the full force of the Letter Agreement.

The heart of the case is found in the Letter Agreement. Passamaquoddy in the deed to Eliasberg granted the right to use the elevator and loading platform "in accordance with a separate written agreement," that is, with the Letter Agreement. It is to be noted that the Letter Agreement, although dated as of the same date as the deed, was not recorded until several days thereafter. Without the Letter Agreement, Eliasberg acquired no rights whatsoever in the elevator or loading platform.

The bite of the agreement for our purposes lies in the undertaking of Passamaquoddy to secure an agreement from the purchaser for use of the elevator and loading platform by Eliasberg in the event Passamaquoddy disposes of Building No. 5. If Eliasberg had an easement (or an agreement in the nature of an easement) running with the land, it would have no need of this protective clause. With such a provision carrying with it an affirmative undertaking to obtain a like agreement for Eliasberg from the next owner of Building No. 5, there remains no doubt in our minds that the parties intended that the permission to use the elevator and loading platform under the Letter Agreement ended with the sale of the property. In short, Passamaquoddy

licensed Eliasberg to use the elevator and loading platform while Passamaquoddy owned the property, and no longer.

Grossman's of Maine, Inc. entered the picture in the dissolution of Passamaquoddy and must be held to like responsibilities with Passamaquoddy. Mr. Reeve, however, was a purchaser of real property not subject to limitations made by his predecessors in title that had not reached the status of easements or agreements in the nature of easements running with the land.

We may assume that Mr. Reeve knew of the duty of Passamaquoddy and of Grossman's of Maine, Inc. to obtain an agreement for the continuance of the right to use the elevator and platform. It does not follow, however, from such knowledge that he and his assignees became bound thereby in the absence of an agreement with Eliasberg.

Grossman's of Maine, Inc. (and Passamaquoddy as well), breached the agreement to obtain such an agreement compelling the purchaser Reeve to honor the agreement they had made. This was the extent of their obligation.

To hold otherwise would saddle Building No. 5 with an easement or an arrangement not unlike an easement in face of the plain intent to limit the right to use the elevator and loading platform to the period of ownership of the two properties Buildings Nos. 4 and 5 by Eliasberg and Passamaquoddy (or Grossman's of Maine, Inc.) in the absence of a further agreement with the purchaser from Passamaquoddy.

Inasmuch as an easement (or right in the nature of an easement) in the use of the elevator and loading platform was not established, there is no need, in our view, to consider or pass upon issues relating to the extent and termination of easements or rights of this nature.

There should be entered in the Superior Court (1) a declaratory judgment to the effect that Eliasberg and its

successors and assigns have no right in the maintenance, use, occupancy, and protection of the elevator or loading platform in Building No. 5 against the Stenton Trust, or its successors or assigns, by or through the conveyance from Passamaquoddy to Eliasberg and the Letter Agreement referred to therein, both dated May 15, 1956, recorded in York County Registry of Deeds, Book 1326, Page 241, and Book 1326, Pages 344, 345; (2) a denial of the prayer for injunctive relief against the removal or destruction of the elevator and loading platform; (3) a denial of the prayer for a mandatory injunction directing the Stenton Trust to repair the elevator and loading platform, or in lieu thereof to furnish equally convenient facilities.

On the claim of the plaintiffs against the Stenton Trust for damages from the flooding of the cellar of Building No. 4 resulting from the partial demolition of Building No. 5, the record is brief and not sufficient to form an accurate basis for decision on liability. The claim may, however, have merit. *McRae* v. *Water Co.*, 138 Me. 110, 22 A. (2nd) 133. Justice requires that on this issue the case be remanded for hearing with opportunity to introduce additional evidence and decision by the presiding justice.

The entry will be

Remanded to Superior Court for action in accordance with this opinion.

BONNAR-VAWTER, INC.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, July 25, 1961.

Sales Tax. Corporations.
Bailment — Sale — Course of Business — Service — Tangible Property.
Consumed or Destroyed.

One may be engaged in a business activity with an object of "gain, benefit or advantage" within the meaning of R. S., 1954, Chap. 17, Sec. 2 even though not for profit. The gain, benefit, or advantage may be large or small, direct or indirect.

The charges of a subsidiary corporation for the cost, labor, materials, overhead, depreciation and taxes to the parent corporation for printing plates made in New Hampshire by the subsidiary and used by the parent corporation in Maine were for gain, benefit or advantage within the meaning of the word "business" (R. S., 1954, Chap. 17, Sec. 2.)

There is no provision in the Maine Sales Tax Law which would render the use of printing plates non-taxable on the ground that the transaction constituted a sale of services rather than personal property.

Courts have generally refused to disregard the corporate entity in order to grant relief from taxation at the expense of the state. Transactions between parent and subsidiary corporations, such as in the instant case, are considered in the ordinary course of business.

Relief from taxation for property "consumed or destroyed" is limited to cases only where the personal property is physically consumed or destroyed in the manufacturing process to such an extent that it is rendered unfit for further practical use for its intended purpose. This does not apply to printing plates stored to await further orders.

ON REPORT.

This is a tax appeal before the Law Court upon report. Appeal to the Superior Court denied. Case remanded to Superior Court for decree denying appeal.

Samuel W. Collins, Jr.,
Boyd L. Bailey, for plaintiff.

Ralph Farris, Sr.,
Richard A. Foley,
John W. Benoit, for state.

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

SIDDALL, J. On Report. This is an appeal by complaint from an assessment by the State Tax Assessor, hereafter called the appellee, against Bonnar-Vawter, Inc., hereafter called the appellant, of a use tax, interest, and penalty arising out of the use within the State of Maine of certain printing plates. The case is reported from the Superior Court for decision upon the complaint, answers, and agreed statement of facts. The total tax assessment, including interest and penalty, amounts to $5,253.33.

The stipulations disclose that the appellant is a Delaware corporation having offices in Rockland, Maine, and Keene, New Hampshire. It is engaged in the business of printing in Rockland. In its plant are rotary presses, which consist of rotating drums on which type is mounted. The printing plates, for the use of which a tax has been assessed, constitute the type. These plates are sheets of rubber type with brass fillings designed to mount them to rotary presses. The metal backing is curved and fitted for the appellant's presses. Opposite the drum is a steel impression cylinder. Paper is fed, in a continuous strip, between the rotating drum and the impression cylinder, permitting a continuous repeated imprint upon the paper by the type mounted on the drum. The plates are manufactured in New Hampshire by Photoplate, Incorporated, hereafter called Photoplate, a wholly-owned subsidiary of the appellant. The President, Board of Directors and other officers are the same in the two companies. The two corporations maintain separate

books of account and separate corporate balance statements, and also file separate Federal Income Tax returns. The employees engaged in the manufacture of the plates are employed by Photoplate.

When the appellant receives a printing order, it orders the necessary plates from Photoplate. Photoplate then orders from various supply houses the raw materials, i.e., rubber and brass, to make the plates. The raw materials are shipped by the supplier consigned to Photoplate. No agency agreement exists between the appellant and Photoplate in respect to the order for raw materials, and they are not purchased by Photoplate as the disclosed agent of the appellant. When received, these materials are carried as items of inventory on the books of Photoplate. The invoice when received is approved and forwarded by Photoplate to the appellant who enters an "account payable—Trade" on its books and makes payment to the vendor, and then enters an "account receivable—Photoplate" on its books. Photoplate enters an "account payable—Bonnar-Vawter" on its books. The raw materials are then fabricated by Photoplate into printing plates. The appellant pays the employees of Photoplate, and the labor charge is entered on Photoplate's books as an "account payable—Bonnar Vawter" and the labor charge is entered on the appellant's books as an "account receivable—Photoplate." The completed plates are shipped to the appellant in Rockland upon completion. Photoplate bills the appellant monthly for the plates so shipped. The monthly invoice shows the total amount of the charges for the particular month covered by the invoice, and contains the words "Sold to Bonnar Vawter, Incorporated, 93 Dunbar Street, Keene, New Hampshire." The invoice figure is not determined in advance, and varies as expenses and overhead vary. During a portion of the taxable period the monthly charge for the plates was determined by adding 300% to 500% of the labor costs to the actual cost of labor. It was stipulated

that the 300% to 500% of labor costs was to cover materials, overhead, depreciation, taxes, etc. During the remainder of the taxable period 25% of labor and material costs were added to the actual costs of labor and material. The 25% of labor and material costs was charged to cover overhead, depreciation, taxes, etc. The price formula was set up in such a manner as to permit Photoplate to break even and not make a profit on the transaction.

When the printed plates are received by the appellant, the entry of "account receivable—Photoplate" is cancelled on the appellant's books, and the entry of "account payable—Bonnar Vawter" is cancelled on the books of Photoplate.

After the plates have been used to make up the customer's order, they are detached from the press and returned to New Hampshire for storage against a possible re-order by the same customer. About 34% of the plates are never used again. About 30% are used with some slight alteration. About 30% are used with major alterations and about 5% are used again with no alteration.

One of the contentions of the appellant is that the transactions between it and Photoplate, as disclosed by the specifications, did not constitute taxable sales, because the plates were not sold to the appellant in the ordinary course of the seller's business within the meaning of the tax statute. As bearing on its contention the appellant argues (1) that Photoplate was not maintained with any object of gain, benefit, or advantage, either direct or indirect; (2) that Photoplate did not have the general property in the plates, and that the transfer of the plates was in the nature of the termination of a bailment; (3) that the purchase of the plates was the purchase of services and not of tangible personal property; (4) that the nature of the transactions between the two companies was such that Photoplate was operated as a department of the appellant.

The pertinent statutory provisions applicable to appellant's contentions are as follows:

> "**Use Tax.**—A tax is imposed on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale . . . at the rate of 3% of the sale price." R. S., 1954, Chap. 17, Sec. 4, as amended.
>
> " '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, ... " R. S., 1954, Chap. 17, Sec. 2 as amended.
>
> " 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect." R. S., 1954, Chap. 17, Sec. 2.
>
> " 'Use' includes the exercise in this state of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale." R. S., 1954, Chap. 17, Sec. 2.

We now discuss appellant's claim that Photoplate was not engaged in an activity with the object of gain, benefit, or advantage, either direct or indirect.

It will be noted that the statute does not use the word "profit." The statute used the words "gain, benefit, or advantage, either direct or indirect." These words have a broader meaning than that of the word "profit." One may engage in a business activity with an object of "gain, benefit, or advantage" and not necessarily for profit. *State* v. *Zellner,* 133 Ohio St. 263, 13 N. E. (2nd) 235, 238; *Union League Club* v. *Johnson,* 115 P. (2nd) 425, 426.

The appellant cites the case of *Valier Coal Company, Applt.* v. *Department of Revenue,* 11 Ill. (2nd) 402, 143 N. E. (2nd) 35, 64 A. L. R. (2nd) 763. In that case an at-

tempt was made to assess a retailer's occupation tax against a wholly owned subsidiary of the Chicago, Burlington and Quincy Railroad Company. By an order of the Illinois Public Utilities Commission the subsidiary was prohibited from selling its product to the general public, and could sell to the parent company only at a price not exceeding the actual cost of production, plus an amount sufficient to pay interest on the investment and to provide a sinking fund. The court held that the subsidiary was in effect forbidden to engage in business, and that the *right* to sell to the general trade and to make a profit or realize a gain are ordinary incidents of being engaged in retail business, although the imposition of a tax does not depend upon whether a profit is actually realized. In the instant case Photoplate was not prohibited from making a profit or gain, or from selling to the general public. The failure to realize a profit from its transactions, or to deal with the general public, was not by prohibition but by choice.

The gain, benefit or advantage may be large or small, direct or indirect. Although no profit was made by Photoplate from its transactions with the appellant, it is not difficult to discover a direct or indirect gain, benefit, or advantage therefrom to Photoplate. The charges made by Photoplate were made to cover, in addition to the cost of labor and materials, "overhead, depreciation, taxes, etc." We must assume from the nature of the plates that Photoplate was the owner of equipment necessary in their production. This equipment was subject to depreciation. There was necessarily some overhead in the maintenance of the corporation. Apparently there was a tax liability of some sort. The charges made to the appellant, and paid for by it, provided revenue to Photoplate sufficient to cover its overhead, taxes, and depreciation, and thereby, to that extent at least, Photoplate benefited from its transactions with the appellant. We must conclude that Photoplate was engaged in an activity with the object of gain, benefit, or ad-

vantage, within the meaning of the word "business" as defined in the statute.

The appellant claims that the property interest of Photoplate in the plates was not substantial enough so that the transfer to the appellant constituted a "sale," and that the transfer of the plates was in the nature of a bailment. We cannot accede to this view. The materials used in the manufacture of the plates were bought by and consigned to Photoplate by the supplier. We find no facts from which it can be reasonably inferred that the general title to the plates, during the fabricating and manufacturing process, was in any other person than Photoplate. The only reasonable conclusion to be drawn from the facts in this case is that full title to the plates continued in Photoplate at all times during their manufacture and until it parted with possession of them to the appellant. The facts are all consistent with the relationship of vendor and vendee between Photoplate and the appellant, and inconsistent with any other relationship.

Another claim made by the appellant is that in purchasing the plates it bought services and not personal property. The cost of the materials used in the manufacture of the plates was approximately 15% of the total amount charged as set forth in the invoices. The balance of the invoice price was made up of labor, overhead, depreciation, taxes, etc. The language of sales and use tax legislation varies in different states. Decisions by other courts are consequently of little assistance, unless the specific language of the statute involved is clearly set forth. The appellant cites, among other cases, the case of *Washington Times-Herald, Inc.* v. *District of Columbia,* 213 F. (2nd) 23. In that case a newspaper purchased certain comic strip mats manufactured by the seller from original drawings. The mats were of inconsequential value. We note that the District of Columbia Use Tax Act exempted from sales and use

taxes, "professional or personal service transactions which involve sales as inconsequential elements for which no separate charges are made." By regulation a sale was an "inconsequential element" where the price of the tangible personal property was less than 10% of the amount charged for the services. The transaction was held to be a sale of professional and personal services and a transfer of mats of inconsequential value, and consequently was not subject to tax. We do not consider that the manufacture of the plates in the instant case involved the type of service furnished in the above cited case. Furthermore, we find no comparable provision in our statutes relating to personal service transactions. In the case before us the complete fabricated and manufactured plates were shipped to the appellant from outside the state and were used in this state by the appellant. The purchase price reflected the cost of labor, materials, overhead, depreciation, and taxes. We are unable to discover any provision in our statutes that would render the use of the plates in this state non-taxable on the ground that the transaction constituted a sale and purchase of services and not of tangible personal property.

The appellant, in arguing that the goods were not sold to it in the ordinary course of business, asks us to disregard the legal entity of Photoplate and consider that in its transactions with the appellant it was operating as a department of the parent company.

Generally, courts have been reluctant to disregard the legal entity of a corporation, and have done so with caution and only when necessary in the interest of justice. The corporate entity will be disregarded when used to cover fraud or illegality, or to justify a wrong. It will not be disregarded when to do so would promote an injustice, give an unfair advantage, or contravene public policy.

> "The doctrine of corporate entity is one of substance and validity; it should be ignored with cau-

> tion, and only when the circumstances clearly justify it. The theory of the alter ego has been adopted by the courts to prevent injustice, in those cases where the fiction of a corporate entity has been used as a subterfuge to defeat public convenience or to perpetuate a wrong; it should never be invoked to work an injustice, or to give an unfair advantage." *Pickwick Corporation* v. *Welch,* 21 F. Supp. 664, 669.

For a discussion of the same principle see 13 Am. Jur. Corporations, Sec. 7; 18 C. J. S. Corporations, Sec. 6; Fletcher Cyclopedia Corporations, Sec. 41.

In the field of retal sales tax legislation and similar tax legislation, courts have generally refused, for various reasons, to separate the corporate entities of the parent company and the wholly owned subsidiary in order to grant relief from such taxes at the expense of the state. See *Superior Coal Co.* v. *Department of Finance,* 377 Ill. 282, 36 N. E. (2nd) 354. *Superior Coal Co.* v. *Department of Revenue,* 4 Ill. (2nd) 459, 123 N. E. (2nd) 713; *Northwestern Pac. R. Co.* v. *State Board of Equalization,* 21 Cal. (2nd) 524, 133 P. (2nd) 400; *Re Bush Terminal Co.,* 93 F. (2nd) 661; *Rexall Drug Co.* v. *Peterson,* 113 Cal. App. (2nd) 528; 248 P. (2nd) 433; *Simmons Hardware Co.* v. *City of St. Louis,* 192 S. W. 394, (Mo.); 64 A. L. R. (2nd) 769 (Annotation).

In the instant case, the appellant did not cause the plates to be manufactured by its own company. It elected to organize a subsidiary company to manufacture the plates. The reason for so doing was not disclosed by the stipulations. We must assume, however, that some economic advantage resulted therefrom. A corporation ought not to be able to take whatever advantages are gained by maintaining a subsidiary as a separate entity, and at the same time cast aside that entity whenever it becomes a burden. We see no reason, under the circumstances of this case, for ap-

plying the rule that allows the corporate entity to be disregarded.

We have determined that Photoplate was engaged in an activity with the object of gain, benefit, or advantage and that it had the general property in the plates. We have also found that the purchase of the plates was the purchase of tangible personal property and not services, and have refused to disregard the corporate entities of the two corporations. In the instant case there were two distinct corporations. Separate books were kept by the corporations. The usual formalities of purchase and sale were observed. The form of invoice used was similar to that generally used in purchase and sale transactions. The transactions between the appellant and Photoplate bore all of the earmarks of a sale by the subsidiary to the parent company. We therefore conclude that the plates were purchased at retail sale in the ordinary course of business of the seller, and their use in this state by the buyer, under the circumstances set forth in the stipulations, was taxable under the provisions of R. S., 1954, Chap. 17, Sec. 4, as amended, unless we find merit in appellant's contention that the property was consumed or destroyed in the manufacturing process within the meaning of the statute.

A portion of R. S., 1954, Chap. 17, Sec. 2 provides:

> " 'Retail sale' and 'sale at retail' do not include the sale of tangible personal property which becomes an ingredient or component part of, or which is *consumed or destroyed* or loses its identity in the manufacture of, tangible personal property for later sale by the purchaser but shall include fuel and electricity." (Emphasis supplied.)

Oxford Paper Co. v. *Johnson,* 155 Me. 380, 156 A. (2nd) 235 presents the following facts: Mercury was constantly maintained in the machinery for manufacturing paper. A reservoir of 35 tons of mercury was replenished continu-

ally, day by day, with additional mercury to replace that which had become dissipated. During each year, 7% by weight, or approximately 2½ tons, of all mercury thus utilized was lost in the manufacturing process. The court held that this percentage was continuously "consumed or destroyed" in the manufacture of tangible personal property and that the transaction in purchasing the mercury was not taxable. In *Hudson Pulp and Paper Corp.* v. *Johnson,* 147 Me. 444, 448, 88 A. (2nd) 154, our court, after discussing the application of the words "ingredient or component part," had this to say:

> "The words 'consumed or destroyed,' however, are each applicable not only to that which is being acted upon, the subject matter of manufacture, but also to those things which act upon the subject matter, viz., that which is being produced by manufacture. They are applicable to all of those expendibles by which the process of manufacture is carried on."

In that case certain lubricating oils and greases were used to lubricate machinery, and certain wires and felts were used upon paper machines. The court held that the oils and greases were destroyed in their use for their intended purposes, and that the wires and felt were rendered useless in the paper-making business after relatively short periods of time. All of these items were held to be nontaxable. In *Androscoggin Foundry Co.* v. *Johnson,* 147 Me. 452, 88 A. (2nd) 158, moulding sand, refractories, fire clay, steel shot and grit, crucibles and snagging whirls, all having a relatively short life in the foundry business were held not subject to a use tax. The factual situation in the instant case is different. In this case, if the value of the plates was impaired as a result of their use, it was not on account of any physical damage resulting therefrom, but because their future use depended upon further orders for printing the same copy. The plates were actually stored

awaiting such orders, and many, without alterations, or with either slight or major alterations, were used in the process of printing those orders. The facts in the instant case present a novel question. We are not aided by decisions in other states having a comparable tax statute. A study of the pertinent provisions of our sales and use tax legislation leads us to the conclusion that the legislative intent in the use of the words "consumed and destroyed," was to give relief from the payment of a use tax in those cases only where the personal property is *physically* consumed or destroyed in the manufacturing process to such an extent that it is rendered unfit for further practical use for its intended purpose. This case does not present such a situation.

The appellant claims that the penalty was wrongfully assessed. It concedes, however, that if we find that its use of the plates was taxable, we are not permitted, under the stipulations as drawn, to consider this claim.

We find that the use of the plates was taxable, and the entry will be

Appeal to Superior Court denied. Case remanded to Superior Court for decree denying appeal.

ALBERT H. KNOWLES, ET AL.
vs.
LAWRENCE JENNEY

Kennebec. Opinion, August 10, 1961.

Negligence. Bailments.
New Rules. Appeal. Directed Verdict.
Pleading. Statement of Points.
M.R.C.P. 50 (a); 75 (d)

Under M.R.C.P. 50 (a) a motion for a directed verdict shall state the specific grounds therefor.

A defendant waives his motion for directed verdict made at the close of plaintiff's case, if he proceeds with evidence, and does not renew it at the close of all the evidence.

A denial of a motion for a new trial properly made is reviewable (compare prior practice R. S. c. 113, Sec. 60).

A statement of points which refers to error in denying a motion for new trial does not properly raise the issue before the Law Court, where the appeal is limited to an appeal from the judgment.

A statement of points which complains only of error in denying a motion for new trial is inadequate to support an appeal limited to the judgment.

Under M.R.C.P. 75 (d) the Law Court may give consideration to an appeal from the judgment because of the transition from old practice rules to new.

Where a bailor delivers an article to another for repairs, he owes the duty to disclose conditions of the article known to him, and unknown to the bailee, from which injury to the bailee may arise.

Anticipation of injury or danger by one reasonably prudent is an essential element of actionable negligence.

It is not necessary that the exact injury be foreseeable if injury in some form should have been anticipated as a probable consequence and viewed in retrospect the consequences appear to flow in unbroken sequence from the breach of duty.

ON APPEAL.

This is a negligence action on appeal to the Law Court, M.R.C.P., 73. Appeal denied. Judgment below affirmed.

Richard B. Sanborn, for plaintiff.

Peter Kyros,
James L. Reid, for defendant.

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

DUBORD, J. This case is before the court upon an appeal by the defendant under the provisions of M.R.C.P. 73.

The complaint filed by the plaintiffs was substantially as follows. It was alleged that they were the owners of a certain commercial garage together with equipment contained therein; that the defendant left a certain motor vehicle at their garage for the purpose of having certain work performed upon it; that the vehicle was defective in respect to the electrical system; that said defect was known to the defendant; that he failed to inform the plaintiffs thereof; that as a result of the defect the motor vehicle caught fire resulting in complete destruction of the garage and contents.

Upon denial of liability on the part of the defendant, the cause was heard by a jury which returned a verdict for the plaintiffs. It is from this finding that the defendant has appealed.

Important questions of pleading having been presented by the record and argument of counsel thereon, we first give our consideration to this phase of the case.

The pertinent chronology of defendants' pleadings is as follows:

At the conclusion of the presentation of plaintiffs' evidence, the defendant made a motion for a directed verdict. No specific grounds for this motion were stated. The motion was denied and the defendant then presented his evidence. At the close of the presentation of his evidence, the defendant did not renew his motion for a directed verdict.

The jury returned a verdict for the plaintiffs.

Defendant then seasonably addressed a motion to the presiding justice for a new trial. This motion was denied.

The next step on the part of the defendant was the presentation of a notice of appeal which was seasonably filed. This notice read as follows:

> "Notice is hereby given that Lawrence Jenney, defendant above named, hereby appeals to the Law Court from a Judgment for the Plaintiffs in this action on July 1, 1960, defendant having filed a Motion for a New Trial on July 7, 1960, and the Court having denied said Motion for a New Trial by Order dated August 8, 1960."

Next followed a filing of Statement of Points on the part of the defendant which were as follows:

> "(1) The Trial Court should have granted the motion for a directed verdict at the close of the Plaintiffs' case because no right to relief for the Plaintiffs was proven by the evidence.
>
> "(2) The motion for a new trial made by the Defendant should have been granted because, upon all the evidence, the Plaintiffs were without right to relief:
>
> "(a) Because no negligence on the part of the Defendant was proven by preponderance of the evidence.
>
> "(b) Because the negligence of the Plaintiffs was proven by the preponderance of the evidence."

In his brief in behalf of the plaintiffs, counsel raises the following issues of law:

(1) If a motion for a directed verdict does not set forth the grounds therefor, its denial is not reviewable; (2) if a motion for a directed verdict on the part of the defendant is not renewed at the close of all the evidence, it is not reviewable; (3) if an appeal is taken from a judgment, the statement of points cannot present as grounds for the appeal the denial of a motion for new trial; (4) a denial of a motion for a new trial is not reviewable; (5) a review should not go beyond the issues raised in the statement of points, and (6) the position of the defendant in his statement of points that the plaintiffs must prove their case by the preponderance of the evidence is incorrect.

The answer to the first and second issues of law presented by the plaintiffs is found in M.R.C.P. 50 (a) and the commentary thereon in Maine Civil Practice, Field & McKusick, § 50.1. Rule 50 (a) reads as follows:

> "A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. *A motion for a directed verdict shall state the specific grounds therefor.*" (emphasis supplied.)
>
> "A motion for a directed verdict may be made at the close of the opponent's evidence or at the close of all the evidence. The motion may be oral but whether oral or in writing the specific grounds therefor must be stated. The grounds need not be

> stated with technical precision but should be sufficiently stated to inform the court fairly as to the moving party's position. * * * The defendant may move for a directed verdict at the close of the plaintiff's case without resting. If the motion is denied, he may proceed with his own evidence just as though the motion had not been made. Doing so, however, operates as a waiver of any rights on the motion. The motion must be renewed at the close of all the evidence, and will be decided upon the basis of the evidence as it then stands. * * * A motion for directed verdict at the close of the evidence is essential in order to preserve for appeal the question of the sufficiency of the evidence." § 50.1 Maine Civil Practice, Field & McKusick.

The defendant, having failed to allege specific grounds in support of his motion for a directed verdict at the close of plaintiffs' case, and having failed to renew the motion at the close of the case, is now precluded from pressing any argument relating to the denial of his motion.

The third, fourth, and fifth points of law raised by the plaintiffs can be considered together. Plaintiffs contend that a denial of a motion for a new trial is not reviewable. In view of the position which this court proposes to take, while a determination of this issue is perhaps unnecessary, we do not agree with this contention of the plaintiffs that the denial of such a motion, properly made, is not reviewable.

We quote from Maine Civil Practice, Field & McKusick, § 59.4.

> "It is better practice under the Maine Rules to appeal from the judgment and not from denial of the motion. This should invariably be the step taken if there is any other alleged error in the record. It is believed, however, that an appeal also lies directly from the denial of the motion. (1) Such was the effect of the prior practice under R. S., c. 113, § 60. (2) The Reporter's Notes state

> firmly that the moving party does not 'lose the right he now has for the Law Court to pass upon it [the new trial motion],' and that 'his only loss would appear to be the time spent in arguing the motion and the slight delay in getting to the Law Court.' (3) There is nothing in the rules or statutes specifically negating the right. (4) As pointed out above, a denial of justice inconsistent with the spirit of the rules may otherwise result."

As to the third and fifth issues of law raised by the plaintiffs, the answer is found in the appeal itself. A study of the notice of appeal indicates that the appeal is limited to the judgment itself, the first sentence reading as follows:

> "Notice is hereby given that Lawrence Jenney, defendant above named, hereby appeals to the Law Court from a judgment for the plaintiffs in this action."

The notice then goes on to make reference to the denial of the motion for a new trial, but does not specifically appeal therefrom.

Not having appealed from the denial of the motion for a new trial the defendant is precluded in respect to this portion of the case.

There is left for our consideration, therefore, the question of whether or not the statement of points filed by the defendant is adequate to permit consideration of the case upon its merits.

It is to be noted that subparagraphs (a) and (b), Paragraph (2) of statement of points, are tied in with an allegation relating to the denial of the motion for a new trial. In these subparagraphs (a) and (b) defendant alleges that the negligence of the defendant was not proven by a preponderance of the evidence and that the negligence of the plaintiffs was proved by the preponderance of the evidence.

The position taken by the plaintiffs is that these statements on the part of the defendant do not set forth the law applicable to a review by this court of a jury verdict. Moreover, these two subparagraphs are not specifically set forth as reasons for overturning the jury verdict.

We are constrained to state that the statement of points is inadequate and inconsistent with the appeal from the judgment. A strict compliance with the rules would not permit its consideration. However, because we are still in the transition period from the old to the new rules (*albeit this period is drawing to a close*), we have decided to give consideration to the issue of the appeal from the judgment itself.

In reaching this conclusion we are actuated by the provisions of M.R.C.P. 75 (d) and § 75.7, Maine Civil Practice, Field & McKusick.

> "The appellant shall serve with his designation a concise statement of the points on which he intends to rely on the appeal, and any point not so stated may be deemed waived. No such statement shall be deemed insufficient if it fairly discloses the contentions which the appellant intends to urge before the Law Court." M.R.C.P. 75 (d).

Section 75.7, *supra,* reads in part as follows:

> "Although the appellant is required to file a statement of points this requirement should be applied in a manner to produce substantial justice. The rules do not intend to reinstate in another form the technical refinements of bills of exceptions. Rule 75 (d) itself declares that no such statement of points 'shall be deemed insufficient if it fairly discloses the contentions which the appellant intends to urge before the Law Court.' Failure to serve the statement of points may, within the Law Court's discretion, be the basis for dismissal of the appeal for want of diligent prosecution. The test, however, should be whether the other parties

> have been prejudiced by appellant's failure to file any statement of points or to include a substantial question raised by the record."

We shall, therefore, give consideration to defendant's appeal from the judgment in accordance with the rules laid down in a multitude of opinions of this court in cases where motions for a new trial were presented on the grounds that the verdict was against the evidence.

While preponderance of the evidence upon the issue of negligence and contributory negligence is the basis of a proper instruction to a jury at the close of a trial, this is not the approach for this court in considering whether or not a jury verdict should be overturned.

On many occasions this court has said that a verdict shall not be overturned unless so manifestly erroneous as to make it apparent it was produced by prejudice, bias, or mistake of law or fact; or unless there was palpable and gross error; unless it is plain that the jury have drawn conclusions unauthorized by proof; unless the verdict is clearly and manifestly wrong. We have also said that where the 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 verdict of a jury must stand unless there is a moral certainty that the jury erred. A verdict will stand where the judgment of the jury was honestly exercised. The evidence in a case must be viewed in the light most favorable to the successful party. This court has also said that a verdict will not be lightly set aside; and that the burden of proving a verdict is manifestly wrong is on the party seeking to set such verdict aside. Of course, a verdict based upon incredible evidence cannot stand, nor will a verdict founded on guesswork or speculation be permitted to stand. In summary the law is that a verdict will be overturned only when it is plainly without support in the evidence.

Plaintiffs instituted and prosecuted this action upon the legal theory that where a bailor delivers an article to another for work to be performed upon it, the bailor owes to the bailee a duty to disclose any condition of the chattel known to him, and unknown to the bailee from which danger to the bailee, his property, or his servants might reasonably be anticipated during the work upon the chattel, and that if he fails to give such warning, he is liable for injuries resulting therefrom without negligence on the part of the bailee.

This theory appears to be well founded.

> "In bailments locatio operis faciendi, where the bailor delivers an article to another for work to be performed upon it, as in the case of a chattel left to be repaired, there is authority for the rule that the bailor owes to the bailee a duty to disclose any condition of the chattel known to him, and unknown to the bailee, from which danger to the bailee, his property, or his servants might reasonably be anticipated during the work upon the chattel in the manner known to be intended, and if he fails to give such warning, he is liable for injuries resulting therefrom without negligence on the part of the bailee. It seems, however, that the bailor's duty ceases with such notification; he is not bound further to tell or teach the bailee how to avoid the danger. Moreover, as to a defective or dangerous condition of the chattel at the time of the bailment, of which condition the bailor has no actual knowledge, his only duty to the bailee is to exercise ordinary care, and where it does not appear that he failed in this duty he is not liable for injuries resulting from such condition." 6 Am. Jur., (Rev Ed), Bailments, § 199.

See also *Stroud* v. *Southern Oil Transportation Co.*, (N.C.) 3 S.E. (2nd) 297, 122 A.L.R. 1018; *Rogoff* v. *Southern New England Contractors Supply Co., Inc.*, 129 Conn. 687; 31 A. (2nd) 29; *Blum* v. *Shrock* (Ind.), 10 N.E. (2nd) 752; *Cornett* v. *Hardy* (Texas) 241 S. W. (2nd) 186.

The foregoing rule is qualified to some extent by opinions to the effect that:

> "While the owner of an automobile, delivering it to a repairman for repairs, owes to him the duty to disclose to him any defects in the mechanism which may render it unsafe or dangerous of which such owner has knowledge, such owner does not owe to him the duty to employ the skill of an expert mechanician to make an examination to discover such defect before delivering the automobile for repairs." 7A Blashfield Cyclopedia of Automobile Law and Practice § 5011, Page 534.

Defendant contends that there is no liability under the doctrine of reasonable anticipation of injury or foreseeability of risk; that the evidence does not support a finding that any act on the part of the defendant was a proximate cause of the destruction of the garage and its contents by fire; and that in any event the plaintiffs were guilty of contributory negligence which precluded recovery.

Taking up first the issue of contributory negligence, a study of the record indicates to us that the jury were justified in finding no negligence on the part of the plaintiffs.

As to the issue of proximate cause, there is evidence to indicate that when the fire was first discovered it was in defendant's automobile and centered in the motor area in close proximity to the defective voltage regulator; that from there the fire spread to the garage itself; that such a defect as was present in the regulator can and does cause fire; and that there was no indication or suggestion of any other defects or conditions in or around the motor which also might cause fire. Therefore, upon this issue we are satisfied that the jury could draw a reasonable inference that the fire was produced by the defective regulator and were entitled to find a causal connection between the known defect in defendant's automobile and the fire which ensued.

Defendant is on sound ground when he argues that reasonable anticipation of injury or danger is an essential element of actionable negligence. Whether negligence exists in a particular case depends on whether or not a reasonably prudent person would have anticipated the injury or danger and provided, or guarded against it. 65 C.J.S., Negligence § 5 c. (2) (a).

It is axiomatic that one is expected to guard against only such dangers as a reasonably prudent person would be reasonably expected to anticipate.

The issue of foreseeability is discussed at length in *Hersum, Admr.* v. *Kennebec Water District,* 151 Me. 256, 265, where it was said:

> "The defendant contends, however, that, even granting all of the foregoing, no negligence chargeable to it or its employees was shown and a resulting explosion in the Hersum house was too remote a consequence as to be legally foreseeable. It is not necessary that the exact injury which results from negligence be foreseeable if, in fact, injury in some form should have been anticipated as a probable consequence of the negligence and, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence. *Barbeau* v. *Buzzards Bay Gas Co.,* 308 Mass. 245, 31 N. E. (2nd) 522. As was stated in *Ill. C. R. Co.* v. *Siler,* 229 Ill. 390, 394, 82 N. E. 362, 'If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence.' *McClure* v. *Hoopeston Gas & E. Co.,* 303 Ill. 89, 135 N. E. 43, 25 A.L.R. 250, 259 annotated."

Viewed in the light most favorable to the plaintiffs, the jury could have found that about mid-afternoon on March 3, 1960, the defendant left his car with the plaintiff, Albert

H. Knowles, at his garage, for the purpose of having his brakes relined; that at the time in question there was a serious defect in the electrical system of defendant's automobile; that he was aware of this defect and that he did not inform the plaintiffs thereof; that a defect such as existed in defendant's motor vehicle could start a fire; that because of the defect a fire did start in the automobile which spread to the plaintiffs' garage and resulted in complete destruction of the building and its contents. The jury could also have found the defendant was unlike an ordinary motor vehicle owner who might not apprehend the likelihood and probability that the defect could readily start a fire, but because of experience previously acquired, he had special knowledge of the inherent danger created by the nature of the trouble in the electrical system of his automobile.

A careful study of the evidence convinces us that the verdict is not manifestly wrong and that the defendant has failed to sustain the burden of proving that it is erroneous.

The entry will be:

Appeal denied.

Judgment below affirmed.

HORACE H. DRUMMOND
AND
DRUMMOND'S POULTRY TRANSPORTATION SERVICE
vs.
MAINE EMPLOYMENT SECURITY COMMISSION

Kennebec. Opinion, August 16, 1961.

Taxation. Refunds.
Agricultural Labor. Poultry.

The M.E.S.C. has no authority or legal right to refund the total amount of taxes erroneously and illegally paid but only those amounts specifically authorized by statute, namely the amount which remained after deducting employees benefit paid. R. S., 1954, statute.

Taxes voluntarily paid cannot be refunded unless so provided by statute.

ON REPORT.

This is a declaratory judgment before the Law Court upon report. Case remanded for entry of judgment in accordance with this opinion.

Irving Isaacson,
Brann & Isaacson, for plaintiffs.

Frank A. Farrington, Deputy Atty. Gen., for defendant.

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

TAPLEY, J. On report. The action is one of a petition for declaratory judgment. It comes to this Court from the Superior Court, with a stipulation that the cause is to be decided upon the basis of the complaint and the answer. The allegations contained in the petition for declaratory judgment are taken to be true. Plaintiff, Horace H.

Drummond, was engaged in the business of transporting live poultry from the various farms upon which they were raised in the State of Maine to a processing plant in Winslow, Maine. In the conduct of his business he engaged employees to drive his trucks to the various farms on which the poultry was located, catch, crate and transport the poultry from the farms to the processing plant. The services performed by these employees constituted "agricultural labor," as defined in Sec. 3-I, Chap. 29 of R. S. 1954 and the wages paid for said services were exempt from unemployment taxes. During the years 1954 and 1955 plaintiff Drummond paid unemployment taxes in the sum of $3510.11, with respect to the exempt services performed by the employees.

Plaintiff, Drummond's Poultry Transportation Service, is a corporation organized by Horace H. Drummond and engaged in the same business as was previously conducted by Mr. Drummond in his individual capacity. The business is carried on in exactly the same manner as it was when Mr. Drummond operated it individually. The services performed by the employees of the corporation also constituted "agricultural labor" as defined in Sec. 3-I, Chap. 29, R. S. 1954 and the wages paid were exempt. During the years 1956 and 1957 Drummond's Poultry Transportation Service paid unemployment taxes to the State of Maine on exempt wages in the sum of $5094.87.

Plaintiff, Horace H. Drummond, filed a claim with the Maine Employment Security Commission on June 3, 1957 for a refund of unemployment taxes paid on exempt wages amounting to $3510.11. On the same day plaintiff, Drummond's Poultry Transportation Service, also filed a claim for refund, for the same reason, in the amount of $5094.87.

On June 2, 1960 the Maine Employment Security Commission granted a refund of unemployment taxes with re-

spect to the claim of Horace H. Drummond in the sum of $1914.11.

The Maine Employment Security Commission on June 2, 1960 granted a refund of unemployment taxes in the sum of $427.46 on the claim for refund of Drummond's Poultry Transportation Service.

The Commission deducted from each refund the amount of unemployment benefits paid to claimants who were former employees of the plaintiffs. These benefits were based, in part, on wages paid to them by the plaintiffs which wages were used for the purpose of determining the claimants' wage class and weekly benefit amount under the provisions of Sec. 13-II of Chapter 29. The Commission in determining the amount of benefits payable to the former employees of the plaintiffs included in their base period wages the *uninsured* wages paid by the plaintiffs during such base period. The increased weekly benefit resulting from the inclusion of uninsured wages occasions the deductions, $1596.00 in the case of plaintiff Drummond and $2941.00 in the case of plaintiff, Drummond's Poultry Transportation Service, from the total refund claim.

The plaintiffs contend (1) that payment by the Commission of excess benefits in the amount of $4537.00 to former employee claimants of the plaintiffs was illegal because the Commission erroneously included wages for uninsured work in computing claimants' wage class and weekly benefit amount under Sec. 13-II; (2) the Commission, by administrative action, without notice to the plaintiffs and without affording them any opportunity to protect their interests, illegally paid excessive benefits and now seeks to reduce a claim for refunds by the amount of such illegal payments.

The defendant Commission argues that the deductions represented by the amount of benefits paid were not only

proper deductions but were required under provisions of Sec. 19-IV of the Act.

It is without contention that the services performed for the plaintiffs did not constitute "employment" within the meaning of Maine Employment Security Law; that the wages involved were not paid on "insured work"; that the contributions were "erroneously collected" and never should have been paid.

The Commission bases its right to make the deductions from the refunds on the authority of Sec. 19-IV. The pertinent portion of this section is recited immediately following:

> "IV. *Refunds.*—If not later than 4 years after the date on which any contributions or interest thereon became due, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and if the commission shall determine that such contributions, or interest or any portion thereof *was erroneously collected,* the commission shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made the commission shall refund said amount, without interest, from the fund. For like cause and within the same period, adjustment or refund may be so made on the commission's own initiative. *Provided, however, that any such adjustment or refund, involving contributions with respect to wages upon the basis of which benefits have been paid for unemployment, shall be reduced by the amount of benefits so paid.*****." (Emphasis supplied.)

The facts require a review and an analysis of the law as to the authority of the Commission to refund and the

right of the plaintiffs to be repaid taxes which were, in the first instance, erroneously paid. The law is well settled in this State that taxes illegally assessed and voluntarily paid cannot be recovered. In *Creamer* v. *Bremen,* 91 Me. 508, at page 514, the Court said:

> "But it is further claimed that this suit can not be maintained because the payment of the tax by the plaintiff was voluntary. It is undoubtedly true that when money claimed to be rightfully due is paid voluntarily and with a full knowledge of the facts, it can not be recovered back, if the party to whom it has been paid may conscientiously retain it; and even taxes illegally assessed, if paid voluntarily can not be recovered."

The case of *Coburn* v. *Neal, et al.,* in 94 Me. 541 holds that when a voluntary payment is made, even though under a mistake of law, it cannot be recovered. The principle of law applicable here is aptly stated in 84 C. J. S., Taxation, Sec. 632 a. (1):

> "While a state has power to authorize the refund of taxes paid, the authority to refund must be conferred by a valid statute. Although the legislature has no power to compel the refund of taxes legally collected, it may prescribe the limitations and conditions on which a refund may be had, and may withdraw the right to a refund; and the repeal of a statute authorizing a refund takes away the right of the citizen to claim a refund and of the public officers to make it, and also terminates all pending actions. In the absence of statutory authority, no executive or administrative officer or board has power to refund taxes; and, if the power is given to him or it by law, it must be strictly followed.
>
> "Where a statute providing for a refund of excessive or erroneous taxes paid is general in its terms, it applies to voluntary, as well as to involuntary or compulsory, payment, or payment under protest. A taxpayer seeking relief under a refund statute must bring himself within its terms."

> "****** no executive or ministerial officer has authority to refund taxes, unless such authority is expressly conferred. The Legislature has power to provide how taxes, after reaching the treasury, may be refunded. ******." Cooley, Taxation, Vol. 3, Sec. 1259.
>
> "A refund of taxes is solely a matter of governmental grace **** and any person seeking such relief must bring himself clearly within the terms of the statute authorizing same." *Asmer* v. *Livingston, et al.,* 82 S. E. (2nd) 456, 466 (S. C.).

An Indiana case, *Culbertson* v. *Board of Commissioners of Fayette County,* 194 N. E. 638, concerns a refund of taxes under a statute providing such refund of taxes paid on wrongfully assessed property. This case supports the doctrine that at common law there could be no refund of taxes voluntarily paid, and that the only relief would be statutory and such statutory remedy is exclusive. See also *Board of Commissioners* v. *Milliken, et als.,* 190 N. E. 185 (Ind.).

Under the circumstances of this case, the plaintiffs have no right to a refund except by virtue of the statute. The Legislature, by the enactment of Sec. 19, sub-sec. IV, authorizes an adjustment or a refund if the Commission shall determine that the contributions were *erroneously collected.* The Legislature, however, restricts the adjustment or refund by this language:

> "Provided, however, that any such adjustment or refund, involving contributions with respect to wages upon the basis of which benefits have been paid for unemployment, shall be reduced by the amount of benefits so paid."

The Commission had no authority or legal right to refund the total amount of contributions but only those amounts which remained after deducting the benefits paid. The fact that the benefits were erroneously and illegally

paid to the recipients matters not insofar as this litigation is concerned, as Sec. 19, sub-sec. IV makes no provisions for such circumstances and the Commissioners' refunding power cannot exceed the authority as defined in the Act.

The results arrived at in this opinion are predicated on the established law in this State that taxes voluntarily paid cannot be refunded unless the statute so provides. Sec. 19-IV makes no provisions for refunds to the taxpayer of benefits illegally paid to former employee claimants of any taxpayer.

For this reason, we find it unnecessary to consider issue (2).

The Commission was correct in deducting the amounts paid to the unemployment beneficiaries and allowing refunds to the plaintiffs for the balance of the contributions erroneously paid.

Cases remanded to the Superior Court for entry of judgments in accordance with this opinion.

JOHN J. KOVACK
d/b/a JOHNNIE'S GRILL
vs.
LICENSING BOARD,
CITY OF WATERVILLE

Kennebec. Opinion, August 24, 1961.

Municipal Corporations. Licenses.
Innkeepers. Victualers. Lodging Operators.
Notice.

A licensing board under R. S., 100, Sec. 51, is an administrative body with such power and authority as the legislature has legally and properly endowed it.

The statutory requirement of Sec. 51 on revoking licenses when the Board "shall be satisfied that the licensee is unfit" is procedural; secs. 33 and 34 provide the standards.

Operating a victualers business is a privilege not a right.

There are many instances in the Maine Statutes where the legislature has delegated to an administrative body authority to use its discretion and judgment.

Inadequacy of notice of appeal is waived by appearance and participation in the hearing.

ON EXCEPTIONS.

This is a proceeding to revoke a license. The case is before the Law Court upon exceptions to findings and ruling of the presiding justice of the Superior Court. Exceptions overruled.

Burton G. Shiro, for plaintiff.

Philip S. Bird,
John Jabar, for defendant.

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

TAPLEY, J. On exceptions. In May of 1958 John J. Kovak, the appellant, was issued a victualer's license by the Licensing Board of the City of Waterville for the premises known as and called "Johnnie's Grill." On October 16, 1958 the mayor of Waterville notified Mr. Kovack by letter that a hearing would be held in the Council Rooms of the City Hall on October 21, 1958 at 7:30 P. M. "relative to the possibility of revoking the Victualer's License of Johnnie's Grill, 28½ Ticonic Street." The appellant received the letter in due course, appeared with counsel at the hearing and participated therein. The Licensing Board as a result of the hearing revoked the appellant's victualer's license and from this revocation the appellant appealed to the Superior Court, within and for the County of Kennebec and State of Maine. A hearing was held on the appeal before a single Justice of the Superior Court. At this hearing there was no court stenographer present and, therefore, this court does not have before it a record of the testimony adduced at the hearing. There was introduced at the hearing the letter from the mayor to Mr. Kovack notifying him of the hearing. This letter constitutes the only evidence before us. The presiding Justice, after hearing the appeal, properly refused to rule on the constitutionality of the statute involved in the case and further determined that although the notice received by Mr. Kovack was legally insufficient, he waived this fact by appearing in person with counsel and actively participating in the hearing.

The involved statute is Sec. 51 of Chap. 100, R. S., 1954, and that portion which is pertinent to these proceedings reads:

> "*License revoked or suspended; hearing; appeal.*— A license issued under the provisions of sections 29 to 54, inclusive, may be revoked if at any time the licensing authority shall be satisfied that the licensee is unfit to hold the license. It shall also

> have the right to suspend and make inoperative for such period of time as it may deem proper for all the aforesaid licenses mentioned herein for any cause deemed satisfactory to it. The revocation and suspension shall not be made until after investigation and hearing, nor until the licensee shall have been given opportunity to hear the evidence in support of the charge against him and to cross-examine, by himself or through counsel, the witnesses, nor until the licensee shall have been given an opportunity to be heard. Notice of hearing shall be served on the licensee or left at the premises of the licensee not less than 3 days before the time set for the hearing. The licensing authority, as designated in sections 29 to 54, inclusive, is specifically charged with the duty of enforcing the provisions therein and of prosecuting all offenders against the same.—."

The appellant takes the position, and so argues, that Sec. 51 is unconstitutional, in that it is an improper delegation of legislative power because it grants to the licensing authority an arbitrary discretion when it provides that a license, "may be revoked if at any time the licensing authority shall be satisfied that the licensee is unfit to hold the license." Appellant complains that the Legislature has failed to provide a guide or standard by which satisfaction of unfitness may be measured.

The presiding Justice found,

> "The evidence produced before this Court amply justifies the Board's finding the appellant licensee 'is unfit to hold the license.' - - - - -
>
> "We find as a fact, during the period appellant's license was in effect, he did (a) permit gambling upon his premises, (b) serve intoxicating liquor (beer) to a minor, and (c) permit intoxicated and disorderly persons to remain upon his premises."

Appellant's third exception attacks the presiding Justice's ruling that the appellant permitted gambling upon

the premises, served intoxicating liquor to a minor and permitted intoxicated and disorderly persons to remain upon his premises. This third exception we cannot consider as the case was tried below without benefit of a court reporter so that there is not before us a transcript of the testimony upon which to determine the question of error on the part of the presiding Justice in the ruling complained of. The only evidence before us is documentary in the form of the letter from Mayor Bernier to the appellant notifying him of the hearing. The factual findings of the presiding Justice are accepted as such by this court for the purpose of review.

The Licensing Board of the City of Waterville is an administrative body statutory created and with such power and authority as the Legislature has legally and properly endowed it. Its authority is no less nor more than the legislative body has given it. The Board is clothed with the administrative power of revoking a license when it "shall be satisfied that the licensee is unfit to hold the license." Appellant contends that the Legislature has failed to establish a guide or standard to be applied for the purpose of determining whether a licensee is fit or unfit to be the holder of a license and because of this alleged failure, the statute is unconstitutional. Sec. 51 is procedural in its nature and was enacted for the purpose of administering the laws pertaining to the licensing of innkeepers, victualers and the operators of lodging houses.

> "*Sec. 33. Duties of victualers.*—Every victualer has all the rights and privileges and is subject to all the duties and obligations of an innkeeper, except furnishing lodging for travelers."

Sec. 34 provides:

> "*Innkeepers and victualers to allow no gambling.* —No innkeeper or victualer shall have or keep for gambling purposes about his house, shop or other

> buildings, yards, gardens or dependencies, any dice, cards, bowls, billiards, quoits or other implements used in gambling; or suffer any person resorting thither to use or exercise for gambling purposes any of said games or any other unlawful game or sport therein; and every person, who uses or exercises any such game or sport for gambling purposes in any place herein prohibited, forfeits $5."

Under Sec. 35 there is provided:

> "No innkeeper or victualer shall suffer any reveling or riotous or disorderly conduct in his house, shop or other dependencies; nor any drunkenness or excess therein."

Under Secs. 34 and 35 the Legislature has prohibited a victualer from keeping for gambling purposes implements on the premises, permitting the use of them for gambling purposes or suffering any reveling, riotous or disorderly conduct or any drunkenness on the premises. Thus the Legislature has defined certain prohibitions applicable to licensees.

A victualer has no natural right to operate his business, as by statute it is a privilege which may or may not be conferred by public authority. *Inhabitants of Dexter* vs. *Blackden,* 93 Me. 473.

> "The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers." *Goodwin* vs. *Nedjip, et als.,* 117 Me. 339, at page 342.

Where the Legislature accords the privilege of license, it naturally follows that it provides procedure for revocation or suspension of the license when the licensee fails to conduct his business in accordance with legislative standards or administrative rules and regulations. In the instant

case the Legislature has empowered the Licensing Board to revoke a victualer's license when it is "satisfied that the licensee is unfit to hold the license." The Licensing Board is called upon to make a determination as to the fitness or unfitness of a licensee to hold his license. Administrative bodies are functionally necessary in the process of government. There must be that delegation of power sufficient to the end that a proper, just the legal administration may occur. In considering delegation of power from the viewpoint of constitutionality, it is important that there exists in the statute adequate procedural safeguards. In considering the delegation of legislative power to administrative bodies, Rhyne's Municipal Law, on page 655, states:

> "It is generally held that statutes and ordinances which do not prescribe reasonable standards for the guidance of the officer or body are unconstitutional as attempts to delegate legislative power to administrative officials. However administrative officials may be given authority to ascertain the existence of facts to which a legislative policy is applicable, and generally have absolute discretion to grant or refuse licenses for businesses which are inherently illegal. Legislative standards governing the issuance and denial of licenses were held adequately prescribed where officials were authorized to grant licenses to achieve compliance with all laws, ordinances, rules and regulations, or public health laws, or to license safe and proper places of business, persons of good character and reputation, *fit and proper persons*, applicants found to be physically fit, or persons worthy of assistance." (Emphasis supplied).

It is apparent that the members of an administrative body must exercise their judgment in adjudicating a question of fact as to whether a person is of good character and reputation, a fit or proper person, or one who is physically fit. The Legislature sets the standard in these instances

and authorizes the Board to determine that the standard has been satisfied. There are many instances in the Maine Statutes where the Legislature has delegated to an administrative body authority to use its discretion and judgment. For example, in the abandonment of property or a service of a public utility, the utility is required to obtain the approval of the Public Utilities Commission and,

> "In granting its approval, the commission may impose such terms, conditions or requirements *as in its judgment are necessary to protect the public interests.*" (Emphasis supplied). Chap. 44, Sec. 48.

See *Maine Central Railroad Company* vs. *Public Utilities Commission,* 156 Me. 284. Sec. 55 (Chap. 44) prescribes the process of complaining against the public utility if its rates, tolls, charges, etc. are unjustly discriminatory and unreasonable. The Public Utilities Commission under Sec. 58 (Chap. 44) has delegated authority "to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be *just or reasonable.*" (Emphasis supplied). Secs. 19 to 33 inclusive, of Chap. 48 are designed to regulate motor trucks for hire. The Public Utilities Commission is authorized to issue a certificate of public convenience and necessity *if in its judgment* public convenience and necessity require such operation. Concerning contract carriers, the Legislature under Sec. 23, sub-sec. III directs the Commission to issue no permit "unless it appears that the applicant is *fit, willing and able properly to perform the service of a contract carrier by motor vehicle* - - - - -." (Emphasis supplied). This direction places upon the Commission the burden of affirmatively determining that the applicant is "fit, willing and able to perform." The standard is established but the determination of the requirement is left to the judgment of the Commission in finding the fact. See *Richer re Contract Carrier Permit,* 156 Me. 178.

A case in point is *Sate* vs. *Vachon,* 101 A. (2nd) 509-513 (Conn.). This case involves the licensing of a nursing home. It is contended that there was an illegal and unconstitutional delegation of legislative power to an administrative board because of lack of a legislative standard for guidance. The pertinent statutory law reads: "The public welfare council may license any *suitable person* to maintain a home - - - -." (Emphasis supplied). The Court stated:

> "The act provides the standard for the age of the persons to be cared for, states the minimum number of persons to be housed before the act becomes obligatory and requires that the persons licensed be a 'suitable person.' The words 'suitable person' have a definite meaning in our law, and their use in the act furnishes a standard by which the public welfare council must be guided."

The language used in *Locke's Appeal,* 72 Pa. 491, at page 498, clearly and succinctly demonstrates the principle applicable to the case at bar, that an administrative body may be delegated power to determine questions of fact to further governmental procedure.

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

> "As compared to a delegation of authority to regulate businesses generally, the legislature may be less restricted when it seeks to delegate authority of a legislative nature to an administrative body created for a particular purpose, such as the care of public health. So it has been held that specific

> rules of action need not be prescribed where administrative officers are granted discretion relating to the administration of police regulations and necessary to protect the public morals, health, safety, and general welfare or requiring consideration of personal fitness." 73 C. J. S., Public Administrative Bodies and Procedure, Sec. 30, Page 329.

See 39 A. L. R. (2nd), Anno., Sec. 14, Page 622. Also reference is made to 45 A. L. R. (2nd), Anno, Sec. 7B, Page 1408. In considering legislative delegation of authority, it is important to analyze Sec. 51 in view of the provisions of Secs. 29 to 54 for the purpose of shedding light upon legislative intent as to victualers' licenses, their issuance, suspension and revocation. According to the statute, a victualer licensee is deemed to be in the same category as that of an innkeeper, having the same rights and privileges and subject to all the duties and obligations, with the exception of furnishing lodging to travelers. The business of a victualer is regulated for the benefit of the public and must be maintained under supervision. The supervising authority is the "licensing board." The licensing board is authorized to grant the privilege of a victualer's license "to persons of good moral character, and under such restrictions and regulations as they deem necessary—." The statute expressly prohibits a victualer from permitting gambling, reveling, riotous or disorderly conduct or any drunkenness on the licensed premises. In the event the licensing authority shall be satisfied that the licensee is unfit to hold the license, then it may revoke the license. The facts of the instant case stand undisputed, that the licensee did permit gambling on his premises, did serve intoxicating liquor (beer) to a minor and did allow intoxicated and disorderly persons to remain upon his premises. On the basis of these facts satisfaction on the part of the licensing authority, that the licensee is unfit to hold the license, is warranted.

The Legislature, in the enactment of Secs. 29, 33, 34, 35, and particularly Sec. 51 which is under attack as to its constitutionality, provides sufficient standards to guide the administrative body in its discretionary functions. There are ample safeguards preventing the licensing board from using and exerting arbitrary power, especially in view of the fact that procedural provisions are adequate and judicial review is available to the end that the appellant is not deprived of due process of law.

The appellant fails in his attempt to prove that Sec. 51 is unconstitutional. We are of the opinion, and so declare, that Sec. 51 of Chap. 100, R. S., 1954, is constitutional.

The appellant, by exceptions, complains that he did not receive a legally sufficient notice of the hearing. As to notice, Sec. 51 provides "Notice of hearing shall be served on the licensee or left at the premises of the licensee not less than 3 days before the time set for the hearing." The notice was sent by mail. It was dated October 16, 1958 and notified the appellant of a public hearing assigned for October 21, 1958. He appeared personally and with counsel at the hearing in which he and his counsel actively participated. He contends that the notice was legally defective, insufficient in law and, therefore, did not confer jurisdiction over his person. He further argues that his appearance and active participation in the hearing did not waive the invalid notice.

Whatever rights the appellant may have had on the grounds of inadequacy of notice were waived by his appearance and participation in the hearing. A case directly in point involving a statute, in substance, the same as the pertinent part of Sec. 51 is *Manchester* vs. *Selectmen of Nantucket*, 335 Mass. 156. In the Manchester case, the petitioner (Manchester) received a written notice of a hearing "on complaints received by the Board as regards your operation of the premises known as 'Nantucket New

Ocean House.'" The Board held a hearing previous to which the petitioner filed written objection with the Board, then withdrew and took no part in the hearing. The objection, in substance, related to insufficiency of notice as a matter of law under the statute, and further, that in its terms it was vague and indefinite and contained no charges which would warrant action under the statute. Justice Spalding, for the Court, said on page 159:

> "We are of opinion, as the petitioner argues, that the notice sent by the respondents failed to inform the petitioner with sufficient particularity of the charges she would be called upon to meet; it told her only that she would be given a hearing at a designated time and place 'on complaints received by the Board as regards your operation of the premises known as "Nantucket New Ocean House."' While such notices are not to be tested by the standards applicable to a criminal pleading (see Higgins v. License Commissioners of Quincy, 308 Mass. 142, 145), fairness requires more than was contained in the notice here. The petitioner, however, by filing an objection to the notice and not taking part in the hearing could not thereby deprive the respondents of jurisdiction to proceed with the hearing and render a decision. The petitioner should have asked for additional information concerning the charges that she was to meet; and if upon obtaining such information she needed further time in which to prepare her case she could have asked for a postponement. See Davis, Administrative Law, 279-280. If these requests had been denied a very different question would be presented. The petitioner, however, did none of these things. We are of opinion that in these circumstances she is in no position to challenge the suspension of her license."

See 42 Am. Jur. Pub. Administrative Law, Sec. 119.

Appearance in person and by attorney at the hearing amounts to a waiver of any irregularity or imperfection

in the service of notice. *Keeling, et al.* v. *Board of Zoning Appeals of City of Indianapolis, et al.* (Ind.) 69 N. E. (2nd) 613.

One who appears in an administrative proceeding without the notice to which he is entitled by law has no grounds to complain of lack of notice. *DeLuca, Pet., Aplt.* v. *Board of Supervisors of Los Angeles County, et al.* (Cal.) 285 P (2nd) 43.

In any administrative proceedings a person is entitled, as a matter of right, to such procedural processes as will satisfy the demands of due process. Failing to meet the requirements of due process and applicable statutory procedural rules, the administrative agency does not obtain jurisdiction over the person, and any judgments rendered under these circumstances are nullities. The procedure in effecting notice must be in compliance with statutory provisions and in accordance with the principles of due process. In the instant case, Sec. 51 provides that revocation and suspension of a license shall not be made until (1) after investigation and hearing; (2) the licensee has had opportunity to hear the evidence in support of the charges against him; (3) right of cross-examination, and (4) an opportunity to be heard. The only provision for notice of hearing is that such notice shall be "served on the licensee or left at the premises of the licensee not less than 3 days before the time set for the hearing." The section mentions charges against him but is silent as to any statutory provisions requiring the Board to give notice of the charges. The notice of the hearing was woefully inadequate in that it did not advise the appellant of the charges against him. It is not necessary that the charges be pleaded with the niceties required by criminal pleadings—it will suffice if they are described with reasonable certainty in order that he may prepare his defense and not be taken by surprise at the hearing. Not only due

process, but fairness, require adequacy of notice. The functions of administrative bodies are a vital part of government and their authority over the rights and privileges of the individual is of such importance and their decisions so far reaching that they must be careful to observe the prescribed procedures in bringing a matter to hearing. Notice is the basic approval to an administrative hearing. The necessity of a notice complying with the requirements of statute and due process is of extreme importance and should not be lightly considered or disregarded. In many instances the jurisdiction of the administrative body to hear and adjudicate depends on adequacy of notice.

In the case at bar the appellant, by appearing at the hearing and participating therein, submitted himself to the jurisdiction of the Board and thereby cured an inadequate and legally insufficient notice.

Exceptions overruled.

STATE OF MAINE
vs.
JOHN B. SANBORN

Waldo. Opinion, September 15, 1961.

Criminal Law. Double Jeopardy.
Prior case dismissed over objection.
Evidence. Models. Larceny.

The trial judge in his discretion determines whether a witness may use as a substitute for oral testimony, or in addition to it, a writing, model, device, or other understandable means of communication, and whether it may be admitted in evidence.

Where an indictment alleges the larceny of several articles, a conviction may be had even though some of the articles are insufficiently described or are not proved to be taken.

A criminal case cannot be withdrawn from the jury and a new trial commenced without the consent of the accused, except for *urgent, manifest or imperious necessity.*

Protection against double jeopardy is a fundamental right.

It would not do to hold that, whenever a judge comes to the conclusion that he has committed error, he can declare a mistrial and put the accused upon trial before another jury. A misapprehension of judicial administration is not sufficient to nullify jeopardy.

ON EXCEPTIONS.

This is a criminal case before the Law Court upon exceptions to the overruling of a plea of former jeopardy. Exceptions sustained.

Richard W. Glass, for state.

William N. Niehoff, for plaintiff.

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

ity) SULLIVAN, J., joined by TAPLEY, J. with WILLIAMSON., C. J. concurring specially in the result. SIDDALL, J. dissenting by special opinion and joined by WEBBER, J.

SULLIVAN, J. John B. Sanborn was by indictment accused of the offense of having on May 20, A. D. 1956 feloniously bought, received and aided in concealing 27 listed articles of furniture which had been previously stolen by George Webber from Reynolds Brothers, Inc., R. S., c. 132, sec. 11. Upon his arraignment Sanborn pleaded not guilty. A jury was empaneled and a trial was had to the extent of the presentation of the State's case and partial examination of the first defense witness when the presiding Justice spontaneously declared a mistrial. Respondent immediately objected to such direction by the Justice. Respondent was thereafter subjected to a second trial and punctually interposed a plea of double or former jeopardy. His plea was denied and he now prosecutes his timely exception to that unfavorable ruling.

There follows an abridgement of the significant evidence presented at the first trial.

In the spring of 1956 George Webber a next door neighbor of the Respondent and an acquaintance through 14 years was working as a night employee at the furniture mill of Reynolds Brothers, Inc. Sanborn had visited Webber at night at the mill 3 or 4 times and had talked with the latter of stealing furniture from Webber's employer. About March, 1956 on a street the Respondent solicited Webber to obtain for the former some furniture or parts from the mill. Webber protested: "No, I will probably get caught." Sanborn countered with the admonition: "You be careful you don't get caught." Webber was to be paid by Sanborn $3 or $4 for each article taken. During an estimated period of 2 months Webber had stolen several pieces of furniture from his employer, had taken them to

his home and had sold all of them to Sanborn. Webber identified 3 checks acquired by him from the Respondent in payment for certain of the purloined chattels. The checks were received in evidence. All items stolen had been integral. Two were unfinished. 26 pieces of furniture were collocated in the courtroom at the trial and were marked seriatim State's Exhibits 1 through 26.

Webber identified Ex. 1 as a telephone bench manufactured by Reynolds Brothers, Inc. at its mill and stated that he had stolen some 3 or 4 telephone benches such as Ex. 1 and had sold them to Sanborn for $3 apiece.

Webber described Ex. 2, 3 and 4 as telephone benches made by the mill, testified he had stolen 4, 5 or 6 and sold them to Sanborn.

He identified Ex. 5 as a small table produced by the mill, said that he had stolen as many as 6 of such in March or April or May, 1956 and had sold them to Sanborn.

Webber recognized Ex. 6 through 17 as tables manufactured by the Reynolds mill.

Ex. 6 he termed a clover leaf table. He said that he had stolen several like objects from the mill and had sold them to Sanborn in March, April or May for $2.50 each.

Webber designated Ex. 7 as a clover leaf table and a product of the mill. He asserted that he had purloined several such and had sold them to Sanborn in March, April or May for $2.50 apiece.

State's Ex. 8 the witness called a clover leaf step end made by the mill. He related that he had abstracted several of the kind and had sold them to Sanborn for $2.50 each.

State's Ex. 9 the witness denominated a clover leaf step end and a product of the mill. He told that he had filched

several like the exhibit and had sold them in March, April or May, 1956 to Sanborn for $2.50 apiece.

Webber labelled State's Ex. 10, 13 and 16 lamp, magazine or coffee tables produced by the mill. He had stolen several of such items and had sold them to the Respondent for some $2 each.

Ex. 12, 14 and 17 the witness termed clover leaf step ends from the mill. He had pilfered several of their kind and had sold them in March, April or May, 1956 to Sanborn for $2.50 apiece.

Ex. 18, 19, 20 and 21 Webber classified as magazine racks with 2 steps and as products of the mill. He stated that he had stolen several such and had sold them to the Respondent in March, April or May, 1956 for $3 each.

Ex. 22 the witness called a square table, 15 inches high and manufactured at the mill. In March, April or May he had purloined 2, 3 or 4 and had sold them to Sanborn for $2.50 apiece.

Ex. 23 the witness styled a corner table made at the mill. He admitted having abstracted 2 or 3 like articles and having sold them to Respondent for $2.50 each.

Webber testified that Ex. 24 was probably a lamp table and magazine rack produced in the mill. He confessed that he had stolen several items of the kind and had sold them to Sanborn in March, April or May, 1956 for $2.50 each.

The witness swore that Ex. 25 was a desk or table made by the mill, that he had pilfered several of them and had sold them to Sanborn for $2.50 apiece.

Ex. 26 the witness named a table or school desk. He told of having filched several of such item in March, April or May, 1956 and of having sold them to Sanborn for $2.50 each.

The witness divulged that Sanborn was aware of Webber's thievery while the Respondent was purchasing the furniture appropriated.

Webber in none of his testimony pronounced that Ex. 1 through 26 were the objects stolen and sold. He described the exhibits as facsimiles of the looted goods.

Sanborn by avocation was a furniture dealer. On May 20, A. D. 1956 Pitt J. Smith who was likewise by subordinate occupation a furniture tradesman bought from the Respondent Ex. 1 through 26 in the normal course of trade. Smith supplied to the court Sanborn's receipt for the purchase price paid by Smith for the articles. During the investigation of Webber's abstractions Ex. 1 through 26 had been traced by the sheriff's department to the possession of Smith who readily relinquished those articles to the authorities. Smith identified Ex. 1 through 26 in court and at the same time affirmed that the exhibits were in the same condition as when acquired by Smith from Sanborn.

Ronello Reynolds, director, president and treasurer of Reynolds Brothers, Inc., owner of the mill, related that the mill had missed articles from its inventories, once a week. The lost items had been present in the mill at night and gone on the following morning. This witness recognized Ex. 1 through 26 as first grade current products of the mill and not as samples. Samples, he explained, were made by hand rather than by machine. He averred that only he and his brother, Edward, had had the right to sell furniture from the mill. The witness had never sold any articles similar to Ex. 1 through 26 to either George Webber or Sanborn. The mill had sold only at wholesale and not at retail. Ex. 1 through 26 had all been manufactured since April 25, 1955 following a fire which had consumed a former mill on September 17, 1954. The witness explained that Ex. 1, 2, 3, 4, 22 and 24 had been finished at the mill

but that Ex. 5, 6, 7, 10, 11, 14, 15, 16, 18, 19, 20, and 21 had been completed but not finished. He declared that he had never sold, given away or disposed of any class A-1 manufactured furniture which had not been completed with finish. Sanborn had sought several times without success to buy pieces of furniture from the mill. The witness placed a value upon each of Ex. 1 through 26 and described such articles as we shall note later in this opinion.

Edward Reynolds, production manager of the mill, corroborated the fact that Ex. 1 through 26 were the manufacture of Reynolds Brothers, Inc. and that he and his brother, Ronello, shared exclusively the authority to sell the mill products. The witness had never sold any complete articles to Sanborn with one negligible exception. The witness had not sold any complete items to George Webber or to anybody except to wholesale dealers.

Ex. 1 through 26, with the exception of Ex. 11, were offered by the prosecution without comment and were admitted in evidence by the Court over the objection of Respondent's counsel who opposed because the items were not and had not been demonstrated to be the personal property described in the indictment.

Ex. 1 through 26 had been utilized by the State throughout the trial as models, replicas or standards and as typical products in their respective kinds from the mill. Wigmore on Evidence, 3rd. Ed., secs. 439, 791, 793.

> "Rule 105. *Control of Judge Over Presentation of Evidence.*
>
> The judge controls the conduct of the trial to the end that the evidence shall be presented honestly, expeditiously and in such form as to be readily understood, and in his discretion determines, among other things,
>
> -
>
> (j) whether a witness in communicating admissible evidence may use as a substitute for oral

> testimony or in addition to it a writing, model, device or any other understandable means of communication, and whether a means so used may be admitted in evidence;"
>
> American Law Institute: Model Code of Evidence.

There had been no stated profession that Ex. 1 through 26 were some of the self-same chattels which George Webber had stolen from the mill and had sold to Sanborn. The Reynolds did not assert that they recognized Ex. 1 through 26 as articles stolen by Webber or purchased by Sanborn although the brothers had declared that they had sold no such products to any persons other than dealers and had not sold such products in an unfinished state even to dealers. The Court voiced or assigned no determinant for his acceptance in evidence of Ex. 1 through 26 at the time of their admission. In the record we find no comment upon the fact that some of Ex. 1 through 26 had not been described in testimony to conform with any items of furniture designated in the indictment.

> "In the case before us, the subject matter is a pine log, marked in a particular manner described. The marks determine the identity; and are therefore matter purely of description. It would not be easy to adduce a stronger case of this character. It might have been sufficient to have stated, that the defendant took a log merely, in the words of the statute. But under the charge of taking a pine log, we are quite clear, that the defendant could not be convicted of taking an oak or a birch log. The offence would be the same; but the charge, to which the party was called to answer, and which it was incumbent on him to meet, is for taking a log of an entirely different description. The kind of timber, and the artificial marks by which it was distinguished, are descriptive parts of the subject matter of the charge, which cannot be disregarded, although they may have been unnecessarily introduced. The log proved to have been taken, was a different one from that

> charged in the indictment; and the defendant could be legally called upon to answer only for taking the log there described - - -"
>
> *State* v. *Noble,* 15 Me. 476.
>
> "When a material allegation is made unnecessarily precise by a two particular description, the descriptive averment cannot be separated and rejected but must be proved as laid. Thus where a sheet was described as a woollen sheet, though the statement of material was unnecessary, the epithet must be proved to procure a conviction; so where a horse was needlessly described as a white horse; logs as marked with a certain brand; - - - - So if money is needlessly described the proof must correspond to the description."
>
> Criminal Pleading and Practice: Beale, sec. 112, P. 114.

The following tables will exemplify and clarify several coincidences between the chattels arrayed in the indictment and the denomination by witnesses of Ex. 1 through 26.

Indictment

Item	1.	1 large step-end table
	2.	4 telephone benches
	3.	1 lamp table
	4.	11 step-end tables
	5.	1 end table model No. 1251 N.
	6.	4 three step tables
	7.	1 square table
	8.	1 corner table
	9.	1 magazine rack
	10.	1 large cocktail table
	11.	1 small cocktail table
Total		27

Testimony of George Webber

Ex. 1	telephone bench	*2nd item, indictment*
Ex. 2	telephone bench	*2nd item, indictment*

Ex. 3 telephone bench *2nd item, indictment*
Ex. 4 telephone bench *2nd item, indictment*
Ex. 5 small table
Ex. 6 clover leaf table
Ex. 7 clover leaf table
Ex. 8 clover leaf step end
Ex. 9 clover leaf step end
Ex. 10, 11, 13, 16 lamp, magazine or coffee tables *3rd item, indictment*
Ex. 12, 14, 17 clover leaf step ends
Ex. 18, 19, 20, 21 magazine racks *9th item, indictment*
Ex. 22 square table, 15 inches tall *7th item, indictment*
Ex. 23 corner table *8th item, indictment*
Ex. 24 probably lamp table or magazine rack *3rd, 9th items, indictment*
Ex. 25 desk or table
Ex. 26 table or school desk, etc.

Testimony of Ronello Reynolds

Ex. 1 to 4 No. 2550 gossip bench or telephone stand *2nd item, indictment*
Ex. 5 No. 2510 or 2511 end table
Ex. 6 No. 2577 step end table *4th item, indictment*
Ex. 16 No. 2585 step end table *4th item, indictment*
Ex. 15 No. 2589 step end table *4th item, indictment*
Ex. 18 No. 2547 step end table *4th item, indictment*
Ex. 24 magazine rack *9th item, indictment*
Ex. 22 No. 2588 square cocktail table, Danish, modern
Ex. 23 No. 2584 corner table *8th item, indictment*
Ex. 25 No. 2553 cocktail table *10th or 11th item, indictment*
Ex. 26 No. 2514 cocktail table *10th or 11th item, indictment*

(Ronello Reynolds explained that a gossip bench and a telephone bench are one and the same article.)

The record then manifestly discloses that several of the 27 items enumerated and described in the indictment are

identical with testified descriptions of certain units included within the group of Ex. 1 through 26. In respect to each and every individual chattel so demonstrated by evidence as present simultaneously and coexistently both in the indictment and amongst Ex. 1 through 26, there is the testimony of George Webber that he stole from Reynolds Brothers, Inc. and sold to a knowing Sanborn several facsimiles of that specific object. The Ex. 1 through 26 thus designedly or merely fortuitously served to supply several replicas both of some articles which had been allegedly pilfered by George Webber and sold to the accusedly culpable Sanborn and also of those same articles as they appear by name in the catalogue of the indictment. Many units amongst Ex. 1 through 26, therefore, had a serviceful office as concrete visual aids in contribution to the prima facie case which the State had no doubt achieved.

It had been incumbent upon the State to afford credible evidence of the felonious buying, receiving and concealing by Sanborn of only one article as listed in the indictment. As stated in *Criminal Pleading and Practice, Beale,* Sec. 110, P 113:

> "- - - Where an indictment alleges the larceny of several articles, a conviction may be had, though some of the articles are insufficiently described, or are not proved to have been taken (Maloney v. S.—Tex. C. R.—45 S. W. 718); where an obtaining of goods is alleged by several false pretences, it is enough to prove one; where in an indictment for perjury several false statements are averred, conviction may be had on proof of one (C. V. Johns, 6 Gray, 274; Harris V. P., 64 N. Y. 148) where an act is alleged to have been done with several intents, proof of one is enough (R. V. Evans, 3 Stark, 35)"

Upon the case record to the moment of their admission by the Court Ex. 1 through 26 were proper evidence upon applicable and sound theory. Some of such exhibits were

at least replicas or facsimiles both of chattels assertedly stolen by Webber and sold to Sanborn and of certain chattels set forth in the indictment. All of Ex. 1 through 26 had been placed through testimony in the possession of Sanborn who could not have purchased them from Reynolds Brothers, Inc. which had manufactured them. They were identical with chattels stolen by Webber from the factory and sold by him to Sanborn. Credible circumstantial evidence afforded a basis of inference that Ex. 1 through 26 were personal property stolen by Webber, sold by him to a knowing Sanborn and latterly discovered in Sanborn's possession. The factory had sold no furniture to Webber or Sanborn or to any person other than factory dealers. Those amongst Ex. 1 through 26 which had been described by witnesses variantly from the representation of articles listed in the indictment were, because of testimony in the case and subject to proper instruction from the court, eligible in evidence as stolen property possessed by Sanborn. Such exhibits were probative in establishing scienter and intent. *Nickerson* v. *Gould,* 82 Me. 512, 515; *State* v. *Smith,* 140 Me. 255, 274, 276; *State* v. *Carson,* 66 Me. 116, 118; *State* v. *Acheson,* 91 Me. 240, 246; *State* v. *Fogg,* 92 N. H. 308, 311, 30A (2nd) 491, 493; *Wigmore on Evidence,* 3rd Ed., §§ 153, 324, 325, 327, 2513; *Annotation* 3 A. L. R. 1213, 1219, 1220.

However, subsequent to the admission of Ex. 1 through 26, with the exception of Ex. 11, in evidence and following the conclusion of the State's case the prosecutor by leave of court recalled Ronello and Edward Reynolds to testify further, with the following results:

RONELLO REYNOLDS

"Q. Did you, if I remember correctly, did you testify in direct examination that it wasn't your practice to sell to any individuals?

A. Yes.

Q. Is that the part you wish to explain?
A. Yes.

- - - - It was common practice to sell any furniture which we made, not only which we made but which we were able to buy, to the employees at cost. That's been a common practice and being so common a practice I forgot it at the time.

- -

Well, I forgot that we did. It was so common a practice to sell to employees at cost that I forgot that. I answered your question meaning anyone outside.

- -

Sold them anything they wanted. Sometimes they bought pieces to put together themselves, sometimes they bought first quality.

- -

Q. Referring to State's exhibit from 1 to 26 or similar articles of furniture, did you ever sell any of those to George Webber?
A. No.

Edward Reynolds

"I made the statement that I had sold no furniture to anyone in 1956, and I wish to retract that statement and make an exception, I have sold furniture to employees.

- -

I just didn't think, it was natural to sell to employees.

Q. Well did you sell to any outsiders?
A. No.

Q. Did you ever sell any of the furniture that has been admitted as exhibits in this case or any similar furniture to George Webber?
A. No.

- -

Q. Didn't you testify then under oath that you never sold any similar pieces as described from State's exhibits 1 to 26 to anyone?
A. I did.

Q. And you still stick to that?
A. No, I make the exception we sold to employees.

Q. From 1 to 26? Some of this stuff?
A. Oh yes.

- -

I sold to several employees."

The State rested after the recall of the Reynolds. The Respondent had presented one witness who was being cross examined when the presiding Justice spontaneously recessed the trial and informed counsel of an urgency to confer with them upon a matter of law. The Justice thereupon addressed counsel as follows:

> "Gentlemen, as you know, during recess I have been considering the question as to whether I should declare a mistrial in view of the fact that exhibits 1 to 26 have been introduced and admitted, and a great deal of testimony concerning exhibits 1 to 26 has been admitted over the objections of the respondent, and now it appears to me in view of the testimony we heard this morning from Ronello and Edward Reynolds, those exhibits and a great deal of that testimony should not have been admitted, and would not be admitted if that testimony had been given prior to the rulings the Court made on the various points concerning the exhibits as they came up. Had I known that the Reynolds Brothers sold furniture to their employees as they have said this morning, I would not have admitted State's 1 to 26, and I would not have allowed a great deal of testimony which was given concerning those exhibits, and so as you know, I have been considering whether I should declare a mistrial, and I expect, Mr. Niehoff, you would like to state your position?"

Defense counsel forthwith objected to the granting of a mistrial. He expressed a willingness to waive the objection upon certain stated conditions which the Justice deemed unacceptable. The Justice continued:

> "I am going to decline to do that Mr. Niehoff, because I am convinced that that testimony concerning the exhibits is so involved with all the other testimony in the case, I don't feel the jury could be expected to understand what they are to disregard and what they are not to disregard. And it appears to me that the only way a fair trial can take place in this case is—or I should say it appears to me there is no way a fair trial could take place if the case continues before this jury, it has heard so much testimony which now appears to have been testimony they should not hear, and so over - - in spite of the suggestion and the offer which you have made, I am going to declare a mistrial - - - so I am ordering a mistrial."

Defense counsel straightway excepted.

A resultant of such later and corrective testimony of the two Reynolds brothers was to concede possibilities of Sanborn having obtained furniture from Reynolds Brothers, Inc. mill legitimately and from sources other than George Webber. The revised testimony quite dispelled the significance of the narrated circumstance that Sanborn had had in his possession Ex. 1 through 26 which he had sold to Pitt J. Smith and which the latter had produced in court. The rectified testimony served to render no longer factually inferential but merely conjectural a conclusion that Ex. 1 through 26 were some of the very objects stolen by Webber and assertedly sold to Sanborn. Nevertheless the chastened testimony did not annul the admissibility of several of Ex. 1 through 26. Many such exhibits by testified description and classification had counterparts in the indictment list and so had had a proper and abiding function as visual aids or models. *Wigmore on Evidence,* 3rd. Ed., sec. 439, 791, 793; *American Law Institute; Model Code of Evidence,* Rule 105. It remained that many of the controversial exhibits had qualified for admission and had been admitted.

The testimony of the Reynolds brothers in so far as it had been self-contradictory had been evidentially repudiated by their recantation. Also in the same aftermath the testimony and written evidence from Pitt J. Smith concerning Sanborn's possession and sale to Smith of Ex. 1 through 26 had been revealed as devoid of probative office and calculably hurtful to the Respondent. The testimony of Sheriff Heath as to his impounding of Ex. 1 through 26 assumed an objectively illicit status. Nevertheless testimony of George Webber concerning his theft and sales to Sanborn of facsimiles of certain of Ex. 1 through 26 which had not been described in the indictment remained legitimate with suitable jury instruction. *State* v. *Carson,* 66 Me. 116, 118; *State* v. *Witham,* 72 Me. 531, 535; *Nickerson* v. *Gould,* 82 Me. 512, 515; *State* v. *Acheson,* 91 Me. 240, 246.

The trial was by definition criminal and not civil. Participation in it by the Respondent was by constraint. He had not been an accessory to any dilemma precipitated by the retraction of the Reynolds brothers. Not so, as to the State. The pre-trial conferences of the prosecution with those 2 witnesses could hardly have been thorough or adequate. Routine inquiry of the Reynolds brothers by the prosecutor in advance of the trial would have obviated the incorrect testimony.

The Constitution of Maine, Article 1, guarantees against the oppressive evils of double or former jeopardy.

> "Section 6. No person, for the same offense, shall be twice put in jeopardy of life and limb."

The Constitution of the United States contains a like provision. Amendments, Article V.

The Respondent's plea of double or former jeopardy raises an issue which has been expressed beyond betterment by this court in *State* v. *Slorah,* 118 Me. 203, 208, as follows:

> "The respondent urges in support of his exceptions as a matter of law that jeopardy began when the jury was impanelled and sworn at the January term, and that when jeopardy has once attached he was entitled to a verdict from the jury of either guilty or acquittal; that if the case was withdrawn by the court from the jury without his consent, *except for what has been termed by the courts, urgent, manifest or imperious necessity,* he should be discharged and may plead former jeopardy, if placed on trial again on the same indictment or for the same offence. *Such we hold to be the law.*" (italics supplied)

Protection against former or double jeopardy is a basic and fundamental right. Yet there can supervene circumstances, conditions and uncontrollable mischances obtruding themselves into criminal trials from time to time rendering it necessary that a Justice administering the trial without the consent of the accused end the proceedings and discharge the jury before verdict to maintain and preserve impartial justice for respondent or State or both. No human being could a priori anticipate the varieties of such crises. When the cogency for a mistrial becomes sufficiently impelling and where a response to it cannot be justly protested by the respondent a second trial does not violate the latter's fundamental privilege. Were it otherwise many guilty could secure unconscionable impunity through pure mishap or their own malfeasance.

An early and venerated authority is *U. S.* v. *Perez,* 9 Wheat. 579, 580: (jury unable to agree)

> "- - - We think that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a *sound* discretion on the subject; and it

it impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the *greatest caution*, under *urgent circumstances*, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of their discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. - - - -" (italics ours)

As is said in *State* v. *Slorah,* 118 Me., 209, 210:

"Certain conditions, if arising, in the trial of a case, have come to be well recognized as constituting that 'urgent necessity' which will warrant the discharge of a jury, and if they appear of record will bar a plea of former jeopardy: (1) the consent of the respondent, (2) illness of the court, a member of the jury, or the respondent, (3) the absenting from the trial of a member of the panel or of the respondent, (4) where the term of court is fixed in duration and ends before verdict, (5) where the jury cannot agree.

- - - - - - - - - - - - - - - - - - -

"Of the conditions, except as found in the decided cases, more cannot be said than that in all cases, capital or otherwise, they must be left to the *sound discretion* of the presiding Justice, acting under his oath of office, having due regard to the rights of both the accused and the State, and subject to review by this court. - - -" (italics ours)

As to "sound discretion" this Court commented in *Charlesworth* v. *Amer. Express Co.,* 117 Me., 219, 221:

"- - - It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief

> test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. - - -"

In *U. S.* v. *Whitlow*, 110 F. Supp. 871, 872 the Court commented:

> "Ordinarily a defendant in a criminal case has the privilege, granted to him by the above-mentioned clause of the Constitution of securing a verdict from the jury originally impaneled and sworn to try him. This guaranty is no mere technicality, but constitutes a substantial right. It not only safeguards the defendant against being put to the agony, expense, and trouble of a second trial, but it also entitles him to secure a verdict from the particular jury that has started to hear the case. This privilege may prove at times very valuable, because the defendant may feel that the jury which is trying the case may be more favorably disposed to him than some future jury might be."

In *Baker* v. *Commonwealth*, 280 Ky. 165, 132 S. W. (2nd) 766, 768 we find:

> "In the present case the accused had participated in the selection of a jury and were willing to risk their chances with the jury thus selected but the action of the trial court compelled them to assume the additional peril of being tried by a different jury."

It is noteworthy that in the present case, apart from prospects of acquittal, the Respondent, John B. Sanborn, at mistrial had achieved considerable progress. He was being tried under R. S., c. 132, sec. 11, a statute with special provisions as to degrees of punishment. He had succeeded in substantially reducing the number and aggregate value of chattels which the State by the indictment could persist in contending he had culpably bought and received. He may have already dwarfed the accused

offense from felony to misdemeanor. He had attained some positive advantage.

Lamar, J., concurring in *Oliveros* v. *State,* (Ga.), 47 S. E. 627, 630 comprehensively discoursed:

> "- - - The bystanders may cry, "Hang him! Hang him!" as in Woolfolk's Case (Ga.) 8 S. S. E. 724; and on motion therefor a mistrial might properly have been granted. The result would not have been different if a mob had invaded the court room with shouts of "Acquit him! Turn him loose!" In either case a mistrial is ordered because demanded by the ends of justice. The judge himself might feel called on to make such an order because of his own conduct, where he had inadvertently done an act which would vitiate the verdict. So, too, the misconduct of jurors, counsel, accused, or bystanders might likewise be such as to authorize a mistrial. Not that it was physically or morally impossible to proceed with the trial such as it is or would then be. It could go on as a physical fact, as it did in Woolfolk's Case; but the verdict of acquittal or conviction would never be recognized as that calm and deliberate judgment of 12 men to which the accused was entitled, and to which, be it noted, the state was also entitled. A mistrial is not a necessary result of misconduct, but a cure made necessary by misconduct. It is not so much a necessary effect as a necessary remedy to prevent the effect. *Of course if the occurrence is one calculated to harm the defendant alone, he may choose to waive it, and to have the trial proceed, and it would therefore usually be erroneous—as here—to order a mistrial over his objection.* But if the conduct was such as to prejudice the state, or to prejudice both the accused and the state, it would be for the court to determine what action he should take under the peculiar facts. It is impossible to lay down a rule. It must be left to the sound legal discretion of the trial judge acting under his oath of office, and having due regard to the rights of the accused and of the state, and subject to re-

> view as in all other cases. The principle is probably as accurately stated as it is possible to do in Thompson's Case, 155 U. S. 271 - - - where it was said: 'Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and a defendant is not thereby twice put in jeopardy, within the meaning of the fifth amendment of the Constitution of the United States' - - -." (italics ours)

In the instant case the evidentiary plight which had evolved was prejudicial to the Respondent but not so to the State. The State sought no mistrial. The Respondent insisted upon waiving his right to a mistrial but was overruled by the court.

In *Oliveros* v. *State, supra,* 47 S. E. 627, 628 the Court further said:

> "It would not do to hold that, whenever a judge comes to the conclusion that he has committed error in the trial of a criminal case he can declare a mistrial, and put the accused upon trial before another jury. No one could tell where such a ruling would lead. If the judge could do this in one trial, he could do it in the second or third, or even fourth. The law does not intend that one accused of crime shall be harassed in this way."

A misapprehension in judicial administration is not of itself sufficient to warrant a mistrial and to nullify jeopardy.

In *State* v. *Calendine,* 8 Iowa, 288 the State was conducting its case against the accused and before a jury and 2 witnesses had been examined when the court upon its own motion dismissed the indictment and discharged the prisoner in the mistaken belief that the indictment was defective. On appeal it was held that the indictment had been

valid and that the accused could not be tried again for the same offense. The opinion at Page 292 states:

> "- - - Even the species of necessity supposed did not exist therefor, but the discharge arose from the will of the court."

In *State* v. *Wright,* 5 Ind. 290, the presiding justice at a criminal trial erroneously believed that the court term had expired and that the trial must close. He dismissed the jury, ended the trial and remanded the prisoner to jail for a new trial at the next court term. It was held on appeal that the trial court session could have continued until the conclusion of the trial, that there had been no necessity for withdrawing the case, that the respondent had been entitled to a verdict and that the proceeding was equivalent to an acquittal.

In *State* v. *Witham,* 93 Utah 557, 74 P. (2nd) 696, 698 is the statement:

> "- - - but we all agree that a defendant ought in no case to be put on a second trial for the same offense where the jury has been discharged over defendant's objection, because the court - - - - may feel it has erred in prior rulings."

In *State* v. *Grayson,* (Fla.), 90 So. (2nd) 710, 713:

> "- - - The reason for requesting the mistrial according to the statement of the Assistant County Solicitor was that there might be error in the record. Out of fear of the ultimate effect of such error, the prosecuting officer requested the discharge of the jury. We do not consider this to be an urgent or necessary reason for granting the motion for mistrial, absent the consent of the accused. - - -"

The testimony of the Reynolds brothers to the extent that it was inherently contradictory had bidden fair to neutralize itself in a large measure. Parenthetically one would opine that it had not enhanced the State's case. But

undebatably it had no justifiable presence in the trial. A rejection of it was obligatory together with its correlative and more prejudicial evidence consisting of the testimony and written exhibits of Pitt J. Smith as to Smith's purchase of Ex. 1 through 26 from Sanborn and the testimony of Sheriff Heath concerning the acquisition from Smith of the same exhibits. Likewise those exhibits amongst Ex. 1 through 26 which had been described and denominated variantly from chattels recited in the indictment required some explanation to the jury as to the special and limited probative function of such particular exhibits. *State* v. *Acheson,* 91 Me. 240, 246.

The errant evidence was ascertainable without difficulty and was rationally separable. An emphatic and conventional direction to the sworn jury upon his own initiative by the Justice would have dependably disabused the jury who could and would have, without the necessity of exceptional forbearance, prescinded from the prejudicial and illicit evidence.

> "While there are cases to be found in some jurisdictions holding that the erroneous admission of objectionable evidence is not cured by its withdrawal coupled with an instruction to the jury not to consider it, such cases are exceptional. The great weight of authorities is in support of the rule that ordinarily the erroneous admission of improper evidence is cured, or so far cured as to be no longer a sufficient ground for a new trial, by being withdrawn or struck from the record and an instruction given to the jury to disregard it entirely." *McCann* v. *Twitchell,* 116 Me. 490, 493.
>
> "- - - It is to be presumed the jury will follow the directions of the court. If it were not so, a witness might stop a cause in mid-trial, or it must proceed at the hazard of a new trial, and the court would be powerless to avert the evil by instructions, however pertinent and stringent. In the present case, if the jury gave heed to the court, and

> we must presume they did, no harm was done, even if the evidence was not contradictory; for they were told it was not to be weighed as proof of the prisoner's guilt at all."
>
> *State* v. *Kingsbury,* 58 Me. 238, 242.
>
> "- - - It must be presumed that such an instruction would have effaced all prejudice, if any, resulting from the statement - - -"
>
> *State* v. *Fortin,* 106 Me. 382, 384. (See, also, *State* v. *Norton,* 151 Me. 178, 182.)

In the instant case as always the Respondent's constitutional guaranty against double jeopardy was a security which had to be esteemed as amongst the last of his rights to succumb or yield to circumstances. For a presiding magistrate to direct spontaneously a mistrial against the objection of a respondent is to exercise an extraordinary power. Such may be done only in *"urgent, manifest or imperious necessity." State* v. *Slorah, supra.* The Respondent here had found himself in a vexed predicament in the creation of which he had had no proximate part. The resultant harm had been to him alone. The State had not been without censure in the evidential evolvement at the trial. The Respondent had an empaneled jury with which he appeared satisfied. He had, too, the routine remedies for reversible error.

Under the controlling criminal statute the State had achieved doubtful success in demonstrating any felony. The Respondent had elected to waive his right to a mistrial and had affirmatively objected thereto. The court spontaneously overruled the Respondent from solicitude for the latter whom the court had despaired of otherwise extricating from a prejudicing involvement. The court most creditably pursued the only course which he at the time judged could provide a fair trial for the Respondent. The court had mistakenly assumed that the encores as witnesses of the Reynolds brothers had demonstrated that Ex. 1 through

26 had all been improperly admitted. The court had desponded of eradicating the prejudice from the accepted evidence. Subjectively the court had been motivated by most admirable and laudable inducements. There was wanting, however, that

> "- - - breakdown in the judicial machinery which renders further orderly and systematic procedure impracticable."
>
> *State* v. *Witham,* 74 P. (2nd) 696, 697.

We fail to perceive in the record the urgent, manifest or imperious necessity for the mistrial ordered.

The Respondent's plea of former jeopardy is sustained.

Because of such conclusion it becomes unnecessary that this court consider further the remaining exceptions of the Respondent or his appeal.

Exception sustained.

Case remanded to the Superior Court for Respondent's discharge.

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CONCURRING OPINION

WILLIAMSON, C. J. I concur in the result reached by Justices Sullivan and Tapley and join with them in sustaining the plea of former jeopardy. My reasons differ in emphasis from those given in the main opinion drawn by Justice Sullivan in his thoughtful review of the facts and law. The issue involves a fundamental constitutional right of the respondent.

> "No person, for the same offence, shall be twice put in jeopardy of life or limb." Maine Constitution, Art. I, § 8.
>
> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." U. S. Constitution, Art. V (jeopardy clause).

The right comes from the common law. See *Green* v. *U. S.*, 355 U. S. 184, 78 S. Ct. 221, 61 A. L. R. (2nd) 1119.

The principle governing mistrial without consent of the respondent as found in *U. S.* v. *Perez,* 9 Wheaton 579, and the facts of the instant case are fully stated in the main opinion.

In my opinion there was no "manifest necessity" within the *Perez* rule and the mistrial was not ordered within the sound discretion of the court.

The case, as I see it, comes to this. The State offered and there were admitted 26 pieces of furniture as the furniture that had actually been stolen by the thief. Later in the case two key witnesses for the State changed their testimony with the result that the court considered the furniture and related evidence had been erroneously admitted. The court thereupon ordered a mistrial against the objection of the respondent on the ground that the error, deemed by the court to be prejudicial to the respondent, could not be corrected by an instruction to the jury to disregard the objectionable evidence. ". . . it appears to me (the court) that the only way a fair trial can take place in this case is—or I should say it appears to me there is no way a fair trial could take place if the case continues before this jury, it has heard so much testimony which now appears to have been testimony they should not hear, . ."

The case does not present, in my view, an unusual situation. Evidence admitted at one time often becomes for

one reason or another inadmissible later. The jury is instructed to disregard the inadmissible evidence. The trial then continues to completion, with suitable objections or exceptions to preserve points for decision in the Law Court.

We are entitled to presume that the jury would have followed suitable instructions of the court. In *State* v. *Kingsbury,* 58 Me. 238, at 242, the court said:

> "The government may propose to contradict a witness in defense, and may call testimony for that purpose. The evidence fails to contradict the witness. The jury are instructed not to regard such testimony. When proper instructions are given, such admission is not deemed a ground for a new trial. It is to be presumed the jury will follow the directions of the court. If it were not so, a witness might stop a cause in mid trial, or it must proceed at the hazard of a new trial, and the court would be powerless to avert the evil by any instructions, however pertinent and stringent. In the present case, if the jury gave heed to the court, and we must presume they did, no harm was done, even if the evidence was not contradictory; for they were told it was not to be weighed as proof of the prisoner's guilt at all."

See also *State* v. *Cox,* 138 Me. 151, at 176, 23 A. (2nd) 634.

A finding of "manifest necessity" in the circumstances of this case would, I believe, breach the restrictions placed on mistrial to the disadvantage of the respondent protected as he is by the Constitution. Certainly in the meaning of the principle and in its application would thereby be lessened. The great protection against harassment by a powerful state would rest perhaps upon doubtful rulings on evidentiary problems. The solution of such problems should, in my view, be left to the appellate court and not decided in the trial court without the consent of the man who is in jeopardy.

The case of the respondent who objects to a mistrial does not often arise. The reason no doubt is that the respondent, feeling the heat of an impending guilty verdict, wishes the benefit of a mistrial and thus a new trial without the risk and expense of an appeal.

Such, however, is not the instant case. Here the respondent demands that the jury drawn to try the case between him and the State finish the task. The jury may be entirely satisfactory in its composition. His witnesses may be available now and not later. The expense and torment of a new trial may appear too burdensome. He may believe that with the State's evidence on the furniture removed, he will stand a better chance of a favorable verdict. He may be entirely confident that he will be found not guilty.

Without question, the court acted in his judgment for the protection of the respondent. There is no suggestion that the mistrial was designed to aid the State by giving time to reform its forces and to change its strategy. To grant a mistrial to benefit the State would of course have been improper. The mistrial was ordered, it must be assumed, on the premise that the admissible evidence in the case warranted a guilty verdict, otherwise the court would have directed a verdict for the respondent.

The cases, as I read them, add strength to the respondent's position. No case involves a mistrial without consent on the ground the court was unable to remove the effect of evidence erroneously admitted from the minds of the jury.

In *State* v. *Slorah*, 118 Me. 203, 205, 106 A. 768, the respondent on trial for murder, on a jury view at the scene of the alleged crime cried out, "My God! take me away from here or I shall be insane again." The court said, at p. 216:

> "The exclamation by him in the presence of the jury, however, that if he was not removed he would go insane again, was in the nature of evidence improperly presented to the jury out of court, - - an unsworn statement of the accused."

Thompson v. *United States,* 155 U. S. 271, 15 S. Ct. 73 (qualifications of a juror); *Wade* v. *Hunter,* 336 U. S. 684, 69 S. Ct. 834 (tactical needs of an advancing army in Germany preventing court martial); *U. S.* v. *Gori* (CA 2) 282 F. (2nd) 43, affirmed *Gori, Petr.* v. *U. S.,* S. Ct. June 12, 1961 (conduct of district attorney); *Lovato* v. *New Mexico,* 242 U. S. 199, 37 S. Ct. 107 (dismissal to permit arraignment); *People* v. *Thomas,* 15 Ill. (2nd) 344, 155 N. E. (2nd) 16 (judge charged defendant's attorney with attempting "a manufactured and sympathetic emotional appeal"); *Simmons* v. *U. S.,* 142 U. S. 148, 12 S. Ct. 171 (incompetent juror and outside influence on jury); *U. S.* v. *Cimino,* 224 F. (2nd) 274 (prejudiced juror); *Scott* v. *U. S.,* 202 F. (2nd) 354 (withdrawal of counsel); *U. S.* v. *Perez, supra* (the typical "hung jury" case).

In *Brock* v. *N. C.,* 344 U. S. 424, 73 S. Ct. 349, the issue was whether there was a violation of the Fourteenth Amendment by a mistrial in the North Carolina Court on refusal of state's witnesses to testify on the ground of self-incrimination. The court concluded that this had long been the common law rule in North Carolina and did not violate the Fourteenth Amendment. The North Carolina rule is against the great weight of authority. Chief Justice Vinson, in dissenting, pointed out that no case in any other jurisdiction supported the North Carolina rule. See also *State* v. *Locklear,* 16 N. J. 232, 108 A. (2nd) 436, 442, for a review of cases.

We are not here concerned with the guilt or innocence of the respondent.

> "Assuming a failure of justice in the instant case, it is outweighed by the general personal security

afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power." *State* v. *Locklear, supra,* at p. 442.

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DISSENTING OPINION (WEBBER JOINS)

SIDDALL, J. The respondent was charged with buying, receiving, and aiding in concealing stolen property. The articles alleged to have been stolen consisted of some twenty-seven articles of furniture. After the jury was impaneled and sworn in the first trial, the State presented as a witness one George Webber who testified that he worked at one time for Reynolds Bros., Inc., furniture manufacturer and alleged owner of the articles of furniture claimed by the State to have been stolen. He stated that while he was so employed he was approached by the respondent, with whom he had had previous business relations, who requested him to pick up some furniture or parts from the employer of the witness with the warning, "You be careful you don't get caught." He was to be paid three or four dollars for each article delivered to the respondent. He testified that over a period of two months he stole from his employer articles of furniture, including tops and spindles, which he turned over to the respondent. Over respondent's objection he identified the various articles of furniture marked for identification as exhibits numbered from one to twenty-six, inclusive, as being similar to articles of furniture which he stated he stole from Reynolds Bros., Inc. and sold to the respondent.

Ronello Reynolds and his brother Edward testified for the State. Ronello Reynolds, President of Reynolds Bros.,

Inc., over respondent's objection identified the various marked exhibits as having been manufactured by his company, some of which, however, were not stained or the finish material applied at the mill. He stated that he never disposed of any Class A 1 manufactured furniture that had not been completed with finish. He also testified that all of the market exhibits before assembly were composed of first grade pieces, and that there were no seconds or reject pieces among the exhibits; that he and his brother were the only persons authorized to sell manufactured articles from the factory, and that he never sold any of these articles, or similar articles, to the witness George Webber or to the respondent. He also testified that articles similar to the marked exhibits were missing from the inventories once a week; that they were there at night and gone in the morning and that there was no way to account for their disappearance. Against the objection of the respondent he was permitted to give evidence of the value of the various articles of furniture covered by the marked exhibits. Each brother testified that the company did not sell finished furniture to anyone at retail.

Edward Reynolds, Vice President and Plant Superintendent of the Reynolds Bros., Inc. testified over objection that exhibits one to twenty-six, inclusive, were manufactured by his company. He testified that the marked exhibits were all "firsts" and that he never sold any of the company's products to George Webber and that he did not sell any item similar to the marked exhibits to John B. Sanborn, but did at one time sell Sanborn a telephone bench which was a "poor second."

Pitt J. Smith testified over objection that he had purchased from the respondent the items of furniture identified by exhibits one to twenty-six. The exhibits were offered and admitted over respondent's objections. After the State had closed its case, it was permitted over respondent's

objection to reopen the case for the purpose of recalling Ronello and Edward Reynolds to correct certain phases of their testimony. Ronello Reynolds qualified his previous testimony by stating that it was a common practice of the company to sell furniture to employees at cost; that the practice was so common that he forgot to mention it. He stated that he did not sell any of the articles of furniture identified by the numbered exhibits, or similar articles, to the employee George Webber. Edward Reynolds qualified his previous testimony that he had sold no furniture to anyone in 1956 and testified that he had sold furniture to employees, but not to George Webber. Based upon this change in the testimony of the two witnesses the Court ordered a mistrial.

The record discloses that the mistrial was ordered by the court in view of the fact that exhibits one to twenty-six, together with a great deal of testimony concerning them, were admitted over the objection of the respondent, and would not have been admitted had the later testimony of Ronello and Edward Reynolds been given prior to the rulings by the court on the exhibits and the testimony relating to them. Counsel for the respondent objected to the mistrial order and stated that the respondent was willing to waive any right to a mistrial upon the express condition that the court rule out exhibits one to twenty-six and instruct the jury to completely disregard these exhibits *and all testimony relating thereto.* All of the testimony relating to the exhibits did not depend upon the final admission of the exhibits in evidence. There was sufficient admissible evidence in the case, if believed, to warrant a conviction. The task of instructing the jury on what testimony to consider and what not to consider was undoubtedly a difficult one. However, the court did not base his mistrial order upon the mere difficulty of giving proper instructions. He stated that he was convinced that the testi-

mony concerning the exhibits was so involved with all of the other testimony that the jury could not be expected to understand what they were to disregard and what they were to regard, and "that a fair trial could not take place if the case continued before that jury who had heard so much testimony which they should not have heard."

The law is well settled that jeopardy begins when a respondent is put upon trial before a court of competent jurisdiction, upon a sufficient indictment, after the jury has been impaneled and sworn. *State* v. *Slorah,* 118 Me. 203, 208, 106 A. 768. All of these elements necessary to the attachment of jeopardy were present.

Under the strict rules of common law the discharge of the jury after the attachment of jeopardy was equivalent to an acquittal. However, modern practice has brought about a relaxation of this strict rule to the extent that the court may now discharge a jury after it has been impaneled and sworn where manifest and urgent necessity calls for such action. The exercise of this power cannot be employed arbitrarily, but must be left to the sound legal discretion of the presiding justice, acting cautiously under his oath of office and having due regard to the rights of both the respondent and the State. This principle is expressed in 15 Am. Jur. Criminal Law, Sec. 406, p. 75, 76, as follows:

> "Under the strict practice which formerly prevailed, in England at least, the discharge of the jury in a criminal case for any cause after the proceedings had advanced to such a stage that jeopardy had attached, but before a verdict of acquittal or conviction, was held to sustain a plea of former jeopardy, and therefore, to operate practically as a discharge of the prisoner. In deference, however, to the necessities of justice, this strict rule has been greatly relaxed, and the general modern rule is that the court may discharge a jury without working an acquittal of the de-

> fendant, in any case where the ends of justice, under the circumstances, would otherwise be defeated. The court is to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper for the court to interfere. The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful. The courts, however, undoubtedly have the right to order the discharge; and the security which the public has for the faithful, sound, and conscientious exercise of this discretion rests on the responsibility of the judges under their oaths of office. In order, however, to justify an exercise of this power, the occasion for it must be very cogent, or, as some courts have said, there must be an absolute or manifest necessity. The power to discharge cannot be arbitrarily exercised."

For a further discussion of the same principle see WHARTON'S CRIMINAL LAW, 12th Ed., Vol. 1, Sec. 395; 22 C. J. S., Criminal Law, Sec. 259.

Our own court in *State* v. *Slorah, supra,* has given careful consideration to the question of the right of the court to withdraw a criminal case from further consideration by the jury after jeopardy of the respondent has attached. We quote at length from this opinion as follows:

> "Does the record disclose conditions creating what has been termed by the courts a manifest, urgent necessity, such as warranted the presiding Justice in withdrawing the case from the jury and discharging them from further consideration of it. We think it does.
>
> Anciently it is claimed that a jury once sworn in a 'case of life or member' could not be discharged by the court, but must render a verdict. Coke Litt., 277. Whether ever enforced to its full limit, which as one case puts it would require 'the confinement of the jury till death, if they do not

agree,' *Winsor* v. *Queen,* 1 L. R., Q. B. C., 1865, page 394, is of no consequence. The rigor of and strict compliance with the technicalities of the common law in safeguarding the accused in criminal cases has been much relaxed since the decrease in the number of capital offenses. As early as the time of Blackstone, at least, an exception in this respect had been introduced in practice and it was recognized that juries in criminal cases might be discharged during the trial in cases of 'evident necessity.' Blackstone's Com., Vol. 4, page 361.

The expression 'evident necessity' has been expanded and defined in practice in the course of time as occasions have arisen until under certain conditions there is no longer any question of the right of the court to stop a trial even in a capital case, and withdraw the case from the further consideration of the jury. In attempting to define those conditions, as the court puts it in the case of *Winsor* v. *Queen, supra,* 'We cannot approach nearer to precision than by describing the degree (of need) as a high degree such as in the wider sense of the word might be denoted by necessity.'

Certain conditions, if arising in the trial of a case, have come to be well recognized as constituting that 'urgent necessity' which will warrant the discharge of a jury, and if they appear of record will bar a plea of former jeopardy: (1) the consent of the respondent, (2) illness of the court, a member of the jury, or the respondent, (3) the absenting from the trial of a member of the panel or of the respondent, (4) where the term of court is fixed in duration and ends before verdict, (5) where the jury cannot agree. . . .

It is not easy to state the principle so as to cover all conditions that may arise, and the above are only examples of the instances first gaining recognition by the courts and illustrative of the principle. It is now equally as well recognized that there are certain other conditions that create what have been termed a moral or legal necessity, as distinguished from physical necessity such as the

> illness of the court or jury. *Nolan* v. *State,* 55 Ga., 521; *Andrews* v. *State,* 174 Ala., 11. . . .
>
> Of the conditions, except as found in the decided cases, more cannot be said than that in all cases, capital or otherwise, they must be left to the sound legal discretion of the presiding Justice, acting under his oath of office, having due regard to the rights of both the accused and the State, and subject to review by this court . . . . Perhaps, the most comprehensive statement of the law is found in *United States* v. *Perez,* 9 Wheat., 579, by Justice Story, and adopted in *Thompson* v. *United States, supra*:
>
> > 'Courts of justice are invested with the authority to discharge a jury from giving a verdict, whenever in their opinion taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated.' . . .
>
> To render a verdict void in civil cases it need not appear that the jury was actually prejudiced, biased, or influenced by the occurrence. If it may have affected their ability to render an impartial verdict, it is sufficient . . . . We think the same considerations should apply in criminal cases whether it might affect adversely the State or the respondent, *State* v. *Hascall,* 6 N. H., 352. Both are entitled to a fair trial."

In the *Slorah* case the court sets out certain conditions well recognized as constituting manifest or urgent necessity. Manifest and urgent necessity does not always arise from physical necessity. As stated in the *Slorah* case, it may arise from moral or legal necessity as distinguished from physical necessity. Our court does not attempt to define the exact conditions under which manifest necessity exists. They are left to the sound discretion of the presiding justice, acting under his oath of office, and subject to review by this court. Other courts have followed

the same practice, and have been reluctant to define the exact conditions under which such a necessity may exist.

It is clear that an arbitrary order of mistrial operates as an acquittal. According to the overwhelming weight of authority, the discharge of a jury on account of the inability of the prosecution to proceed with the trial in the absence of necessary witnesses or other evidence to prove the crime charged operates as an acquittal. See *Cornero* v. *United States,* 48 F. (2nd) 69, 74 A.L.R. 797; 74 A.L.R. 803 (annotation); 15 Am. Jur. Criminal Law, Sec. 409.

We have been unable to find a case in which the conditions facing the court at the time of mistrial were the same as in this case. However, the general statement of the law in *United States* v. *Perez,* as quoted in the *Slorah* case has met with approval in other and more recent cases.

In the case of *Thompson* v. *United States,* 155 U. S. 271, 273, 274, it came to the attention of the court that one of the jurors had been a member of the grand jury that returned the indictment. The court, without the consent of the defendant, and under exceptions, discharged the jury and directed that another jury should be called. Answering defendant's plea of former jeopardy the court said:

> "As to the question raised by the plea of former jeopardy, it is sufficiently answered by citing *United States* v. *Perez,* 22 U. S. 9 Wheat. 579 6:165; *Simmons* v. *United States,* 142 U. S. 148 35: 968, and *Logan* v. *United States,* 144 U. S. 263 36: 429. Those cases clearly establish the law of this court, that courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is

> not thereby twice put in jeopardy within the meaning of the 5th Amendment to the Constitution of the United States."

In *Wade* v. *Hunter,* 336 U. S. 684, a soldier participating in the invasion of Germany was put on trial before a court-martial. After hearing the evidence and arguments the court-martial closed to consider the case. Later the court-martial reopened and announced a continuance in order to hear witnesses not then available. Subsequently, the Army's advance having so increased its distance from the residence of the witnesses that the case could not be completed within a reasonable time, the charges were withdrawn and transmitted to another military unit. Another court-martial was convened and a plea of former jeopardy was made by the prisoner. The court after quoting from the *Perez* case said:

> "The rule announced in the Perez Case has been the basis for all later decision of this Court on double jeopardy. It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy. Measured by the Perez rule to which we adhere, petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment."
>
> "We are urged to apply the Cornero interpretation of the 'urgent necessity' rule here. We are asked to adopt the Cornero rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether

> a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest."

The *Perez* case, the *Thompson* case, and the case of *Wade* v. *Hunter,* were cited with approval in *United States* v. *Gori,* an appeal to the United States Court of Appeals, Second Circuit, based upon a plea of former jeopardy, reported in 282 F. (2nd) 43. At the former trial the Government during the examination of a witness ran into difficulty because of continuous formal objections by the defense and "interference on the part of the trial judge." The court, during the course of the testimony of this witness, declared a mistrial "because of the conduct of the district attorney." The court found that the prosecutor did nothing to instigate the declaration of mistrial. A majority of the court held that the prior trial did not support a plea for former jeopardy. On certiorari, the United States Supreme Court affirmed the decision of the Court of Appeals. *Gori* v. *United States* (1961)—U. S.—, 81 S. Ct. 1523, 6 L. ed. (2nd) 901. We quote the following extracts from the majority opinion in that case:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. * * * * It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. . . .,' * * * * and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion."

In *Lovato* v. *New Mexico*, 242 U. S. 199, the accused had pleaded not guilty to an indictment for murder. Without withdrawing his plea, he demurred to the indictment. The demurrer was overruled and a jury was impaneled and sworn. It then appeared that the defendant had not been arraigned since the overruling of the demurrer. The court dismissed the jury and the respondent pleaded not guilty. The same jury was impaneled, and the case proceeded to trial. At the conclusion of the evidence for the prosecution, the defendant made a motion for a directed verdict on the ground of former jeopardy. The motion was denied, and a conviction for manslaughter followed. The same ground was relied upon in a motion in arrest of judgment which was denied, and an appeal was taken. The Supreme Court of New Mexico held that the question concerning double jeopardy was raised too late and affirmed the previous judgment. The U. S. Supreme Court, in affirming the judgment of the Supreme Court of New Mexico, withheld any opinion as to the correctness of the ruling of the court below concerning the failure to promptly raise the question of former jeopardy, but, citing the *Perez* case, found that the action taken by the trial judge was clearly within the bounds of sound judicial discretion.

In *People* v. *Thomas*, 15 Ill. (2nd) 344, 155 N. E. (2nd) 16 (1959), the court during the course of the trial, in the presence of the jury, instructed the jury to disregard a certain statement made by counsel for the respondent, and further remarked that the statement was "purely a manufactured and synthetic appeal."

After a conference, the court, on motion of the prosecution, declared a mistrial. The respondent was again tried and at the second trial his motion to dismiss on the ground of former jeopardy was denied. Upon conviction he brought a writ of error in which he contended that he had been twice put in jeopardy for the same offense. In affirming

the conviction the court found it unnecessary to determine the propriety of the mistrial on the assumption that it was granted to protect the prosecution from unfairness. The court found in the record another basis for the mistrial because the trial judge had made a serious charge that would almost inevitably have prejudiced the respondent in the eyes of the jury. Under such circumstances, the court stated, a verdict of guilty probably would have been set aside. The court then said:

> "The ends of justice can hardly be said to be served by requiring that a trial be continued to its conclusion after an inadvertent error by the trial judge has sharply minimized the possibility of sustaining a verdict for the prosecution. Cf. American Law Institute, Model Penal Code, Tent. Draft No. 5, sec. 1.09. Concepts of impartial justice and scrupulous fairness to a defendant do not include an opportunity to speculate upon the chance of a favorable verdict when, as in this case, a legal defect has substantially eliminated the chance of an unfavorable one."

The following quotation from the opinion indicates that the court considered the court below was justified in making the mistrial order by reason of manifest necessity:

> "The varying circumstances that will justify a mistrial without giving rise to double jeopardy have frequently been generalized in the expression that a court has authority to discharge a jury 'whenever in the court's opinion there is manifest necessity for such act or the ends of public justice would otherwise be defeated, * * *.' *People* v. *Touhy,* 361 Ill. 332, 344, 197 N. E. 849, 856; *People* v. *Simos,* 345 Ill. 226, 231, 178 N. E. 188, 190; *People* v. *Peplos,* 340 Ill. 27, 172 N. E. 54. These decisions hold that the ruling of the trial court is not subject to review in the absence of an abuse of discretion."

See also on the same principle *Brock* v. *North Carolina,* 344 U. S. 424; *Simmons* v. *United States,* 142 U. S.

148; *United States* v. *Cimino,* 224 F. (2nd) 274; *Scott* v. *United States,* 202 F. (2nd) 354.

It is not necessary that the respondent consent to a mistrial in order to obviate the constitutional bar. A mistrial may be properly ordered either on the motion of the prosecuting attorney or by the court of its own motion, and over the opposition of the respondent. *United States* v. *Gori, supra.*

The question here is the application of the rule laid down in the *Slorah* and *Perez* cases. I feel that the action of the presiding justice in declaring the mistrial was proper and justifiable under that rule. The basic issue in the instant case can be stated rather simply. Can the situation ever arise in which it would be completely unrealistic to expect a jury to heed an instruction to disregard certain evidence and put it out of mind in the course of their deliberations? If so, is this such a case? I would answer both questions in the affirmative. The court, in view of the evidence before him at the time, had admitted certain exhibits. The jury undoubtedly were under the impression that the exhibits were offered and admitted as tending to prove that they were the identical articles alleged to have been unlawfully received by the respondent. The qualification of certain previous testimony relating thereto, rendered the exhibits and some of the testimony inadmissible for such purpose. There was, however, ample admissible evidence in the case, if believed, without the exhibits, to justify a conviction for the crime charged. Not all of the evidence relating to the exhibits was inadmissible. Evidence concerning the exhibits was admissible for the purpose of proving value, without the actual admission of the exhibits in evidence. See *Berney* v. *Dinsmore,* 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445. Also, testimony relating to the exhibits was admissible for the purpose of assisting the jury in determining whether the description

of the property alleged to have been stolen and unlawfully received conformed with the description set forth in the indictment.

The presiding justice concluded, in my view correctly, that the evidence to be disregarded was so voluminous and so interwoven into the entire fabric of the case that it would be virtually impossible for any group of twelve citizens, untrained in the law, to sort out of a considerable body of evidence so much that under changed conditions must be eliminated from consideration. Justice is not furthered by a verdict which is the product of utter confusion in the minds of the jury. In the ordinary case evidence to be subtracted out of consideration is relatively isolated and easily separable. In such a case the assumption that the jury can heed an instruction to disregard is valid. But human capacity would seem to impose some reasonable limits on such an assumption.

The justice below was presented with a choice between two alternatives. He could, as the respondent requested, give the instruction to disregard the evidence. Was the decision to be his or the respondent's? I suppose no one would suggest that by imposing as a condition of his waiver of his right to a mistrial the giving of an erroneous instruction as to the law, the respondent could thereby compel the giving of such an instruction. No more could the respondent, in my view, compel the giving of an instruction which the presiding justice, in the exercise of a sound discretion and for good reason, deemed to be hopelessly confusing and meaningless. If, on the other hand, he refused to give the requested instruction, the order of a mistrial was left as the only available means of protecting the respondent from the consequence of an unfair verdict. The danger to the respondent which only the presiding justice seems fully to have apprehended lay in the fact that there was ample evidence in the case entirely apart from the evi-

dence to be disregarded to warrant a conviction. If trial of the case had continued and a verdict of guilty rendered, it could never have been known whether that verdict rested solely on legal evidence or resulted wholly or in part from the inability of the jury to immunize themselves from the influence of a substantial volume of evidence which they were suddenly instructed to disregard. The court was in a position, by the exercise of a sound discretion, to determine what decision ought to be made in the interest of justice in the troublesome situation that had arisen in the course of the trial. His statement explaining his action and giving his reasons therefor plainly indicates his concern that the jury, in the event that instructions were given, might not understand what testimony to regard and what to disregard. He also expressed misgivings that a fair trial could take place before the jury which had heard so much testimony that had become inadmissible. The court obviously felt that the ends of justice would be defeated if trial of the case continued. His action was not an arbitrary one. I see in the election of the justice below to order a mistrial no more than the exercise of a sound discretion, on which no valid claim of double jeopardy can be found. *Gori* v. *United States* (1961) — U. S. —. 81 S. Ct. 1523, *supra.*

The exceptions should be overruled.

Mr. Justice Webber concurs in this opinion.

CITY OF CALAIS
vs.
CALAIS WATER & POWER COMPANY
and
MAINE PUBLIC UTILITIES COMMISSION

Kennebec. Opinion, September 28, 1961.

Public Utilities. Rates.
R. S. 1954, Chap. 44, Sec. 18. Inter and Intra State Business.
Apportionment. Separation of Integrated Business.
Evidence. Allocation to Public Service.

The value of the property of a public utility employed by it in intra-state business must be considered, for purposes of rate making, separately and apart from that, if any, employed in inter-state business.

Administrative bodies have no right to exercise adjudicatory or quasi judicial functions on the basis of evidence not before it. (consideration of prior proceedings of P.U.C. improper when not in evidence in instant proceeding.)

The commission has the duty to disclose the method employed to reach the prescribed rates. (Show the amount allocated to cost of fire protection arrived at.)

ON PETITION FOR REVIEW.

This is a rate case before the Law Court upon petition to review a decision and certain rulings of the P.U.C. Petition sustained, decree annulled. Cause remanded to P.U.C. for stated purposes. Orders and decrees to be filed with Clerk of the Law Court within 10 days of such order or decree. Petition retained on Law Court docket.

Richard B. Sanborn,
Francis A. Brown, for plaintiff.

Francis E. Day, for defendant.
John G. Feehan, for commission.

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

DUBORD, J. This is a petition filed by the City of Calais (hereinafter referred to as the "City"), under the provisions of Section 69, Chapter 44 of the Revised Statutes of 1954, seeking a review of a decision of the Public Utilities Commission of Maine fixing certain rates for water service.

The Calais Water & Power Company (hereinafter referred to as the "Company"), is a public utility subject to the jurisdiction of the Public Utilities Commission (hereinafter referred to as the "Commission"), which furnishes water for domestic, commercial, industrial and municipal purposes in Calais, Maine, and Milltown, New Brunswick, including fire protection service to both communities. The principal source of water supply for the Company is in St. Stephen, New Brunswick.

On June 27, 1960 the Company filed a rate schedule with the Commission proposing an increase in water rates to its customers to begin October 1, 1960. With its proposed rate schedule, the Company asserted that an increase in its rates was made essential by the urgent need of necessary improvements to its facilities, particularly for the purpose of affording better fire protection to the communities which it serves. The Company also declared that an increase in rates was vital in order to enhance its earnings and to demonstrate its ability to repay loans needed for the installation of rapid filters and a new water tank, all to be used to better public fire protection.

Adequate notices were issued and public hearings held. At the conclusion of the Company's presentation of the evidence, the City moved to dismiss the petition for increased rates on the ground that the Company was seeking rates upon properties not used or required to be used within the State.

It was argued by the City that the Commission had not complied with the provisions of Section 18, Chapter 44, R. S. 1954, as amended, the pertinent portion of which statute reads 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* (emphasis supplied) and a fair return thereon."

This motion was denied.

Subsequently and prior to the decree the City requested findings of fact as to the value of the property of the Company used or required to be used in its service to the public in Maine, the fair return thereon, cost thereof when first devoted to use, prudent acquisition cost thereof and expenses and revenues of the Company in Maine. This request of findings of fact was denied.

On December 28, 1960 the Commission entered its decree. It fixed a rate base of $358,035, which included the properties of the Company in Maine and in New Brunswick. It granted the Company its requested water service revenues of $88,154, being revenues received from customers in both Maine and New Brunswick. Increased rates were set to become effective January 1, 1961, with certain revisions to become effective April 1, 1961.

The new rates for public fire protection to be paid by the City provide for an annual increase over the old rates of about $10,000, and constitute an increase of approximately 107% over prior rates. It is set forth in the decree that of the total revenue to be provided by the proposed increased rates, slightly less than 33% would be obtained from fire protection service.

The petition now before us for consideration alleges in substance that: (1) the rates are unreasonable, unjust and

unlawful in that they amount to confiscation of property and violation of constitutional rights of the City; (2) the decree is unlawful because the Commission did not comply with the provisions of Section 18, Chapter 44, R. S. 1954; (3) the Company has not sustained the burden of proof made incumbent under the provisions of Section 71, Chapter 44, R. S. 1954; (4) the Commission erred in denying the City's motion to dismiss the proceeding; and (5) the Commission erred in its failure to make findings of facts in accordance with the motion filed in behalf of the City.

In their brief, counsel for the City set forth the principal issues as follows:

> "1. Was it proper for the Commission to overrule the City's Motion to Dismiss?
>
> "2. Was it proper for the Commission to fail to grant the City's Request for Findings of Fact?
>
> "3. Did the Commission properly fix a reasonable value upon all the property of the utility used or required to be used in its service to the public in Maine? In other words, may the Commission fix a rate base for a rate proceeding in Maine upon all of the property of a utility in both Maine and Canada?
>
> "4. Did the Commission fix a fair return upon all the property of the utility used or required to be used in its service to the public in Maine? Again, can Maine and Canadian properties and operations be combined?
>
> "5. Did the Commission err in finding that there was no evidence that segregation or separation of the plant and expenses between New Brunswick and Maine would substantially change the proposed rate distribution and in questioning the feasibility of requiring a separation of plant and expenses?
>
> "6. Did the Commission err in making allocation of fire protection costs?"

While the foregoing sets forth the issues in detail, the principal issue revolves around the contention of the City that the Commission failed to formulate its decision in accordance with the provisions of Section 18, Chapter 44, R. S. 1954.

Counsel for the City argues strongly that it was error on the part of the Commission to combine the properties owned by the Company in New Brunswick and Maine; that in so doing the Commission totally disregarded the provisions of the pertinent statute.

Because of the facts connected with the unique and unusual situation, the entire plant of this Company might well be considered as one single integrated water system which is used or required to be used in its service to customers in both jurisdictions. Mains and reservoirs in Canada feed water into mains in Maine. The pumping station and filter plant in Maine services the customers in Canada. Water flows back and forth from one side of the boundary to the other in accordance with needs. The Company has never attempted to allocate and segregate the portions of its plant or its services.

That the Commission did not separate the assets in New Brunswick from the assets in Maine, nor did they separate the respective revenues and the expenses, is clearly shown by statements in the decree itself.

In denying the motion to dismiss, the Commission had this to say:

> "It is the contention of the City of Calais, in its objection to this rate application, that in accordance with jurisdiction requirements, Section 18, Chapter 44 of the Revised Statutes of the State of Maine, the Company by not separating plant and expense has not carried its statutory burden of proof. Such a position is not new to the rate proceedings of the Company, as the contention was

> disposed of by this Commission in prior proceedings. (P.U.R. 1922A, pages 370-373) In our opinion, the situation pertaining to relative investment, population distribution, does not seem to have substantially changed, and having no evidence which leads us to believe that segregation or separation of the plant and expenses between Milltown, N. B. and Calais, Maine would substantially change the proposed rate distribution, we shall subscribe to the Company's position that one integrated water system be considered. We question the feasibility of requiring that a separation of plant and expenses be made and, as shown in the record in this case, a motion to dismiss this case on that basis on the part of the City, was denied."

That the value of the property of a public utility employed by it in intra-state business must be considered, for purposes of rate making, separately and apart from that, if any, employed in interstate business has been determined in many jurisdictions. However, we need give no consideration to decisions in other jurisdictions because the issue has been definitely determined by this court in *New England Tel. & Tel. Company* v. *P.U.C.*, 148 Me. 374; 94 A. (2nd) 801.

In that case this court said:

> "What the Company says, as we view it, is that it is not only entitled to an income based on a reasonable return on the fair value of its property devoted to the public service within Maine, but that in figuring such fair return it is entitled to deduct the expenses of operating its plant within this state. The problem of allocating these expenses between interstate use and intrastate use is a real one; for the plant and equipment of the Company are used in common for both services. The seeming confusion grows out of our form of government under which Maine as other states has control of operations within the state, and the federal government through the Federal Communications Commission has jurisdiction over operations

which go beyond the borders of the state. Justice Hughes, speaking for a unanimous court in the *Minnesota Rate Cases, supra,* laid down the principal standard for apportioning expense as that of the relative use of the facilities and equipment employed in the two services, interstate and intrastate service.

"After a careful reading of the opinion and findings of the Maine Public Utilities Commission in both cases, No. 1316 and No. 1370, we are convinced that the majority of this Commission disregarded this factor which the Supreme Court and many state courts have held to be the most important element of all in applying separations. This exception by the Company was well taken and must be sustained."

"The Commission was concerned here with what portion of the plant of the Company was properly allotted to intrastate service in Maine; also what portion of the expenses should be charged to the operation of it. We have stated before that the only proper way to decide these questions is to determine them on the basis of the relative use of the plant in the two services, intrastate and interstate. As was acknowledged by Chief Justice Hughes in *Smith* v. *Illinois Bell Telephone Co., supra,* the problem is a difficult one and exactness cannot be expected in the solution of it. It is all the more important because it is a jurisdictional question; and must be decided broadly after giving due consideration to the rulings of the federal authorities on the same point. * * * * As the rulings of the Commission on this point are prejudicial to the Company, and unsupported by the evidence, the exception is sustained."

In the absence of a special legislative provision pertaining to the rather unusual setup of the Company which actually operates as an integrated utility, even though its plant and equipment are located in different jurisdictions, it was the duty of the Company, in order to sustain the burden of proof placed upon it by the statute (Section 71,

Chapter 44, R. S. 1954) to introduce evidence at the hearing upon the issue of separation of properties, revenues, and expenses, to the end that the Commission might proceed in compliance with the dictates of Section 18.

Moreover, another point not appearing in the record, but argued by counsel seems to be pertinent.

In reaching its conclusion not to separate the properties in Calais from those across the boundary line in New Brunswick, the Commission said that the contention of the City upon the point had been disposed of in prior proceedings. Evidence of these prior proceedings was not introduced as evidence and made a part of the record. We ruled in the case of *P.U.C.* v. *Cole's Express,* 153 Me. 487; 138 A. (2nd) 466, that administrative bodies have no right to exercise adjudicatory or quasi judicial functions on the basis of evidence not before it.

That prior procedure on the part of the Commission to consider the Company as an integrated unit without the necessity of separation has not been questioned before, does not preclude the City from raising the issue at this time.

We, therefore, conclude that the decree of the Commission is erroneous and should be annulled.

The motion of the City that the Commission make a finding of facts upon which its decision was based is undoubtedly interwoven with the City's main contention relating to failure to comply with the provisions of Section 18, Chapter 44; and it may not be essential that we discuss this issue. However, in view of previous decisions of this court, it clearly appears that the Commission was under a duty of making a finding of facts in compliance with the City's motion therefor.

In the recent case of *Richer, Re: Contract Carrier Permit,* 156 Me. 178, 182; 163 A. (2nd) 350, 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 ruling 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.

One other issue remains for determination; and that relates to the contention of the City that there is nothing in the decree of the Commission showing how the amount allocated for the cost of fire protection rendered the City of Calais was arrived at. We ruled in *City of Bangor* v. *P.U.C.,* 156 Me. 455, 473, 167 A. (2nd) 6, that 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.

In this respect, the present decree does not conform to the requirements set forth in the City of Bangor case.

The only reference in the decree of the Commission concerning the allocation for fire protection service is a statement to the effect that "slightly under 33% of these revenues would be obtained from fire protection service." This statement is perhaps founded upon the policy formerly applied by the Public Utilities Commission in apportioning from 28% to 32% of the gross revenues of a water company to public service. However, in the light of the decision in the Bangor case, we are of the opinion that each case must be considered on its merits and local conditions examined. When a decision is reached there should be embodied in it the manner in which it was arrived at. Tested by this formula, the present decree is not in conformity

and the contentions of the City in respect thereto must be sustained.

We recognize that the problem of allocating the revenues of a public utility between fire protection service and general customer service is a perplexing one and that a correct mathematical result is perhaps unlikely of attainment.

There is a complete discussion of this difficult problem in *City of Bangor* v. *P.U.C., supra,* beginning on Page 460 and extending through Page 465.

In the instant case, it may well be that the results reached by the Commission are correct and reasonable. However, the City of Calais has the right to expect the decree of the Commission to be based upon the applicable statutes and the rules specified in prior decisions of this court.

Consequently, the petition is sustained and the decree annulled. The cause is remanded to the Public Utilities Commission (1), for the purpose of establishing a new rate base formulated after separation of the properties in the two jurisdictions, and the revenues and expenses in connection therewith, and for the consideration of the rates of the Calais Water & Power Company under the principles herein set forth upon the present record and such further evidence as may be introduced by the interested parties; and (2), for a disclosure by the Commission in its new decree of the method employed to reach the prescribed rates for fire protection.

Copies of all orders and decrees 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 is retained upon this docket until final disposition thereof.

So Ordered.

JOSEPH A. ROY

vs.

JOSEPH P. HUARD

Kennebec. Opinion, October 5, 1961.

Brokers. Commissions.
Rule 50 M.R.C.P. Procedure.

A broker earns his commission by producing a buyer ready, willing and able to purchase upon the terms offered or modified terms satisfactory to and accepted by the seller.

Where a joint tenant wife (not a party to a brokerage contract of her husband, nor to a contract of sale with a third party purchaser) refuses to join in the conveyance of the real estate, the broker has earned his commission from the husband by producing the customer even though the broker knew when he contracted with the husband that the wife's joinder would be necessary later.

When a husband agrees to pay a commission for the sale of his wife's separate real property, he is liable therefor although she refuses to execute the conveyance.

Quaere: Where the broker also knew or had reason to know that the wife did not presently intend to release her interest?

Where a plaintiff entitled to jury award of $725.00 as a broker's commission obtains an erroneous verdict of only $144.00 and appeals to Law Court without having moved for a directed verdict or verdict *n.o.v.*, the Law Court is reluctant to order judgment in excess of jury awards because Rule 50 M.R.C.P. requires a seasonable filing of a motion *n.o.v.*

ON APPEAL.

These are cross appeals from a judgment. Defendant's appeal denied. Plaintiff's appeal sustained. New trial ordered as to damages only unless within 30 days after filing of the mandate, defendant consents by stipulation to entry of judgment for plaintiff for $725.00 and costs.

Lester T. Jolovitz, for plaintiff.

Jerome F. Daviau, for defendant.

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

WEBBER, J. In this case both plaintiff and defendant appeal from a judgment, the plaintiff on the ground that damages fixed by the jury were inadequate, and the defendant because as he avers he has incurred no liability to plaintiff. The essential facts are not in dispute and may be briefly stated.

Plaintiff, a real estate broker, was authorized in writing by the defendant to undertake the sale of the latter's home for an agreed commission of five per cent of the sale price "whether or not the sale price is the original asking price." The asking price agreed upon was $14,700. The agreement executed by the defendant further provided: "The owner or seller hereby agrees and promises to execute a warranty deed of the above listed property if the sale is made in accordance with this contract of sale or any alteration hereof mutually agreed upon." Under well established principles of law the plaintiff could satisfy this contract and earn his commission by producing a customer who was and remained ready, willing and able to purchase the property upon the exact terms offered by the defendant or upon modified terms satisfactory to and accepted by the defendant. In due course the plaintiff produced customers who offered $14,500 for the house. This offer was accepted by the defendant and thereupon a written contract of sale was executed by the defendant and the proposed purchasers. When the time arrived for consummation of the sale by execution and delivery of a proper deed, the defendant declined to perform his contract and informed the plaintiff

that the former's wife, owner of an interest as joint tenant, refused to convey her interest. No sale thereafter resulted.

Without objection on the part of the plaintiff, the defendant was permitted to inject into the case the erroneous theory that if the plaintiff knew at the beginning of his dealings with the defendant that the wife had an interest, he had the burden of proving himself free of negligence in not obtaining the wife's consent to his listing and the subsequent contract of purchase. This additional burden of proof was incorporated into the charge to the jury and was successfully carried by the plaintiff as evidenced by a verdict in his favor. The verdict, however, was for $144 when it is apparent that the only verdict possible in this case was one for $725.

The issue as to whether or not a broker is entitled to commission when the sale to his customer is prevented by the refusal of the wife of the principal to join in a conveyance appears to be one of novel impression in this state. The point has, however, been considered many times in other jurisdictions. The rule which we deem to be the better reasoned and which finds support in the great majority of cases bearing on the point would not deny the broker his commission even though he knew when he contracted with the husband that the joinder of the wife in a later conveyance would be necessary to perfect a sale. It must be borne in mind that the contract of hire is only between husband and broker. There is no attempt to charge the wife with liability for any portion of the commission and therefore no necessity to prove that her husband acted as her agent in the employment of the broker. What is really involved is the right of the broker to proceed with his contract on the assumption that the principal will be able to make his title good and procure his wife's joinder when the sale occurs. If this assumption is reasonable, the broker has no duty to

approach the wife for her consent. As was stated in *Campbell* v. *Arthur H. Campbell & Co.* (1927), 155 Tenn. 515, 296 S. W. 9:

> "This is rather a case in which there has been a default in performance on the part of the seller. In our opinion, when the husband assumes to have authority to offer for sale land owned by himself and wife, this amounts to a representation that he has such authority. If under such circumstances, the husband employs a real estate broker to bring about a sale of the land, and the broker procures a purchaser for the land, we think, as against the husband, the broker is entitled to his commission. Such right of the broker against the husband cannot be defeated by the refusal of the wife to join in a conveyance. We think that in the great majority of cases the husband attends to the business for the family, and we think the broker has a right to rely on the husband's assumption of authority and his implied representation that the wife will join in the necessary title papers. A like conclusion has been reached in all the decisions which we have examined."

Reaching the same result, the court in *Hamlin* v. *Schulte* (1886), 34 Minn. 534, 537, 27 N. W. 301, reasoned that any other result would permit the principal not only to disappoint the purchaser but to deprive the broker of his compensation, fairly earned, through collusion with the wife or because of the husband's inability to persuade her to join in the conveyance. In *Staley* v. *Hufford* (1906), 73 Kan. 686, 85 P. 763, the court viewed the inability of the principal to persuade his wife to join as presenting a situation in which, as a matter of law, the consummation of the sale is prevented by the fault of the principal. For like reasons the same result was reached in *Mackenzie* v. *Standenmayer* (1921), 175 Wis. 373, 185 N. W. 286; *Tebo* v. *Mitchell* (1905) (Del. Sup.), 5 Pennewill 356, 63 A. 327; *Rick* v.

Moyer (1929), 296 Pa. 176, 145 A. 793; *Aler* v. *Plowman* (1948), 190 Md. 631, 59 A. (2nd) 196; *Max Broock, Inc.* v. *Walker* (1957), 349 Mich. 63, 84 N. W. (2nd) 336; *Weltman's, Inc.* v. *Friedman* (1952), 102 F. Supp. 485; *Price* v. *Francis* (1945), 184 Va. 484, 35 S. E. (2nd) 823; See Anno. 156 A. L. R. 1398.

The California court stated the rule in these terms: "Indeed, it is the general rule that the refusal of the wife of the owner to join in the conveyance of the property to the proposed vendee does not, itself, in a case of this character, operate to deprive the broker of his right to compensation." *Russell* v. *Ramm* (1927), 200 Cal. 348, 254 P. 532, 539. Followed in *McAlinden* v. *Nelson* (1953), 262 P. (2nd) (Cal.) 627.

In *Peters* v. *Coleman* (1953), 263 S. W. (2nd) (Texas) 639, 643, the court said: "Nor will the refusal of the principal's wife to execute a conveyance affect the broker's right to a commission, even though he knew that her joinder was necessary to make a valid conveyance. * * * *If (the principal) desired to make his liability for the commission conditioned on the acquiescence of his wife, he should have put that condition in his contract with (the broker).* * * * Where a husband agrees to pay a commission for the sale of his wife's separate real property, he is liable therefor although she refuses to execute the conveyance." (Emphasis ours.)

When a principal inserted such a condition in his contract with the broker, he was protected from liability in *Hensley Ins. Co.* v. *Echols* (1947), 159 Fla. 324, 31 So. (2nd) 625.

In the instant case the broker enjoyed the additional protection of the above-quoted express contractual obligation of his principal to "execute a warranty deed." Clearly the parties intended that the principal was bound to furnish a good title. The broker was justified in proceed-

ing to find a purchaser on the assumption that the principal either held or would acquire a good title in the listed property and would place himself in a position to transfer such title by a warranty deed executed by himself and his wife in consummation of any satisfactory sale arranged by the broker. Thereafter, the duty to deal with the wife devolved exclusively upon the principal.

We neither intimate nor suggest what result we might reach in a case in which it was shown, not only that the broker knew of the wife's outstanding interest, but also knew *that she did not presently intend to release it*, especially where there was present an unqualified contractual promise to furnish a good title. It is enough to say that there is no suggestion in the case before us that the broker knew or had reason to know of any such intent on the part of the wife. We do hold that mere knowledge on the part of the broker that the principal's wife held some interest in the property to be sold could not defeat the broker's recovery in the absence of some condition in the listing contract protecting the principal. Husbands may reasonably be expected to consult their wives before listing property with brokers for sale.

One other matter may be disposed of briefly. Counsel for defendant asserts that the broker failed to earn his commission because he procured no more than an option to purchase as between his principal and his customer. He mistakenly relies upon *MacNeill Real Estate* v. *Rines, et al.*, 144 Me. 27. In that case the sale was prevented *by fault of the purchaser* and the issue was whether the broker had effectively bound the purchaser by a mutually enforceable contract. The applicable rule was stated in *Labbe* v. *Cyr*, 150 Me. 342, in which the broker procured only an option but the sale was prevented *by fault of the seller*. In *Labbe* at page 348 we distinguished *MacNeill* and pointed out that the opinion in *MacNeill* had recognized that the broker

earns his commission by producing a purchaser who is and remains ready, willing and able to buy the property on terms acceptable to the principal, where the consummation of the sale is prevented *by fault of the seller.* In view of the application of this rule which finds almost universal acceptance, it is unnecessary here to point out why and in what respects the agreement executed by the principal and the customers in the instant case constituted a mutually enforceable contract rather than a mere option.

The application of the foregoing rules of law to the facts of this case permits of but one result. The lack of dispute as to any material issue of fact left no necessity for jury determination. The amount of the commission earned was fixed by the contract of the parties and involved only a simple mathematical computation. The plaintiff, however, addressed no motion for a directed verdict to the presiding justice, nor did he seasonably file a motion for verdict notwithstanding the judgment. The denial of either motion, if properly made, would have constituted legal error. With a verdict of $725 the only possible legally correct result on the undisputed facts of this case, we turn our attention to the appropriate action to be taken by the Law Court on the plaintiff's appeal from an erroneous judgment.

That a new trial may in an appropriate case be limited to the assessment of damages as the sole issue has heretofore been decided. *Cosgrove* v. *Fogg, et al.,* 152 Me. 464. We find no prior decision in Maine, however, bearing on the authority of the Law Court to order judgment for an amount in excess of verdict where the exact amount to be recovered is fixed by legal principles applied to undisputed facts. The procedure established by Rule 50, M. R. C. P., requires the seasonable filing with the presiding justice of a motion for judgment notwithstanding the verdict. As already noted, no such motion was filed by the plaintiff in this case. Even though we recognize that only one judgment is possible in

this case, we are reluctant to order that judgment forthwith in the absence of such motion. We prefer to employ the mechanics of conditioning an order for new trial.

The entry will be

Defendant's appeal denied.

Plaintiff's appeal sustained.

New trial ordered as to damages only unless within 30 days after the filing of the Mandate, defendant consents by stipulation to the entry of judgment for plaintiff for $725 and costs.

MAINE CENTRAL RAILROAD CO.
vs.
FRED I. MERRILL, INC.

Cumberland. Opinion, October 5, 1961.

Common Carriers. Freight Charges. Evidence.

In an action by a carrier against a consignee to recover additional freight charges (to correct a deficiency under I. C. C. published rates), evidence relating to contractual dealings between the consignor and consignee is irrelevant and inadmissible.

A defendant who accepts shipments is ordinarily liable for freight charges.

The I. C. C. Act fixes the legal liability of a consignee without regard for the liability or non-liability of the consignor (49 U. S. C. A., Sec. 6, Par. 7).

There is no problem of primary-secondary liability involved where both consignor and consignee are independently and primarily liable to the carrier, regardless of their relationship to one another.

ON REPORT.

This is an action for recovery of freight charges before the Law Court upon report and agreed statement. Judgment for plaintiff in accordance with opinion.

Scott W. Scully, for plaintiff.

Royden A. Keddy & Charles P. Barnes II, for defendant.

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

WILLIAMSON, C. J. This action by the Maine Central Railroad Co. against Fred I. Merrill, Inc. to recover undercharges on two interstate freight shipments is before us on report upon an agreed statement of facts. The railroad is engaged in interstate and intrastate commerce as a common carrier and is subject to the Interstate Commerce Act. 49 U. S. C. A. § 1 *et seq.*

The first shipment was from a shipper in South Carolina consigned to the defendant at Bangor, freight charges collect. Shortly after delivery in August 1958, the defendant paid the freight charges billed by the railroad in the amount of $683.10. The railroad later discovered the correct charge under the classifications and tariffs published and filed with the Interstate Commerce Commission should have been $972.90. In December 1958 the railroad first requested payment of the balance due of $289.80 for additional freight charges. The defendant has refused to make payment.

The second shipment was from a shipper in Wisconsin consigned to the shipper at Portland, "notify Fred I. Merrill, Inc. at Portland, Maine, freight charges collect." In December 1959 the shipment was delivered to the defendant which paid the freight charges of $922.50 billed by the rail-

road. It later appeared that the correct charge should have been $1454.85. The defendant has refused to pay the balance due amounting to $532.35 since demand was made in December 1959.

With reference to each shipment, if the evidence is admissible, it is agreed: that the defendant paid the shipper the purchase price of the items shipped after deducting the freight charges paid the railroad; that the railroad's demand for payment of a deficiency in freight charges was made subsequent to the payment by the defendant to the shipper; that such payment terminated the business relationship between the defendant and the shipper; that the railroad had no knowledge of the terms of the agreement with the shipper or of payment of the purchase price.

In each instance "(the railroad) objects to evidence relating to contractual relationships between Defendant and third parties and evidence of payments made by Defendant to third parties as being irrelevant."

Decision is controlled by Federal law. The pertinent provision of the Interstate Commerce Act reads:

> ". . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."
>
> 49 U. S. C. A. § 6, par. (7).

For our purposes liability of the defendant in each instance is based on this provision. There is no suggestion

that the defendant avoided (or indeed on the facts could have avoided) liability for additional charges found due after delivery under 49 U. S. C. A. § 3 (3). The statute relating to demands discharged by partial payment (R. S., c. 113, § 64), would not be applicable in any event to this situation which is controlled, as we have said, by Federal law.

In our view the defendant is here liable for the undercharges under principles long since firmly established. The Supreme Court, in the leading case of *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, in holding the consignee liable under an identical statute, said at p. 581:

> "The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure."
>
> * * * * * * * * * * *
>
> "It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law."
>
> * * * * * * * * * * *
>
> "The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the

only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation."

* * * * * * * * * *

"It is alleged that a different rule should be applied in this case because Fink by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. There is no proof that such agreement was known to the carrier, nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods. *Pennsylvania R.R. Co. v. Titus,* 216 N.Y. 17. Nor can the defendant in error successfully invoke the principle of estoppel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute. *New York, New Haven & Hartford R.R. Co. v. York & Whitney Co.,* 215 Massachusetts, 36, 40."

See also *Louisville & Nashville R. R. Co.* v. *Maxwell,* 237 U. S. 94; *N. Y. Cent. R. R.* v. *York & Whitney Co.,* 256 U. S. 406; *Baldwin* v. *Scott County Milling Co.,* 307 U. S. 478, 59 S. Ct. 943, 948; *F. Burkhart Mfg. Co.* v. *Fort Worth & D. C. Ry. Co.,* 149 F. (2nd) 909; *Southern Pac. Co.* v. *Wheaton Brass Works,* 5 N. J. 594, 76 A. (2nd) 890; *New York, N. H. & H. R. R. Co.* v. *Calif. Fruit G. Exch.,* 125 Conn. 241, 5 A. (2nd) 353; *Railway Express Agency* v. *Michelson,* 311 Mass. 704, 42 N. E. (2nd) 805; *Montpelier & Wells R. R. R.* v. *Caldbeck-Cosgrove Corp.* (Vt.), 8 A. (2nd) 681; 13 C. J. S., *Carriers* § 393; 9 Am. Jur., *Carriers* §§ 160, 164, 624.

The *Fink* case has been cited with approval in *Grant* v. *American Ry. Express Co.*, 126 Me. 489, 139 A. 784, in which the court said, at p. 492:

> "When the carrier may transport the duly filed and approved rate is, for all shipments of like character, the only lawful rate. . . Deviation therefrom there may not be, because deviation would be violative of equality and uniformity, and deny all shippers similarly situated that like treatment, which the interstate statute requires."

In *Boston and Maine R. R.* v. *Hannaford Bros., et al.*, 144 Me. 306, 68 A. (2nd) 1, the consignee as agent of the consignor received carloads of bananas and requested collection of the freight charges from the consignor. The railroad sought for a period of thirteen months without success to recover payment from the consignor. The court, in holding for the railroad, said:

> "The consignee of property transported in interstate commerce by acceptance of delivery makes himself liable for the transportation charges." (Citing *Fink, supra,* and *Central Iron & Coal Co., infra.*)

The defendant seeks in practical effort to apply a rule quite different from that settled in the *Fink* case, *supra.* It asks two questions: (1) "May Plaintiff hold Defendant responsible for the payment to Plaintiff of the undercharges. . ?" If answered, yes, (2) "May Plaintiff so hold Defendant prior to Plaintiff's exhausting all remedies against the parties ultimately responsible for the payment of those undercharges, (the shippers) ?"

The defendant argues that fair dealing and avoidance of multiple suits require the railroad to look to the consignors. The position of the defendant appears to be that although the defendant which accepted the shipments is ordinarily liable for the freight charges, nevertheless the liability has

here been shifted, or discharged, or delayed, not however by way of estoppel.

The cases cited by the defendant do not, in our view, call for this conclusion. *Western Ry. of Alabama* v. *Collins*, 201 Ala. 455, 78 So. 833, and *Yazoo & M. V. R. Co.* v. *Zemurray*, 238 F. 789 (CCA 5th Cir.), both actions against consignors, were decided prior to *Fink* and must give way thereto. *St. Louis-San Francisco Ry. Co.* v. *Republic Box Co.*, 12 F. (2nd) 441, and *Louisville & Nashville R. R.* v. *Central Iron & Coal Co.*, 265 U. S. 59, involve the liability of the consignor or shipper and not, as here, the consignee. Indeed, the *Central Iron & Coal* case, as we read it, strengthens the position of the railroad. The court said, at p. 65:

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

and also at p. 70:

> "For, under the rule of the *Fink Case*, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act."

In *Davis* v. *Akron Feed & Milling Co.*, 296 F. 675 (CCA 6th Cir.), the consignee at Akron was informed that all charges for freight from Kansas City to Chicago had been

paid. The court held the consignee not liable. It distinguished the case from the general rule, which it stated in these words, at p. 677:

> "The law is well settled that representations or claims made by the carrier as to the correct amount of freight to be charged will not relieve a consignee from the payment of the scheduled rate, for the reason that a shipper or consignee has equal opportunity with a carrier to know the published rate, and he is conclusively presumed to have such knowledge."

In *American Express Co.* v. *Sweeney,* 283 F. 691 (D. Mass.), the consignee was held liable for an undercharge based on rate but not on distance. In *Griffin Grocery Co.* v. *Pennsylvania RR Co.,* 93 Ga. App. 546, 92 S. E. (2nd) 254, the court expressly distinguished the undercharge cases in an action involving a representation to consignee that freight had been prepaid. *Houston & T. C. R. Co.* v. *Lee County Produce Co.,* 14 F. (2nd) 145 (S. D. Tex.), involved liability of the consignor after diversion of shipment by the purchaser.

The defendant seeks by analogy to the consignor cases to relieve itself from liability as the consignee accepting delivery of the freight. In our view the analogy is not apt. Under *Fink, supra,* the liability of the *consignee* is fixed without regard for liability or non-liability of the *consignor.*

Further, this is not a case of primary and secondary liability. In other words, the plaintiff is not here seeking recovery against a party who is only secondarily liable. In *Boston and Maine R. R.* v. *Hannaford Bros., et al., supra,* it was plainly held that both the consignor and the accepting consignee were independently and primarily liable to the railroad, whatever their relationship might be to each other.

The second point made by the defendant is that the railroad is estopped to recover the undercharges. This issue,

in our opinion, has been settled adversely to the defendant by the Supreme Court in the *Fink* and *Central Iron & Coal Co.* cases, *supra.*

In our view of the Federal law, the evidence relating to the contractual relationships between the defendant and third parties and evidence of payments by the defendant to third parties was not admissible.

The defendant, which accepted the shipments, became liable for the proper freight charges, and no arrangement with the consignors or shippers could avoid the liability. As we have noted, there was no avoidance of liability in this instance through compliance with Section 3 (3) of the Interstate Commerce Act.

On this view of the case, in accordance with the agreement of the parties, the plaintiff recovers for the first shipment $289.80 with interest from December 21, 1958, and for the second shipment $532.35 with interest from December 26, 1959.

The entry will be

Judgment for the plaintiff in accordance with this opinion.

DEPOSITORS TRUST COMPANY
vs.
MARYLAND CASUALTY COMPANY

Kennebec. Opinion, October 17, 1961.

Rules 56 (b) and (c). Banks.
Automobile Trust Receipts. Bonds.
Larceny.

Where asserted or undisputed facts preclude recovery, then the question is one of law and a proper matter for summary judgment.

A commercial bank, which finances the purchase and sale of automobiles for a dealer through the medium of trust receipts, cannot recover from the Bonding Company its losses caused by the dealer's failure to remit proceeds upon sale, since the Exclusion Clause of the "Banker's Blanket Bond" excluded losses suffered as the result of non-payment or default of any loan. This is so even though the dealer's default might amount to larceny and loss from larceny is otherwise covered by the bond.

Construction of insurance contracts containing ambiguities are to be construed most strongly against the insurer.

The word "trustee," as used in the Uniform Trust Receipts Act, is in an artificial sense and does not connote a true equity trustee.

ON APPEAL.

This is an appeal for a Summary Judgment. Appeal denied.

Irving Isaacson, for plaintiff.

Mahoney, Desmond and Mahoney, for defendant.

John E. Campbell, on brief.

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

TAPLEY, J. On appeal. The plaintiff appeals from an order of the justice below granting defendant's motion for

summary judgment. Action was brought by the plaintiff, Depositors Trust Company, against defendant, Maryland Casualty Company, to recover the sum of $57,505.72, which amount is claimed to be due and payable under the provisions of a certain "Bankers' Blanket Bond" issued by the defendant to the plaintiff.

Defendant filed a motion for summary judgment under provisions of Rule 56 (b) and (c) of Maine Rules of Civil Procedure.

> "- - - on the ground that the Pleadings, the Plaintiff's Answer to Defendant's Interrogatories and the Plaintiff's Pretrial Conference Statement of Facts show that the Defendant is entitled to judgment as a matter of law."
>
> "Where facts asserted are such that if established, there could be no recovery; or where undisputed facts are such as would preclude plaintiff's recovery then the question becomes, one of law for determination of the court and a proper matter for disposition by summary judgement." *Greyhound Corp. v. Excess Insurance Co. of America,* 233 F. (2nd) 630.
>
> "- - - - a summary judgment should only be given when it is quite clear what the truth is. - - - One who moves for summary judgment has the burden of demonstrating clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him." *Heyward, et al.* v. *Public Housing Administration, et al.,* 238 F. (2nd) 689, at page 696.

See Vol. 3, Page 119, Sec. 1234, Federal Practice and Procedure (Barron and Holtzoff).

The pleadings, plaintiff's answers to defendant's interrogatories, and the pretrial conference statement of facts, provide the factual basis upon which the motion for summary judgment is to be determined.

The facts are summarized as follows: The plaintiff and defendant entered into a contractual relationship through the medium of a "Bankers' Blanket Bond" bearing designation #90-454449, wherein the Maryland Casualty Company agreed to indemnify Depositors Trust Company against any losses sustained by it up to an amount not exceeding $550,000.00, under such conditions as are described in said bond. On March 13, 1956 the plaintiff entered into business relations with Vincent Fiore, d/b/a Fiore Cadillac-Olds Company of Augusta, Maine, wherein it agreed to engage in the wholesale financing of the purchase of new and used automobiles to be sold at retail by Fiore. The purchase of new cars was financed through the medium of trust receipts. Before commencing financing, the plaintiff filed a statement of trust receipt financing in accordance with the provisions of the Uniform Trust Receipts Act (Ch. 461, P. L., 1955).

The financing procedure between the plaintiff and Fiore was in the following manner: New Cadillacs, Fiats and Jaguar cars were invoiced by the distributors to Fiore. The invoices, prior to delivery of the vehicles, were sent, with sight drafts attached, to the plaintiff. The plaintiff, under a power of attorney from Fiore, executed trust receipts, together with a note in the amount of the invoice, paying the amount of the invoice in accordance with the sight draft. Oldsmobile cars were invoiced by the factory directly to the plaintiff, with sight drafts attached, and the plaintiff followed the same procedure in regard to payment of the sight drafts, execution of trust receipts, and delivery of the vehicles to Fiore for sale. Used cars taken in trade by Fiore, or those which Fiore desired to purchase, were mortgaged to the plaintiff under chattel mortgages. Plaintiff authorized Fiore to sell the vehicles in the regular course of his business, with the agreement that he was to remit the proceeds of the sales, both those under trust receipts and chattel mortgages, within 24 hours after the sale of the ve-

hicles, proceeds to be applied against amounts due from Fiore to the plaintiff.

On September 24, 1958 an inventory check was made of Fiore's vehicles resulting in disclosing the fact that 14 automobiles to which the plaintiff had title had been sold by Fiore and he had failed to pay the proceeds of the sales to the plaintiff, having converted such proceeds to his own use. The amount of these proceeds was $52,399.81. Following the discovery of the conversion, the plaintiff entered into an agreement with Fiore for the payment of these funds by providing weekly payments of $500.00 and additional payments from the sales of Cadillac, Oldsmobile and foreign car sales. These payments were to be in addition to any other payments due from Fiore. Under this agreement approximately $16,000.00 was repaid by Fiore to the plaintiff. The plaintiff continued financing the purchase of automobiles by Fiore with the hope of mitigating its loss. The plaintiff in its answers to interrogatories reports further conversions by Fiore in 1959 wherein it was discovered that Fiore had sold 11 vehicles, the titles of which were in the plaintiff and, as before, he failed to pay the plaintiff the proceeds of such sales. This default amounted to $21,752.23.

The plaintiff bases its right of recovery on Coverage Clause (B) of the bond which is couched in the following language:

> "Any loss of Property through robbery, burglary, common-law or statutory larceny, theft, false pretenses, hold-up, misplacement, mysterious unexplainable disappearance, damage thereto or destruction thereof, whether effected with or without violence or with or without negligence on the part of any of the Employees, and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is (or is supposed to be) lodged or deposited within any offices or premises

> located anywhere, except in an office hereinafter excluded or in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation."

The defendant takes the position of no liability because it says that the facts of the case, as developed by the pleadings, interrogatories and pretrial conference statement of facts, put the transactions between the plaintiff and Fiore within the category of a loan and, therefore, come within the Exclusion Clause, Sec. 1 (d) of the bond. This Exclusion Clause reads:

> "Any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clause (A), (D) or (E)."

We first give our attention to the construction of the Exclusion Clause in light of the undisputed facts. The primary reason for the creation of the relationship between the Depositors Trust Company and Vincent Fiore was the borrowing and lending of money for the particular purpose of operating the business of buying and selling automobiles. The type of security for the loans required by the Depositors Trust Company was in the nature of trust receipts and chattel mortgages. Notes formed a part of the trust receipts and chattel mortgage transactions.

Trust receipts are a method of financing and supply a procedure whereby the lender acquires security from the borrower in order to safeguard his loan. In other words, the loan is the prime consideration between the parties and the trust receipt is incidental thereto. The Uniform Trust Receipts Act defines the words "entruster" and "security interest" as follows:

> " 'Entruster' means the person who has or directly or by agent takes *a security interest in*

goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. A person in the business of selling goods or instruments for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded." (Emphasis supplied.)

" 'Security interest' means a property interest in goods, documents or instruments, *limited in extent to securing performance of some obligation of the trustee* or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only." (Emphasis supplied.)

The University of Chicago Law Review, Vol. 3, on page 26, contains an Article by George Gleason Bogert entitled, "The Effect of the Trust Receipts Act." Some quotations from the Article follow:

"B. PARTIES TO TRUST RECEIPT MUST BE LENDER AND BORROWER

The two necessary parties to the trust receipt transaction (called in the act 'entruster' and 'trustee') must occupy the relation of lender and borrower toward each other. The word 'trustee' is used in the act in an artificial sense, and does not connote a true equity trustee. The trust receipt does not involve a strict trust or other fiduciary relation."

\- - -

"E. REQUIREMENTS AS TO PURPOSE FOR WHICH POSSESSION IS RETAINED OR OBTAINED BY BORROWER

Not only must the lender and borrower be of a particular type, and not only must the lender permit the borrower to retain or get possession, but

> that possession must be kept or obtained for one or more of a limited number of purposes, if the transaction is to be a trust receipt transaction under the act. The purpose must be one of the following:
>
> (1) In order to enable the borrower to sell or exchange goods, documents or instruments entrusted.
>
> - - -
>
> (2) In order to enable the borrower to process or handle the goods entrusted, or the goods represented by the document entrusted, preparatory to sale by the borrower.
>
> - - -
>
> (3) In order that instruments delivered to, or retained by, the borrower may be (a) delivered to a principal of the borrower; or (b) delivered to a depositary or registrar; or (c) used for presentation, collection or renewal."

On page 38 the writer of the article summarizes the effect of the act and, as to that portion of his summary which is pertinent here, he states:

> "F. In general the theory of the act is to give to the bank, finance company, or other lender every conceivable protection in handling trust receipt and pledge transactions, so that the use of these security devices may be increased and the financing of sales and other transactions facilitated."

In considering the purposes of the Uniform Trust Receipts Act, the court, in *Barrett, Trustee* v. *The Bank of the Manhattan Company,* 218 F. (2nd) 763, on page 765, stated:

> "It was devised to promote greater ease in the financing of purchases by buyers who had no available funds for immediate payment and must borrow the price until they could sell the goods; - - -."

> "A transaction wherein one party transfers to the other a sum of money which that other agrees to repay absolutely is a 'loan' without regard to its form, if such was the intent of the parties. Yecek vs Delaware, L. & W. R. Co., 28 N. Y. S. 2d, 35, 36; 176 Misc. 553." Words & Phrases, Vol. 25 A., page 80.

See also *National Bank of Paulding* v. *Fidelity & Casualty Co.,* 131 F. Supp. 121.

It has been held that trust receipts are "a method of securing a debt and not of creating a debt." *Commercial Discount Co.* v. *County of Los Angeles,* 105 P. (2nd) 115.

The law is too well settled to require citations to the effect that construction of insurance contracts containing ambiguities are to be construed more strongly against the insurer. The Exclusion Clause (d) in the blanket bond is plain and unambiguous so no problems of construction are concerned. See *Community Federal Savings & Loan Association of Overland* v. *General Casualty Company of America,* 274 F. (2nd) 620. This case involves fraud practiced upon the lender by the borrower to obtain loans. The bond involved contained an exclusion clause nearly identical with the one concerned in the present litigation. The court said on page 624:

> "Plaintiff insists that its loss is not the result of a complete or partial nonpayment of or default in any loan made or obtained by it. Plaintiff argues that if the statements as to the completion of the buildings and the payment of lien claims had been true, no loss would have been suffered; hence, the fraud was the cause of the loss. The same type of claim could doubtless be made in almost any type of loan induced by fraud. It is undisputed that loans were made which remain unpaid in part. While the loan was induced by fraud, it seems clear that the immediate cause of the loss was the nonpayment of the loans. It is

> entirely clear from the exclusion provision as written that the exclusion extends to losses on loans induced by fraud."

Counsel for plaintiff bases its right of recovery on the premise that Fiore committed larceny by converting the proceeds of the sales to his own use, which act occasioned the loss to the bank. He takes the position that the proximate cause of the loss is the alleged larceny, and looks to the bond to recover the loss under Coverage Clause B. The Exclusion Clause (d) excludes liability for any loss occasioned by a complete or partial nonpayment or default of the loan. It states in unequivocal and plain language that if there is *any loss* suffered as a result of nonpayment or default of any loan made by or obtained from the bank it will not be liable. We are satisfied that the relationship between the plaintiff and Fiore was one of lender and borrower.

The loan is the basis of the relationship between the plaintiff and Fiore. Without it there would be no trust receipts or chattel mortgages. Exclusion Clause (d) excepts from its operation Insuring Clauses A, D and E, so it appears that the defendant agrees that it is liable to pay any losses or defaults of loans covered by conditions expressed under A, D, or E. It is significant to note that "B" is not included as an exception to the Exclusion Clause. Plaintiff's case is based not on loan defaults but larceny of proceeds from the sales of vehicles under conditions requiring immediate payment of proceeds to the plaintiff. Counsel for the plaintiff in his brief states: "The losses in question arise out of larceny of the bank's property, and not as a result of a nonpayment of a loan." He fails to consider the fact that the entire chain of circumstances is predicated upon a loan. If it were not for a loan there would be no loss.

The pretrial statement of facts states:

> "Fiore was authorized by the Plaintiff to sell the vehicles in question in the course of his business,

> *but he agreed with the Plaintiff to remit the proceeds of sales of all vehicles, both under trust receipts and chattel mortgages, within twenty-four (24) hours after the sale of each vehicle, to be applied against amounts due from him to the Plaintiff.*" (Emphasis supplied.)

Fiore, with the consent of the plaintiff, sold the vehicles, agreeing to remit the proceeds of the sales to the plaintiff. Thus the purchasers received good titles to the vehicles free of encumbrances but the loan *obligations* on the part of Fiore to the plaintiff remained.

> "A. SALES BY TRUSTEE IN THE ORDINARY COURSE OF TRADE.
>
> 1. Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the 30 day period specified in subsection I of section 8, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold, and no filing shall constitute notice of the entruster's security interest to such a buyer.
>
> "2. No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter."
>
> Sec. 9, II of the Uniform Trust Receipts Act.

We conclude, and so determine, that the facts of this case place it within the purview of Exclusion Clause (d), Section 1 of the bond.

The presiding justice was not in error in granting defendant's motion for summary judgment.

Appeal denied.

JOHN PALMITESSA
vs.
ROBERT A. SHAW

York. Opinion, October 30, 1961.

Negligence.

The burden of demonstrating that a plaintiff's verdict is wrong is upon the defendant — he must show prejudice, bias or mistake and the evidence must be viewed in the light most favorable to the verdict.

Where it is impossible to accept as objective reality and fact indispensable details of the plaintiff's evidence, a judgment *n.o.v.* should be granted.

ON APPEAL.

This is a negligence action before the Law Court upon appeal. Appeal sustained. Entry of judgment for defendant directed.

Waterhouse, Spencer & Carroll
By Harold D. Carroll, for plaintiff.

Robinson, Richardson & Leddy
By Richard D. Hewes, for defendant.

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

SULLIVAN, J. Plaintiff had sued defendant for personal injuries and property damages which the former asserted he had sustained because of the latter's negligence which had induced a collision between automobiles operated by the parties. A jury trial was had. At the close of all the evidence defendant on the ground of insufficiency of the evidence moved for a directed verdict which was denied him.

After verdict for the plaintiff defendant upon the same ground unsuccessfully sought judgment notwithstanding the verdict and also a new trial. Defendant appealed. Maine Rules of Civil Procedure, Rule 50, 155 Me. 548.

All three of defendant's motions yielded identical issues, whether the plaintiff at the trial had presented evidence which with all fair inferences therefrom would warrant a reasonable jury in finding the defendant negligent and whether such negligence had been a proximate cause of the resultant misfortune. Maine Civil Practice, Field and McKusick, P. P. 409, 411, 415 and authorities cited. The rectitude of the decision of the trial court is now the inquiry of this review.

The burden of demonstrating that the verdict which was rendered is manifestly wrong rests here upon the defendant. *Witham* v. *Quigg,* 146 Me. 98, 103. He must make it apparent that such verdict was produced by prejudice, bias or mistake. *Jannell* v. *Myers,* 124 Me. 229, 230. The evidence must be regarded in the light most favorable to the successful plaintiff. *Bragdon* v. *Shapiro,* 146 Me. 83, 84.

There follows an abstract of the testimony advantageous to the plaintiff.

A two lane surfaced highway extends from Biddeford to Alfred, east to west. On its northern side is Maling's Garage in front of which is a broad and flat parking area with two gasoline pumps. The road is there level but 600 feet easterly toward Biddeford is a knoll or hill.

On January 18, A. D. 1960 about 4 P. M. in daylight and fair weather the plaintiff a man of 71 years drove his automobile from Maling's garage lot to the northerly edge of the road. Before entering upon the highway he looked left and right, stopped and again looked left. He saw nothing approaching and started across the highway. When he reached the center of the road his car was facing easterly

toward Biddeford with its rear on the north lane. At the peak of the hill 500 or 600 feet away he then saw the truck operated by the defendant "pop over the hill. One moment I saw him I didn't have a chance to straighten out; he was on top of me - - - - Nothing I can do no more. He was on top of me."

Defendant's vehicle struck the left center portion of plaintiff's car. Plaintiff was thrown to the ground from the driver's side of his automobile and landed at the road's center. The contact had occurred at the medial line of the highway and at that instant plaintiff's car was partly on the southerly lane, in part upon the northerly lane and not quite straightened easterly. Defendant told plaintiff, "it was icy, he couldn't stop." At 25 or 30 or 100 feet to the east from the point of collision was an area of ice which extended eastward upon the road for one hundred feet.

The collision diverted plaintiff's car to its left and northerly so that it was halted at the Maling gasoline pumps. Plaintiff's automobile was in motion continuously from plaintiff's entry upon the public way until it came to rest following the impact of defendant's truck. Plaintiff's only expressed judgment of defendant's speed is that defendant's truck popped over the hill.

A photographic exhibit showing a clear broad and hard surfaced area to the north of and adjoining the westerly lane of the highway and upon the Maling Garage property opposite the point of collision was introduced in evidence by the defendant.

Plaintiff testified that his car moved in gear from the moment when he entered upon the two lane highway until his vehicle became arrested at the gasoline pump after the collision. He asserted that his automobile was across the center lane of the highway angled toward Biddeford with its front upon the Biddeford or easterly lane and with its

rear resting upon the westerly or Alfred lane when he first noticed the defendant operating the truck on the crest of the hill 500 or 600 feet distant. Plaintiff's car was moving at the moment of collision. He landed upon the middle of the highway after the encounter of the motor vehicles. Physical evidence, the residual dirt from the bottom of his car, shattered glass, etc., was in the center of the road following the impact of the automobiles, "just about on the yellow line." It is, therefore, the narration of the plaintiff that his car was progressing and yet immobile while the defendant's truck sped 500 or 600 feet. The principle of contradiction is elementary: "nothing can both be and not be at the same time under the same respect."

Suffice it to say that it is impossible to accept as objective reality and fact indispensable details of the evidence most favorable to the plaintiff. Nor can we supply conjecture, nor employ imagination.

> "The burden which the proponent of a motion to overturn a verdict assumes, has been long and often declared. In determining the issue the Law Court must proceed upon the theory that the jury had a right to accept the testimony of the plaintiff's side as true, and to reject all the testimony of the defendant's side as untrue, mistaken, or unsatisfactory, unless the testimony, including the circumstances and probabilities, reveals a situation that proves the testimony on the plaintiff's side to be inherently wrong."
>
> *Sanborn* v. *Stone,* 149 Me. 429, 433.

> "- - - 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 - - - -"
>
> *Jordan* v. *Portland Coach Co.,* 150 Me. 149, 158.

We find that the justice presiding erroneously denied the motion for judgment notwithstanding the verdict and direct the entry of judgment for the defendant.

Appeal sustained.

Entry of judgment for defendant directed.

AMERICAN FIDELITY CO.

vs.

GEORGE F. MAHONEY, INSURANCE COMMISSIONER

Kennebec. Opinion, October 31, 1961.

Insurance. Automobiles.
Administrative Law. Policies. Definitions.

The Insurance Commissioner may disapprove the proposed use in the State of Maine of an automobile liability policy which is "misleading or capable of a construction which is unfair to the assured or the public."

The administrative authority of the commissioner is restricted to fact finding and needful regulation delimited within the policy, standard and rule affirmatively established by the legislature.

The disapproval of the Insurance Commissioner must be an exercise of sound discretion.

A policy is properly censured which requires (1) confirmatory clarification conclusively presuming a non-owning and insured spouse of an owner to be an owner (2) the ambiguity dispelled as to the definition of "operation," a clarification of the term "motor vehicle."

See also Dubord, J., concurring specially in re public policy and provisions relating to "death," "minors."

ON APPEAL.

This is an appeal from the disapproval by the Insurance Commissioner of a proposed auto liability policy. Appeal denied.

Linnell, Perkins, Thompson, Hinckley & Thaxter
By Casper F. Cowan, for plaintiff.

Orville T. Ranger, Asst. Atty. Gen., for defendant.

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

SULLIVAN, J. Defendant for stated reasons had notified the plaintiff that an individual operator's liability insurance policy and an additional insured endorsement therefor both of which the plaintiff had proposed to use did not meet with the defendant's official approval. The plaintiff thereupon filed in the Superior Court its appeal from such a determination by the defendant and the controversy has been reported to this court. R. S., c. 60, § 6, P. L., 1957, c. 42; Rule 72, Maine Rules of Civil Procedure, 155 Me. 573.

The defendant had summarized his disapprobation of the policy and endorsement in two strictures:

"(1) It is misleading in that the coverage afforded by it is so limited as to be beyond the reasonable comprehension of the average policyholder, who, through the years, has been educated to a broadening of coverages under liability policies insuring his automobile.

(2) It is capable of a construction which is unfair to the assured or the public because the assured would normally expect coverage to exist where it does not, and the public, therefore, would be left unprotected in many instances. Furthermore, studies by various groups over the years indicate that comprehensive changes

in the laws of agency, vicarious liability, and financial responsibility must be made before an insure-the-driver form of policy could operate fairly."

Subsequently the defendant had additionally communicated to the plaintiff these 20 particularized details which had motivated the defendant's reproval of the policy and endorsement:

"(1) There is no liability coverage for the named insured while his car is being operated by anyone else with or without his permission, when he is not a passenger.

(2) There is no liability coverage for anyone who drives the car of the named insured with or without his permission, unless he is a passenger.

(3) There is no liability coverage for the named insured when his spouse, a member of his family, or his employee or agent is driving under (1) above.

(4) There is no liability coverage for the spouse of the named insured, or a member of his family, or his employee or agent who is driving under (2) above.

(5) There is no liability coverage for the named insured owner of the car when his son is driving the car with his permission with his wife as passenger, even though the wife is a named insured.

(6) There is no liability coverage for the son under (5) above.

(7) There is no liability coverage for the wife under (5) above.

(8) There is no liability coverage for the named insured or anyone else under any condition for damage caused by the negligent maintenance of the insured's car.

(9) There is no liability coverage for anyone operating a car not owned by the named insured even though the named insured is a passenger. For example, a rented car, a leased car, a company car, or a borrowed car.

(10) There is no liability coverage for the named insured riding as a passenger in a non-owned automobile.

(11) 'Motor vehicle' is not defined. The explanation that the term 'motor vehicle' need not be defined because it already has a well-defined meaning in the Maine law begs the question, since the policyholder cannot be expected to read the Maine law in order to understand what his coverage is.

(12) An apparent attempt is made to provide additional coverage in the 'Exclusions' part of the policy. For example, Part 1, Coverage A states the company will pay for certain damages arising out of the *operation* of an automobile. The 'Definitions' under Part 1 define an automobile as a private passenger, farm, or utility automobile or trailer. The 'Exclusions' under Part 1 state that the policy does not apply under Part 1 to any *operation* as a public or livery conveyance, but that this exclusion does not apply to respect to bodily injury or property damage which results to the named insured's occupancy or (of) a non-owned automobile other than as the operator thereof, for which no coverage is provided anyway. The meaning of this is certainly obscure.

(13) The policy does not cover the named insured as a passenger in a non-owned automobile for his negligence in causing an accident whether by directing the operation of the automobile, distracting the driver, or as the result of a joint venture.

(14) 'War' is defined but not used in Part 1 of the policy.

(15) Part (2) of the new definition of 'Operation' is not entirely clear. The reference to 'his' owned automobile would seem to mean any insured's owned automobile, but under the 'Persons Insured' provision, persons other than the named insured only have coverage with respect to the automobile owned by the named insured.

(16) The definition of 'Operation' is still unsatisfactory. Does it cover only operation, or does physical control and regulation include maintenance, use, and ownership?

(17) There is no medical payments coverage for the named insured while occupying a motor vehicle not his own.

(18) Exclusion (i) has been omitted from the amendatory endorsement.

(19) The policy provides for automatic cessation upon the date of death of the named insured. Such a provision is certainly not in the public interest, because it would deprive the family of the named insured of protection during a time when matters such as automobile insurance are not likely to be given any thought.

(20) The result of the narrow scope of the coverage afforded by the policy and the lack of clarity of its terms is to provide the public with less protection than it might reasonably expect. The fact that the cost of this policy is less than that of standard forms is not a valid basis for its approval when it does not provide adequate protection to the public."

Ostensibly the defendant rested his administrative ruling upon the subjoined statutory language, resolving that the policy and endorsement are:

"- - - - misleading or capable of a construction which is unfair to the assured or the public, - - - -"

R. S., c. 60, § 6, as amended.

It must be noted that compulsory motor vehicle liability insurance does not obtain in Maine save for the limited provisions of R. S., c. 22, §§ 75 through 82, the Financial Responsibility Law, which are of no moment here. Nor has the Legislature adopted or prescribed any standard form of motor vehicle liability policy.

The specimen policy submitted by the plaintiff for the consideration of the defendant bore in red letters upon its cover the following premonition:

"INDIVIDUAL OPERATOR'S
LIABILITY POLICY

LIMITATION

This is not a Standard Automobile Policy. It cannot be written for persons who on the application date are required to file Certificates of Financial Responsibility.

It protects the individuals, named in the policy, against liability due to their operation of an automobile but in general does not cover operation of the insureds' automobiles by others.

PLEASE READ THIS POLICY"

The premium for the subject policy would be less than the cost of a more conventional liability policy because of curtailed risks and of fewer insured losses. Any assured, therefore, would be fairly chargeable with heed to the practical axiom that one receives only in proportion to the amount he pays. The policy is calculated to accommodate holders in the less endowed financial group, parents whose children have become *sui juris* and persons in general who do not, or who find rare occasion to, lend their cars. None of these potential customers is normally obligated to purchase any liability insurance. It is understandable that the availability of such a policy might serve to augment the number of the assured. It is likewise foreseeable that the

policy could effect a diversion from the more extensive coverage of present policyholders who for their own more adequate protection and from concern for the public weal might otherwise be prone to retain the broader insurance. Such speculations must attend an empirical answer.

In this case it becomes the statutory duty of this court to:

> "- - - - determine whether or not the reasons assigned by the commissioner are valid- - -"
>
> R. S., c. 60, § 6, as amended.

The administrative authority of the defendant as an executive officer is restricted to requisite fact finding and to needful regulation delimited within the policy, standard and rule affirmatively established for his guidance by the Legislature.

> "- - - - Its authority is no less nor more than the legislative body has given it - - - -"
>
> *Kovack* v. *Licensing Board,* - - - Me. - - ,
>
> "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct - - - - - The essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the

> inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework - - - -" *Yakus* v. *U. S.*, 321 U. S. 414, 424.

It has been a consistent tradition of our decided cases that one who enters a relation evidenced by a writing is bound by its terms in the absence of very exceptional circumstances of a voiding equitable nature. The law of contracts, sales, the parol evidence rule, etc. attest to that truth. *Watkins Medical Co.* v. *Stahl,* 117 Me. 190, 191; *Peterson Co.* v. *Parrott,* 129 Me. 381, 382; *Dutch* v. *Gamage,* 120 Me. 305, 308; *Spaulding* v. *American Realty Co.,* 121 Me. 493, 497; *Lavoie* v. *Auburn,* 128 Me. 412, 413 (*"caveat emptor"*). Latter day social legislation has done much as in labor laws and in investment security acts to equalize the trading position of persons otherwise less advantaged to negotiate at arms' length with their better positioned fellows. However, the law has not been characteristically paternalistic. The Legislature in its praiseworthy measure to protect policyholders and the public from misleading liability policies and from those capable of a construction which is unfair intended a quantified censorship. Yet the Legislature has expressedly assumed no mission to require broad liability coverage or any. Purchasers of liability insurance are left uninhibited in their selective judgment of amount and kind of available insurance. The Legislature has exercised its police power to prevent the use in this State of any perceptibly guileful or delusive or illusory policy and of any policy logically and demonstrably susceptive to an interpretation or construction inequitably thwarting or frustrating the assured or the public.

The Legislature has not relieved policyholders from the pains and consequences of reading and choosing such policies as are not reprehensibly misleading or amenable to un-

fair construction. Such policyholders must continue to be presumed by the ordinary rules of law to know the contents of their policies whether the policies are read or not. *Watkins Medical Co.* v. *Stahl,* 117 Me. 190, 191. It is quite true that the Legislature must have been aware that all too many insurance policies are not read and are not easy to read intelligibly. The Legislature concerned itself only with the specific evils which it listed. It was not monitoring comprehensible forthright policies for any breadth, depth and multiplicity of coverage beyond what the expressed meeting of the minds of the freely contracting insured and insurer might negotiate.

The plaintiff in its contest of the rulings and 20 detailed specifications of the defendant set forth earlier in this opinion readily affirms that its proposed policy with the endorsement is designedly restricted in coverage and directs attention to the cautionary limitation imprinted in red by the plaintiff on the obverse cover of the policy.

Plaintiff generally concedes that the coverage of the policy is as the defendant describes it. Plaintiff comments that broader coverage as to protected personnel and as to risk may be had by the insured as desired for an enhanced premium. Defendant's statement in specification 5 is objectively true and plaintiff's disagreement with it is incorrect. The insured is protected with expressed exceptions while operating a nonowned automobile and for negligent operation of a motor vehicle. Insured does not receive the broader coverage against negligent maintenance of his car and against certain negligence apart from operation. Medical payments coverage is plain if not plenary. The scope of the coverage afforded by the policy is comparatively narrow. The Legislature has not ordained any greater coverage or any coverage at all.

In the instant case this court is not to prescribe a policy. We judge the validity of the reasons which the defendant

assigned for his disapproval of the policy in issue. The disapproval of the defendant must be an exercise of sound discretion.

In its response to defendant's 6th and 7th objections to the policy plaintiff acknowledges that there is at least technical justification for the Commissioner's censure. Plaintiff's assurance that despite a persisting nebulous element it would recognize and honor a sort of joint ownership in insured wife and husband is commendable but does not constitute a firm legal commitment. The policy requires confirmatory clarification conclusively presuming a non-owning and insured spouse of an owner to be an owner.

A definition of the term, *"motor vehicle"*, as the defendant insists in specification 11 is at least preferable and facile.

Dissatisfaction of the defendant as to the definition of *"operation"* in specification 16 and specifically as to the phrase, *"to physically control and regulate"* is warranted and the ambiguity should be dispelled.

The external red warning upon the policy runs in part as follows:

> *"It protects the individuals, named in the policy, against liability due to their operation of an automobile - - - -"*
>
> (Italics ours.)

But the policy internally contains coverage exclusions, *inter alia:*

> "(g) to bodily injury to (1) the spouse or any parent, son or daughter of the insured,- - - -"

The exclusion (g) withholds coverage against bodily injuries to any son or daughter emancipated or adult at the time of an accident. (Anno. 122 A. L. R. 1355.) The policy obviously does not *fully* protect "the individuals, named in

the policy, against liability due to their operation of an automobile "as implied so conspicuously and notably in the warning which hints of no reservation. The red caution requires becoming modification in its language to square with the reality of the liability coverage. The defendant in his more comprehensive disapprobation of the policy has in principle protested such shortcoming.

It is our opinion that the reasons assigned by the defendant are accordingly valid in part and invalid in part. R. S., c. 60, Sec. 6, as amended; Rule 80 B, M. R. C. P., 155 Me. 592. Policy disapproval applicable to the warning and specifications of disapproval numbered 6, 7, 11 and 16 are determined to be valid and are sustained.

Appeal denied.

DUBORD, J., CONCURRING

I would concur in denying the appeal, but base my finding upon much broader grounds than those specified in the majority opinion.

Section 6, Chapter 60, R. S., 1954 reads in part as follows:

> "If the commissioner shall notify any insurance company doing business in the state that any policy form or form of endorsement used or proposed to be used by any such company does not meet with the approval of the commissioner, for the reason that it does not comply with the statutes of this state or is otherwise illegal *or is misleading or capable of a construction which is unfair to the assured or the public,* (emphasis supplied) such policy form or form of endorsement shall not thereafter be used by such company in the state."

Pursuant to authority vested in the commissioner, he disapproved the policy in question for two principal reasons, viz.:

(1) That the policy is misleading in that the coverage afforded by it is so limited as to be beyond the reasonable comprehension of the average policyholder; and (2) the policy is capable of a construction which is unfair to the assured or the public because the assured would normally expect coverage to exist where it does not; and the public, therefore, would be left unprotected in many instances.

These two principal statements of disapproval were enlarged by twenty detailed reasons which are set forth in the majority opinion.

It is not my intention to discuss in detail all of the twenty reasons specified by the commissioner. However, I make reference to a few of them.

Under specification (1), (2), (3), and (4), it is indicated that there is no liability coverage for the named insured while his car is being operated by anyone else with or without his permission, when he is not a passenger. This includes the spouse of the named insured, a member of his family, or his employee or agent.

Under specification (5), it is pointed out that there is no liability coverage for the named insured owner when his son or daughter is driving the car with his permission with his wife as passenger, even though the wife is a named insured.

When we consider, in relation to this specification, the provisions of Section 156, Chapter 22, R. S., 1954, which makes an owner of a motor vehicle causing or knowingly permitting a minor under the age of 18 years to operate such vehicle upon the highway, jointly and severally liable with such minor for any damages caused by the negligence of such minor, it is easy to visualize one of the great weaknesses of this policy.

Under specifications (19), it is pointed out that the policy provides for automatic cessation upon the date of death

of the named insured. This is a clause most dangerous to the public and is not commented upon in the majority opinion. Under the ordinary liability policy, the coverage remains in force and the estate of the insured is afforded protection.

Moreover, many of the terms of the policy are veiled in obscurity and nebulousness.

For example, in describing the named insured, the policy provides as follows:

> "The following are insured under Part 1: (a) The named insured, with respect to (1) his operation of any motor vehicle, except that no coverage is afforded hereunder for the operation of any vehicle other than an automobile (as defined hereunder) if such vehicle is owned by or regularly and frequently used in a business or occupation of the named insured, and (2) the operation of an automobile by a 'person insured'."

In defining the meaning of the word "operation" there is a clause in the policy which reads as follows:

> " 'Operation' means to physically control and regulate; to have charge of it as the driver; and includes the insured's legal liability for Bodily Injury and Property Damage (1) caused by the automobile whether owned or non-owned while the insured leaves it unattended, (2) caused by his owned automobile while it is in the care and custody of a garage, service station, repair shop, storage garage or public parking place; provided however that with respect to this coverage . . . ."

Ability to read and understand these two clauses warrants defiance, and there are many other clauses just as difficult of comprehension.

Conceding the honesty of the motives of the company in drafting a contract of restricted liability which can be sold at a low premium, what about the acts of unscrupulous

agents in selling this policy without explaining either with intention or carelessness how restricted is the liability?

Granting that persons have a right to enter into contracts which are not clouded with fraud or otherwise illegal, no argument is needed to point out that the ordinary, average person, does not read his policy of insurance and if he does so, has great difficulty in understanding the many clauses contained therein. If we can suppose that a prospective purchaser of this policy were told there was no liability for his spouse, a member of his family, or an employee or agent in driving the insured car with or without permission unless he is a passenger; that the policy ceases upon his death; that if he allows his 17 or 18 year old son or daughter to use his car there is no coverage; or if he sends a friend to a neighborhood store with his car to run an errand there is no coverage; then if the policy is purchased with a full and clear understanding of its contents there would be no legal objection to such a contract.

However, there is a matter of public policy involved here. The sale of this policy will undoubtedly lead to unsatisfied judgments and litigation between the policy owner and the company involving matters of interpretation and construction.

It is my considered opinion that when the legislature enacted Section 6 of Chapter 60, it was imbued with a praiseworthy desire of affording protection to the public and had within its contemplation a situation such as is now before us.

The commissioner has properly exercised the power and discretion reposed in him. He is to be commended for using his prerogative in the interests of the public welfare. I would sustain all of his findings and deny the appeal.

Appeal denied.

ANNIE E. DUGAN
vs.
CITY OF PORTLAND

Cumberland. Opinion, November 3, 1961.

Municipal Corporations.
Negligence. Nuisance. Sovereign Immunity.

One may not escape the rigorous and limiting requirements of R. S., 1954, Chap. 96, Sec. 89 (relating to suits against towns) by denominating a defect as a nuisance and seeking recovery under the provisions of the nuisance statute.

ON APPEAL.

This is an action against a Municipal Corporation for nuisance, i. e. (protruding railroad tie spikes in sidewalk retaining wall maintained by city). The case is before the Law Court upon appeal. Appeal denied.

Julian G. Hubbard, for plaintiff.

Robert W. Donovan, Asst. Corp. Counsel, for defendant.

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

WEBBER, J. Plaintiff appeals from dismissal of her complaint. She alleged that she tripped over spikes protruding from a railroad tie used as a retaining wall in a sidewalk maintained by the defendant municipal corporation. She alleges that this condition constituted a nuisance and seeks recovery under the nuisance statute. R. S., Ch. 141, Sec. 6.

R. S., Ch. 96, Sec. 89 provides a remedy for one situated as was this plaintiff. The statute provides in part:

> "Whoever receives any bodily injury * * * through any defect or want of repair or sufficient railing in

> any highway, townway, causeway or bridge may recover for the same in a special action * * * to be commenced within 1 year from the date of receiving such injury * * * , of the * * * town obliged by law to repair the same, if the * * * municipal officers or road commissioners of such town * * * had 24 hours' actual notice of the defect or want of repair; but not exceeding $4,000 in case of a town; and if the sufferer had notice of the condition of such way previous to the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way; and any person who sustains injury or damage as aforesaid or some person in his behalf shall, within 14 days thereafter, notify one of the * * * municipal officers of such town by letter or otherwise, in writing, setting forth his claim for damages and specifying * * * the nature and location of the defect which caused such injury."

It is apparent that the plaintiff was unable to show compliance with this statute and she has abandoned any claim under it. The issue is then whether or not one who is injured by reason of a defect in a town way may escape the rigorous and limiting requirements of R. S., Ch. 96, Sec. 89 by denominating the defect as a nuisance and seeking recovery under the provisions of the nuisance statute.

As was stated in *Verreault* v. *Lewiston*, 150 Me. 67, 70:

"The rights of the traveling public and the liability of the municipality with respect to injuries caused by defects in highways are limited by the scope of the statute. Independent of the statute there is no liability whatever on the part of municipalities for injuries caused by defective highways. The liability is a creature of the statute, and it does not extend beyond the express provisions." The "statute" referred to was the highway defect statute, now R. S., Ch. 96, Sec. 89. At page 74 the court added: "As we have seen, at common law there was no right of action against a

town or city for injuries caused by defects in highways. The State in granting a right of recovery for defects in highways can make the right granted as broad or as narrow as it sees fit." Maine has always adhered to the rule followed by the New England states and others that the repair and regulation of public streets is a governmental duty and that no liability for highway defects exists at common law. See *Bouchard* v. *City of Auburn,* 133 Me. 439. We have, therefore, adhered strictly to the rule that "the liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the legislature and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute." *Huntington* v. *Calais,* 105 Me. 144, 145; *Morneault* v. *Inhabs. Town of Hampden,* 145 Me. 212, 214; McQuillin on Municipal Corporations, 3d Ed., Vol. 19, p. 20, sec. 54.04.

What the court said in construing the statute relating to municipal liability for failure to keep public drains in repair in *Dyer* v. *South Portland,* 111 Me. 119, 121, has equal application here. "The statutory provision for liability in this State, we think, must be regarded as exclusive of others. We think the Legislature intended to cover the *whole subject.*" (Emphasis ours.) We are satisfied that the highway defects statute was intended to cover the "whole subject" and provided the sole and exclusive remedy in such a case as the one presented here.

Although the highway defect statute provides a remedy, it also offers some protection to the municipalities who may be charged with violation. A municipality would be deprived of all of the safeguards provided by the statute if it were rendered vulnerable to an action based upon nuisance. Basing its decision upon just such considerations, the Massachusetts court in *Whalen* v. *Worcester* (1940), 307 Mass. 169, 29 N. E. (2nd) 763, 767, first defined a defect as

"anything that renders the way inconvenient or unsafe for ordinary travel." The court noted that defects would include "conditions appearing upon the surface of the way" as well as "obstructions overhanging the way and * * * structures and objects that may fall on or in the way." Turning its attention to the highway defects statute which was very similar to our own, the court concluded that "it was intended to be an exclusive remedy" and added: "The legislative intent cannot be thwarted *by calling the defect a nuisance*, by declining to give the required notice, by bringing suit any time within six years or by seeking to recover damages far in excess of those fixed by the statute." (Emphasis ours.)

Reaching the same conclusion in a case involving a water shut-off or stop-box projecting above the surface of a sidewalk, the Wisconsin Court held that "a city is not liable *as for a nuisance* for the failure to discharge the duty imposed upon it to maintain the streets in a reasonably safe condition for travel as required" by the statute. (Emphasis ours.) The court was satisfied, as are we, that "the extent of (the municipality's) duty in that regard is fixed by the statute." *Lindemeyer* v. *City of Milwaukee* (1942), 241 Wis. 637, 6 N. W. (2nd) 653, 656. The plaintiff's complaint described a highway defect. The plaintiff could not avoid the "conditions and limitations" of R. S., Ch. 96, Sec. 89 by terming such a defect a nuisance.

Appeal denied.

OPINION
OF THE JUSTICES OF THE SUPREME JUDICIAL COURT GIVEN UNDER THE PROVISIONS OF SECTION 3 OF ARTICLE VI OF THE CONSTITUTION

* * * * * * * * * *

QUESTIONS PROPOUNDED BY THE GOVERNOR
ON OCTOBER 27, 1961
ANSWERED NOVEMBER 8, 1961

LETTER PROPOUNDING QUESTIONS

STATE OF MAINE

EXECUTIVE DEPARTMENT
Augusta, Maine
October 27, 1961

To the Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon me as Governor of the State of Maine by the Constitution of the State of Maine, Article VI, Section 3, and being advised and believing that the questions of law hereafter presented are vital to the proper performance of my duties as governor and that the answering of these questions constitutes a solemn occasion, I, John H. Reed, Governor of Maine, respectfully submit the following statement of facts and questions of law and ask that the Justices of the said Supreme Judicial Court give their opinion thereon.

STATEMENT OF FACTS

WHEREAS, the 100th Maine Legislature, pursuant to law, adopted Chapter 95 of the Resolves of 1961, a "Resolve, Proposing an Amendment to the Constitution to Limit to Retirement Purposes the Use of Funds of the Maine State Retirement System" and Chapter 106 of the Resolves of 1961, a "Resolve, Proposing an Amendment to the Con-

stitution Authorizing the Construction of Industrial Buildings";

WHEREAS, both of said Resolves contain the following language:

> "Form of question and date when amendment shall be voted upon. Resolved: That the aldermen of cities, the selectmen of towns and the assessors of the several plantations of this State are empowered and directed to notify the inhabitants of their respective cities, towns and plantations to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of Senators and Representatives at the next general or special state-wide election to give in their votes upon the amendment proposed in the foregoing resolution, and the question shall be:
>
> " 'Shall the Constitution be amended as proposed by a resolution of the Legislature providing that the funds of the Maine State Retirement System shall be maintained in trust and shall not be diverted?'
>
> "The inhabitants of said cities, towns and plantations shall vote by ballot on said question, and shall indicate by a cross or check mark placed against the words 'Yes' or 'No' their opinion of the same. The ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings and returns made to the office of the Secretary of State in the same manner as votes for Governor and Members of the Legislature, and the Governor and Council shall count the same, and if it shall appear that a majority of the inhabitants voting on the question are in favor of the amendment, the Governor shall forthwith make known the fact by his proclamation, and the amendment shall thereupon, as of the date of said proclamation, become a part of the Constitution.";

WHEREAS, Chapter 220 of the Private and Special Laws of 1961, "An Act to Authorize the Construction of Self-Liquidating Student Housing for the State Teachers Colleges and the Issuance of not Exceeding $2,600,000 Bonds of the State of Maine for the Financing Thereof" provided that a referendum for ratification be held "on the second Tuesday of October, 1961 . . . ";

WHEREAS, a referendum election was held on the second Tuesday of October, 1961 (being the 10th of October, 1961) at which time the inhabitants gave their approval to the foregoing bond issue, a highway bond issue, and the two constitutional amendments;

WHEREAS, under Revised Statutes, Chapter 10, section 18, it is my duty as Governor of the State of Maine within 30 days after it appears that a constitutional amendment has been adopted to make proclamation thereof, and,

WHEREAS, it is essential that I as Governor be advised as to the validity and effectiveness of the favorable votes approving the two constitutional amendments referred to above, so that I can determine whether or not a proclamation should be made according to the provisions of Revised Statutes, Chapter 10, section 18,

NOW, THEREFORE, I, John H. Reed, Governor of Maine, respectfully request an answer to the following questions:

QUESTIONS

1) Does the fact that the two constitutional amendments were submitted to the electors on a date not in conformity with Article X, section 4, of the Constitution of the State of Maine, render invalid and ineffective the favorable vote cast at the special referendum election?

2) If the answer to the first question is in the affirmative, can these two proposed amendments again be presented to the electorate at the next biennial meetings to be held in November, 1962?

Respectfully submitted,

JOHN H. REED,
Governor of Maine

ANSWERS OF THE JUSTICES

To The Honorable John H. Reed, Governor of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on October 27, 1961.

The opinion is sought in connection with the duty of the Governor under R. S., c. 10, § 18, which reads in part:

> "Within 30 days after it appears that a constitutional amendment has been adopted, the governor shall make proclamation thereof. . ,"

QUESTION 1

1. Does the fact that the two constitutional amendments were submitted to the electors on a date not in conformity with Article X, section 4, of the Constitution of the State of Maine, render invalid and ineffective the favorable vote cast at the special referendum election?

We answer this question in the affirmative only as to the favorable vote cast for the two proposed constitutional amendments.

Article X, Sec. 4 of the Constitution, as amended by the eighty-third amendment in 1957, reads:

> " 'Section 4. The legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to this constitution; and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at the next biennial meetings in the month of November, or to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators and representatives, on the Tuesday following the first Monday of November following the passage of said resolve, to give in their votes on the question, whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this Constitution.' "

Thus a precise day and calendar month for voting by either alternative are positively appointed and denoted by the Constitution which is by definition our fundamental and basic law.

The voting upon the two proposed constitutional amendments with which we are concerned was had upon October 10, A. D. 1961, the Tuesday following the second Monday of October. Such a time was in compliance neither with the command of the Constitution nor with the resolution of the Legislature.

In *Opinions of the Justices* (1842), 18 Me. 458, 464, Whitman, C. J., said:

> "When the constitution designates, in express and explicit terms, the precise time when a fundamental act shall be done, and is utterly silent as to

> its performance at any other time, we are not aware of any ground, upon which the doing of it can be authorized at any other time."

Justice Cooley, in his authoritative work on the Constitution, said:

> "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution."
>
> Cooley's Constitutional Limitations, 6th ed., page 93, 8th ed., vol. 1, page 159.

In *Collier* v. *Frierson* (1854), 24 Ala. 100, 109, the court said, in a soundly reasoned and very respected precedent:

> "We entertain no doubt, that, to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself, must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said, that certain acts are to be done - - certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government, can dispense with them. To do so, would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law."

See also *Johnson* v. *Craft* (1921), 205 Ala. 386, 87 So. 375.

> "The power given to the legislature is a grant of power. It has it not without the constitutional provision. The grant is given to be exercised in

> the mode conferred on the legislature by the constitution. It is so limited by the people acting in the exercise of their highest sovereign power. In such case the mode is the measure of the power." *Oakland Paving Co.* v. *Hilton,* 69 Cal. 479, 514, 11 Pac. 3, 19.

We are satisfied that there has been no vote upon such amendments pursuant to the Constitution and therefore the amendments have not yet been adopted.

QUESTION 2

2. If the answer to the first question is in the affirmative, can these two proposed amendments again be presented to the electorate at the next biennial meetings to be held in November, 1962?

This question we answer in the affirmative.

A submission of the proposed amendments to the people at the "biennial meetings of said inhabitants for the election of Senators and Representatives at the next general . . . state-wide election" in November, 1962 will conform to the express requirement of the Constitution and the Legislative resolves. Resolves 1961, Chap. 95, Chap. 106; Maine Constitution, Article X, Sec. 4, as amended.

Dated at Augusta, Maine, this 8th day of November, 1961.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY, JR.
FRANCIS W. SULLIVAN
F. HAROLD DUBORD
CECIL J. SIDDALL

HOWARD BECKWITH

vs.

FRANK ROSSI AND THOMAS TEAGUE

Intervener by Application

Somerset. Opinion, November 7, 1961.

Trespass. Summary Judgment—Rule 56.
Real Property. Profits a Prendre.
Rights Appurtenant. Rights in Gross.
Rule 16.

A profit a prendre in gross is treated as an estate or interest in the land itself. It is assignable and may be for life or inheritance.

A right of a profit a prendre involves a right to do anything upon the land in which the right exists that is reasonably necessary for the proper exercise of the right—the exercise of the right must be in a reasonable manner.

An owner of a profit a prendre who exceeds his rights in manner or extent of use is guilty of trespass.

Even though the pre-trial order refers to the misuse of the defendant's rights (i. e. the improper filling in of gravel boring holes) solely in terms of damages, a liberal construction of the pre-trial order in the instant case properly preserves genuine issues of fact (whether gravel boring tests were conducted and soil restored in a reasonable manner). The entry of summary judgment is consequently improper.

ON APPEAL.

This is a plaintiff's appeal from an order denying plaintiff's motion for summary judgment and granting defendant's motion. Appeal from denial of plaintiff's motion denied; appeal from granting defendant's motion sustained.

Eames & Eames, for plaintiff.

Robert A. Marden, for defendant.

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

SIDDALL, J. This is an appeal from a decree granting defendant Rossi's motion for a summary judgment and denying plaintiff's motion for such a judgment.

Sarah T. Cole, in 1945, conveyed to Ralph A. Jewell certain property located in Fairfield, Maine. The controversy in the case involves the interpretation of the following provision in that deed, to wit, "Also reserving the gravel near the northerly line of said lot but with the understanding that the purchaser of the lot may take gravel therefrom for use on the farm which he owns on the westerly side of said road which was formerly a part of this farm." The property came from Ralph A. Jewell by various mesne conveyances to the plaintiff, subject to the above described reservation. Sarah T. Cole conveyed to Thomas M. Teague the gravel reserved by her in her deed to Jewell. The defendant Frank Rossi entered upon said property by permission and license given him by Teague to take the gravel. Rossi bored seven holes in the ground to test for the presence of gravel, and after finding no gravel, the holes were filled by use of a bulldozer.

Under the old rules of court then in effect the plaintiff brought suit in trespass q.c.f. against the defendant Rossi, claiming that the topsoil of his property had been damaged by Rossi's operations. Subsequent proceedings were conducted under the new rules. Teague intervened as a defendant. Teague in his answer set up a counterclaim requesting that plaintiff be enjoined from certain acts with reference to the reserved gravel.

The action of the court on the motions for summary judgment was taken under the provisions of Rule 56 of the Maine Rules of Civil Procedure. This rule provides that

summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Rule 56 (c).

The points of appeal relied upon by the plaintiff are summarized as follows:

1. That the court erred in ruling that Sarah Cole had an assignable interest in the gravel.

2. That the court erred in ruling that Sarah Cole had a greater interest than a life estate in the said gravel.

3. That the court erred in ruling that the defendant had the right to bore holes and close the holes so bored by the method used.

The use of the words "reserving the gravel" used in the deed from Sarah Cole to Ralph Jewell created in Sarah Cole what is technically designated as a "profit a prendre." A profit a prendre is the right to take from the land of another a part of the soil, or something which is a product of the soil. Examples of profits a prendre are the right to take soil, gravel, minerals and the like from another's land. See *Engel* v. *Ayer*, 85 Me. 448, 455, 27 A. 352. The right may be appurtenant to a dominant estate, in the nature of an easement proper, or it may be a right in gross. In the instant case the right to the gravel does not appear to be appurtenant to other lands and therefore is a right in gross. A right to a profit a prendre in gross in the lands of another is treated as an estate or interest in the land itself. Such interest is assignable and may be for life or inheritance. *Engel* v. *Ayer, supra.*

The ruling of the court that Sarah Cole had an assignable interest in the gravel was correct.

The plaintiff also claims, in the points of appeal filed by him, that the court erred in ruling that Sarah Cole had a greater interest than a life estate in the gravel. There is no suggestion in the record that Sarah Cole was not alive at the time of the acts of the defendant upon which the complaint was based. Furthermore, the plaintiff did not argue this point of appeal in his brief filed with this court. Therefore, a discussion of this claim is unnecessary.

The plaintiff makes the further claim that the court erred in ruling that the defendant had the right to bore test holes and to close such holes by the method used therefor. This claim necessitates; (1) a discussion of the rights and obligations of the owner of a right to profits a prendre and those of the owner of the remaining soil; (2) whether, under common law pleadings, a suit in trespass q.c.f. may be properly brought for damages arising out of the misuse of such right; (3) whether the issue of misuse of such right was eliminated in the pre-trial proceedings.

The record shows that no gravel was found in the area tested. We are therefore not concerned with the question of whether gravel was properly taken from the property. We are, however, concerned with the right of the owner of a right to profits a prendre to make tests for the presence of gravel, and with his obligations to the owner of the soil during and after such operations.

"The right of a profit a prendre involves the right to do anything upon the land in which the right exists that is *reasonably necessary for the proper exercise of the right.*" Thompson on Real Property, Vol. 1, Sec. 225. (Emphasis supplied.)

"A profit a prendre involves a right to do such things on the land in which the right exists as are *reasonably necessary for the exercise of the right.*" Tiffany Real Property, 3d Edition, Sec. 839. (Emphasis supplied.)

The rights and obligations of the owners of the right to profits a prendre and of the owners of the remaining soil are not unlike those of the owners of the dominant and servient estates in the use and enjoyment of easements proper.

One having an easement in another's land must exercise his right in a *reasonable* manner. *Kaler* v. *Beaman, et al.*, 49 Me. 207, 208.

"The owner of the easement has all rights incident or necessary to its proper enjoyment but nothing more." *Great Hill Lake* v. *Caswell,* 126 Conn. 364, 11 A. (2nd) 396, 397.

> "It is an established principle that the unrestricted grant of an easement gives the grantee all such rights as are incidental or necessary to the reasonable and proper enjoyment of the easement. A grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. An unlimited conveyance of an easement is in law a grant of unlimited reasonable use."
>
> * * * * *
>
> "The reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances. No definite rule can be stated, however, as to what may be considered a proper and reasonable use as distinguished from an unreasonable and improper use. The question is usually one of fact." 17A Am. Jur., Easements, p. 720, 721.

In the instant case the reservation of the right to profits a prendre was set forth in general terms, and the rights and obligations of the respective parties were not specifically set forth in the instrument of conveyance. In such a situation, the right of the defendant to make reasonable

tests for the presence of gravel was incidental to the proper enjoyment of his rights to profits a prendre. Having found no gravel, it became the duty of the defendant to restore the soil in a reasonably proper manner.

Generally, the owner of an easement who exceeds his rights either in the manner or extent of its use is guilty of a trespass. 28 C.J.S., Easements, p. 785, 17A Am. Jur., Easements, p. 719-720. We see no reason why the same rule should not apply to the owner of a right to profits a prendre.

The case of *Kaler* v. *Beaman, supra,* involved the wrongful use of certain easements of way and right to the use of water. The suit was for trespass q.c.f. brought by the owner of the servient tenement. In finding for the plaintiff, the court said:

> "Merrill, by his deed, had the right to draw the specified quantity of water from Kaler's flume, at such point as would best convene himself. But he must exercise that right in a reasonable manner. Though he was authorized to select from what part of the flume he would draw the water to which he was entitled, he would not, in the exercise of that right, by wantonness or negligence, so conduct as unnecessarily to injure the plaintiff, in the exercise of his remaining rights.
>
> The defendants also have, by the terms of Merrill's deed, a right to the use of one half of the surplus water, over and above what was necessary to carry Kaler's plaster mill and grist mill, and Merrill's thirty marble saws or six horse power. If the defendants in any manner exceeded the above limitations of their rights they would thereby become trespassers, and become liable for so much damage, as they might occasion to the plaintiffs by such excess."
>
> * * * * *
>
> "The evidence very clearly shows that the defendants have exceeded their rights, both in the

> manner in which they have occupied and used this road by incumbering it with lumber, and also, in the quantity of water they have drawn from the plaintiff's flume, without reference to the manner in which the right to draw water has been exercised."

We quote from the opinion in the case of *Appleton* v. *Fullerton, et al.*, 1 Gray 186, 192, as follows:

> "The plaintiff then was the owner of the soil, in possession, and in a condition to maintain trespass; and the question is, whether the acts done by the defendants were justifiable under their reserved rights. The defendants clearly had a right of entry for certain specified purposes, so that the mere entry of the close was not a trespass; and therefore the real question is, whether the defendants entered upon and used the land for purposes not warranted by the reservation; if so, the action lies."

It therefore appears that the question of whether there was a misuse of the defendant Rossi's right to profits a prendre was one of the issues raised in plaintiff's writ.

We must now determine whether or not this particular issue was eliminated by the stipulations contained in the pre-trial order entered under the provisions of Rule 16, M.R.C.P. Under Rule 16 one of the matters for consideration in pre-trial conferences is the simplification of issues. Courts have often expressed the view that one of the chief purposes of pre-trial procedure is to formulate the issues to be litigated at the trial. Rule 16 provides that the order shall recite the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the action, unless

modified at the trial to prevent manifest injustice. The reason for the requirement that the order controls the subsequent course of the trial is apparent. If the rule were not so, the order would be meaningless, and confusion would often take place at the time of trial. This court should not, of course, be called upon to consider on appeal an issue disposed of by admissions or agreements included in the pre-trial order. The order did not specifically state that all of the issues raised by the respective parties were set forth therein. Obviously, however, the order was designed to define the issues relied upon by each party. The order makes it clear that the plaintiff contended that the reservation of rights in the deed from Sarah Cole to Ralph A. Jewell was not assignable. It is likewise clear that the defendant claimed by assignment those rights reserved by Sarah Cole. The defendant also set up a claim to *res judicata*. The order does not specifically recite that the plaintiff claimed that the misuse of the defendant's right to profits a prendre was an issue. It does, however, contain the following statement: "As related to the question of damages, the plaintiff claims when the bulldozing was done in an area of two acres, a certain amount of the topsoil was disturbed and moved to other places, requiring the plaintiff to re-seed and make changes in the land in order to enable him to use it for a hayfield." Technically, this recitation appears to relate solely to damages, although there may be an inference therein that the damages resulted from the misuse of defendant's right.

As stated above, there was an obvious endeavor on the part of the court to define in his order the issues of the case. The plaintiff, if he had intended to rely upon the misuse of defendant's right as an issue, should have clearly indicated his intention to do so. We are, however, mindful of the fact that the pre-trial conference took place within a few weeks after the Maine Rules of Civil Procedure became effective. At that time pre-trial procedure as pro-

vided by the rules was an innovation in trial practice in our state courts. Members of our bar had not had an opportunity to acquaint themselves fully with the importance and effect of pre-trial conferences and orders. We also note that the court in his order for summary judgment indicates that the plaintiff, in the summary judgment proceedings, was not relying solely on his claim that the reserved rights were not assignable. We quote from the court's opinion and order as follows:

"The defendant (sic) claims:

(1) Sarah Cole retained an interest in the gravel which was personal to her and not assignable.

(2) Even if her interest in the gravel did pass to Thomas Teague, the boring of the seven holes and bulldozing caused damage to plaintiff for which compensation should be had."

Under these circumstances, especially where the controversy involves the granting of a motion for summary judgment, we feel that a liberal construction should be given to the terms of the pre-trial order. Therefore, we rule that the issue of a misuse of the right to profits a prendre was not lost to the plaintiff by the terms of the pre-trial order. The result in this case, however, serves to emphasize the desirability of a clear and definitive statement in the pre-trial order of the issues remaining to be tried. Such, we believe, has now become common practice in the superior court.

The pre-trial order recites that the defendant contends that plaintiff's action is barred by reason of a referee's report, accepted at the September Term, 1956, of the Superior Court for Somerset County. It appears that this report was made in an action brought by the defendant Teague against the plaintiff and his wife. The court below, in his opinion and order, did not consider this claim.

In view of the fact that the defendant did not argue this contention in his brief filed in this court, we do not deem it necessary to discuss it here. We note, however, that the issue of the misuse of the right to profits a prendre was not an issue in the hearing before the referee.

A summary judgment may be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Rule 56 (c) M.R.C.P. In the instant case, whether the tests were conducted in a reasonable manner, and whether the soil was restored in a reasonably proper manner were, on the record in the case, questions of fact and not of law. Issues of material facts were presented by the pleadings and record, and a summary judgment for either party was not in order.

The court's denial of plaintiff's motion for a summary judgment was proper. The court erred in granting a similar motion by the defendant.

The entry will be

Appeal from the denial of plaintiff's motion for summary judgment denied.

Appeal from the granting of defendant's motion for summary judgment sustained.

JOSEPH TIERNEY
vs.
JOSEPH T. QUINN

Cumberland. Opinion, December 8, 1961.

Negligence. Record. Bailment.
Appeal. Imputed Negligence.

The rule that negligence of a bailee is not imputed to the bailor does not preclude consideration of the bailee's conduct on the question of the negligence of a 3rd party defendant.

Where from all the evidence concerning an automobile collision, the court is left with only guess and conjecture as a basis of decision, it is proper to take the case from the jury by directed verdict for defendant.

It is the duty of an appellant to produce a satisfactory record for the Law Court. Testimony tied to a "chalk" or diagram on a blackboard not reproduced in court may be without meaning and result in a failure to produce a satisfactory record.

ON APPEAL.

This is an appeal from a directed verdict for defendant. Appeal denied.

Alton L. Yorke,
Hollis J. Allen, for plaintiff.

Lawrence P. Mahoney, for defendant.

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

WILLIAMSON, C. J. This automobile accident case arises from the collision of the plaintiff's car operated by his sister-in-law and a car operated by the defendant. The case is before us on appeal from the direction of a verdict for the defendant at the close of the evidence.

It is agreed by the parties that the plaintiff's car was loaned or bailed to his sister-in-law under such circumstances that her negligence, if any, would not bar plaintiff's recovery for damage to the car. *Robinson* v. *Warren,* 129 Me. 172, 151 A. 10; *York* v. *Day's, Inc.,* 153 Me. 441, 140 A. (2nd) 730. This rule of law does not of course preclude consideration of her conduct in its bearing upon the proximate cause of the accident or upon the care or lack of care of the defendant under the circumstances. *Crockett* v. *Staples,* 148 Me. 55, 89 A. (2nd) 737; *Ross* v. *Russell,* 142 Me. 101, 48 A. (2nd) 403; *Fernald* v. *French,* 121 Me. 4, 115 A. 420.

We take the evidence in the light most favorable to the party against whom the verdict was directed. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438.

The plaintiff's sister-in-law tells us in substance as follows: She was proceeding northerly on Forest Avenue, a highway four lanes in width, in Portland with the intention of crossing the Avenue westerly to reach a parking lot at the Moran Market. To accomplish this, she drove from the Avenue into the lot of a closed filling station on her right, turned her car to the left, or westerly, stopped for traffic to pass, and then started directly across the Avenue. As she started she first saw the defendant's car approaching on Forest Avenue from the north and "just coming around the bend" at a distance of 380 yards measured by her after the accident. She next heard the squeal of brakes and saw the defendant's car when it was 25 feet from the collision. When the front wheels of plaintiff's car were in the parking lot and the rest of the car in the west traffic lane, it was struck by defendant's car.

The point of contact from the photographs was on the right side of the plaintiff's car between the windshield and the front bumper. The left front light of the defendant's car was broken, and there was other damage on the left side of the front of the car. There is no suggestion of any

personal injuries to the plaintiff's sister-in-law, her three year old daughter, the defendant, or his twelve year old son.

The evidence of speed is meager. The plaintiff's sister-in-law estimated her speed in crossing the Avenue at 10 to 15 miles per hour. From other sources there was evidence that the defendant was exceeding the agreed speed limit of 35 miles per hour without any closer estimate.

The width of the Avenue, as we shall later point out, was from 48 to 60 feet. It is not plain why this fact, so important and so readily proven, was left to the uncertainty of a rough estimate.

The presiding Justice, in directing the jury to return a verdict for the defendant, said:

> ". . . the Court does not see that the plaintiff has proven sufficient facts in the evidence to show that the defendant was negligent and that any conduct of his was the proximate cause of this accident, . ."

The driver of the plaintiff's car was mistaken in her description of the accident. On her evidence, the plaintiff's car traveled the width of the Avenue plus a very few feet in the period in which the defendant's car covered 380 yards, or 1140 feet. At speeds from 10 to 15 miles per hour the plaintiff's car would have taken from 2.2 to 4 seconds to reach the point of collision, and only a slightly longer time to have passed completely into the parking lot beyond the west traffic lane.

At 35 miles per hour the defendant's car would have taken 22 seconds to reach the point of collision, and at 45 miles per hour 17 seconds. We are given no estimate of what speed the defendant was traveling other than that he was exceeding the speed limit. It could not be found on this record, for example, that the speed was 60 miles per hour. We do no more than test the evidence with a

speed above the speed limit, and 45 miles per hour seems reasonable for this limited purpose.

No one expects mathematical accuracy in the relation of the incidents of an accident covering at most a few seconds. When, however, we find such wide disparity in the times it would have taken to bring two cars to a given point at the same moment, we must believe that the driver of the plaintiff's car was in error in fixing the place at which, or the place from which, or both, the defendant's car was first observed by her. In short, the accident could not, as we read the record, have happened as the driver of plaintiff's car tells us. *White* v. *Schofield*, 153 Me. 79, 134 A. (2nd) 755.

Turning to the evidence of three young men aged 17 and 18, who observed the accident from the filling station lot, we find no facts which sustain the plaintiff's position.

The first witness said in substance: that the plaintiff's sister-in-law "pulled over" to her right; that she did not go off the road; that he first saw the defendant's car at a distance of about 300 yards; that the cars came together as indicated by him on the blackboard; that "her front wheels were just about on the lot." Significantly, the witness testified:

"A She turned just as shown on the diagram there, and Mr. Quinn, he was coming right along over his speed limit.

"Q She turned right in front of him, didn't she?

"A She was already turned when Mr. Quinn hit her.

"Q She was going across the road right in front of him, wasn't she?

"A Well, yes."

The second witness said: "she started to pull into the store and she got about six feet across the white line, I guess

about that, and Mr. Quinn hit her"; that the defendant was traveling "fairly fast"—(he) "would think" faster than the speed limit; that he heard the "squeal of tires" when the defendant's car was approximately 25 feet from the plaintiff's car; that the defendant's car was 90 to 100 yards away when plaintiff's sister-in-law started to cross the Avenue.

The only evidence of width of the highway is contained in the following extract from his testimony:

"Q You testified on direct examination that in your opinion Mrs. Kitchen had crossed the white line by about six feet?

"A Yes.

"Q When she was hit. Do you have any idea how wide that is?

"A About ten or twelve yards, I think.

"Q Thirty, thirty-four feet, you think?

"A Approximately.

"Q Do you know how the highway is lined?

"A Yes. There is just one white line down the middle. I don't know if it is a four lane or not."

If the witness meant, as seems likely, that the point of collision was 10 to 12 yards, or 30 to 36 feet, from the easterly side and 6 feet beyond the center line, then the Avenue was 48 to 60 feet in width. The witness further said that after the accident the defendant's car stopped midway between the edge of the Avenue and the center line, and the plaintiff's car was "a little ways into the parking lot. . ."

At most for the plaintiff from testimony of the second witness it appears that the plaintiff's car covered 36 feet and the defendant's car 270 to 300 feet in the same time.

On this testimony we have the defendant traveling 7 to 8 times as fast as the plaintiff's car. At a speed of 45 miles per hour it would have taken the defendant over 4 seconds to reach the point of collision. The evidence does not bear out this possibility.

The third witness testified that the defendant's car was roughly 20 yards distant when the plaintiff's car crossed the white line; that split seconds before the accident the front end of plaintiff's car "was just over the white line"; that he heard the "squeal of tires" when the defendant's car was 40 feet or so from the plaintiff's car. The witness did not place the point of impact.

The defendant on his part tells us that he first saw the plaintiff's car when it was 15 or 20 feet away; that his speed was 25 miles per hour or less, and in his own words, "that I don't pay any attention to cars parked on the side of the road. I was on my side of the road, and the first time I saw this Buick driven by Mrs. Ktichen was when it loomed up in front of me like an ugly monster or something."

From the evidence of the plaintiff's sister-in-law and the three young men, we find no solid foundation for findings of fact which would warrant a verdict for the plaintiff. No more did the defendant give testimony from which the jury could spell negligence.

Taking all of the evidence into consideration, we are left with guess and conjecture to form the basis of decision. Such ingredients do not make a verdict. The case was properly taken from the jury.

There is a further error fatal in itself to the success of the appeal. The testimony is tied to a "chalk" or diagram on a blackboard. There are repeated references to the chalk as a "fair representation" of the scene, of the position of the plaintiff's car before starting to cross the Ave-

nue, and of the point of collision. The "chalk" was used without apparently the slightest intent to preserve its contents for a record on appeal. Much of this evidence, so important at the trial, is without meaning to an appellate court in its attempt to reconstruct the action from the printed page. We cannot too strongly emphasize the duty on the part of an appellant to produce a satisfactory record.

A "chalk" is not evidence in itself, and yet it is often a most useful and indeed an indispensable tool in the courtroom in reconstructing the past or otherwise illustrating the testimony of the witness on the stand. Here, for example, the presiding justice had before him the "fair representation" of the scene to aid in making alive the action of a few seconds in which an automobile traveling along a city street collides with an automobile crossing its path. Without the "fair representation", the record lacks life. The unknowns are multiplied. What happened? What facts, in looking at the evidence in the light most favorable to the plaintiff, aided the justice in reaching his decision? Surely the "fair representation" on the blackboard with its marks and lines explained the evidence and made it more intelligible.

A diagram, or plan, properly introduced in evidence would have told us what the witnesses told the judge and jury. We would then have had the full story of the case available for our consideration. Photographs were introduced to describe the damage to the cars. So also a diagram or plan should have been introduced to preserve the meaning of the testimony. There is nothing to indicate that this procedure could not have been readily adopted.

By the nature of the appellate process, we lose the sights and sounds of the trial with the myriad of facts bearing upon the quality of evidence. This loss we cannot help, and this in fact is sound reason for the insistence by an appellate court that all aid available be given.

In this instance without a "fair representation", we do not have in fairness the record from which it was intended by the plaintiff, and the defendant as well, that the jury should decide the issue, and on which the presiding justice directed the decision on liability. *Stearns* v. *Smith,* 149 Me. 127, 99 A. (2nd) 340. See Annot. 9 A. L. R. (2nd) 1044, 1101.

The entry will be

Appeal denied.

INDEX

ABANDONMENT

ADVERSE POSSESSION

The rule that occupancy of a portion of land extends to the whole parcel does not apply where the deed conveys more than one parcel not enclosed in a common fence or in some way merged.

Adverse possession must be based on more than a mere mental intention; such physical facts as give notice to the owner of hostile intent must be present.

A town cannot claim adverse title and at the same time recognize the title in the one from whom it claims by placing a lien thereon.

The burden of proof is on the one asserting adverse possession.

Island Falls v. *A. K. R. Inc.*, 147.

ANTE-NUPTIAL CONTRACT

In a controversy concerning an ante-nuptial agreement, the wife of a deceased cannot testify to facts occurring prior to her husband's death, unless the door is opened by the personal representative. R. S., Chap. 113, Sec. 119.

In a controversy concerning an ante-nuptial agreement, the wife of a personal representative even though interested is a competent witness as to facts occurring before the death of a decedent under R. S., 1954, Chap. 113, Secs. 114, 119.

Whether promises contained in an ante-nuptial contract are dependent or independent is a question of interest.

Each ante-nuptial contract must be interpreted in the light of its terms and surrounding circumstances.

The partial failure of separate independent agreements, where marriage was the vital consideration of the contract, do not vitiate the contract.

Where the fact of marriage is the prime consideration, the place thereof is of minor importance.

An answer not under oath does not operate as evidence.

The burden of proving fraud is upon the one alleging it.

Where a presumption of fraud arises against the validity of contract, the one claiming under a contract has the burden of presenting evidence tending to make the non-existence of fraud as probable as its existence.

Wilson v. *Wilson*, 119.

APPEAL

ASSESSORS

BAILMENT

BANKS

BONDS

BROKERS

CONTRACTS

CONSTITUTIONAL LAW

CONVERSION

CORPORATE ENTITY

CRIMINAL LAW

DAMAGES

DEATH

EASEMENTS

Testimony of a State Auditor beyond his competence as a witness should be excluded.

Where a proper foundation is laid, an expert or qualified accountant is usually permitted to summarize information contained in voluminous records, thereby relaxing the best evidence rule.

State v. *Huff*, 269.

EMINENT DOMAIN

R. S., 1954, Chap. 23, is silent as to "interest" in condemnation proceedings save as interest may be imputed from "damages".

The true rule in condemnation matters is that the price ought to be paid at the moment the purchase is made, when credit is not especially agreed upon.

The state upon a taking and vesting of title acquires all the incidents of proprietorship such as entry, use, occupation, rents and profits, with a right of immediate possession; the tenants become tenants at sufferance, chargeable with use and occupation.

Williams v. *State Highway Comm.*, 324.

See Appeal, *Smith and Ware* v. *State Highway Comm.*, 355.
See *Opinion of Justices*, 104.

EQUITY

See Easements, *Eliasberg Inc.* v. *Roosevelt et al.*, 370.
See Specific Performance.

ESTOPPEL

See Title, *Leblanc* v. *Gallant*, 31.

EVIDENCE

See Rape, *State* v. *Field*, 71.
See Liens (presumptions), *Thompson Lumber Co.* v. *Heald*, 78.
See Ante-Nuptial Contracts, *Wilson* v. *Wilson*, 119.
See Expert Testimony.

EXPERT TESTIMONY

See Workmen's Compensation, *Brouillette* v. *Weymouth Shoe Co.*, 143.

FALSE IMPRISONMENT

The cause of action for false imprisonment under R. S., 1954, Chap. 112, Sec. 93 "accrues" when the plaintiff regains his liberty by release upon recognizance, notwithstanding the criminal prosecution in which the arrest took place continued within the limitation period.

(An action commenced more than two years after the release upon recognizance is too late.)

Jedzierowski v. *Jordan*, 352.

HUSBAND AND WIFE

HIGHWAYS

One may not escape the rigorous and limiting requirements of R. S., 1954, Chap. 96, Sec. 89 (relating to suits against towns) by denominating a defect as a nuisance and seeking recovery under the provisions of the nuisance statute.

Dugan v. *Portland*, 521.

INCORPORATION BY REFERENCE

INFANCY

A married male upon reaching 21 years of age under R. S., 1954, Chap. 166, Sec. 35, has no right to disaffirm the purchase and sale to him of an automobile, solely on the grounds of infancy.

cf. Chap. 119, Sec. 2 which does not apply to suits brought by an infant.

Uhl v. *Oakdale Auto Co.*, 263.

INNKEEPERS

INSANITY

INSURANCE

The Insurance Commissioner may disapprove the proposed use in the State of Maine of an automobile liability policy which is "misleading or capable of a construction which is unfair to the assured or the public."

The administrative authority of the commissioner is restricted to fact finding and needful regulation delimited within the policy, standard and rule affirmatively established by the legislature.

The disapproval of the Insurance Commissioner must be an exercise of sound discretion.

A policy is properly censured which requires (1) confirmatory clarification conclusively presuming a non-owning and insured spouse of

JEOPARDY

LANDLORD AND TENANT

she is a guest, and this true in spite of the fact that her stay there may be a long one and that she pays on a weekly or monthly basis.
Sawyer v. *Congress Square Hotel Co.*, 111.

LAW COURT

See Appeal (transcript), *Gibson* v. *McMillin*, 239.

LEASES

If a lease is viewed by the parties merely as a convenient memorial, or record of a previous contract to execute such lease, the absence of the lease instrument does not effect the binding force of the contract; if however, the instrument is regarded as the consummation of negotiations, there is no contract until the lease instrument is written and signed. The question is one of intention.

Actual expenses incurred by proposed lessee in reliance upon a contract to lease is a proper element of damages in breach of contract to lease.

The measure of damages upon breach of contract to lease is the difference between the rental value of the store to be altered for use of the lessee under the agreement and the rent reserved, with such special damages as may have been within the contemplation of the parties.

Landau Stores Inc. v. *Daigle et al.*, 253.

LICENSEE

See Innkeeper and Guest, 111.
See Easements, *Eliasberg Inc.* v. *Roosevelt et al.*, 370.
See Municipal Corporations, *Kovack* v. *Waterville*, 411.

LIENS

If a presumption were to arise that materials furnished by a supplier did in fact enter into the construction of a building and thus become lienable, it could only have the effect of placing upon the defendant owner the burden of going forward with the evidence sufficient to satisfy the fact finder that the non-existence of the presumed fact is as probable as its existence. The burden of proof does not shift.

The fact of delivery of suitable materials to a building site *merely permit or justify* a finding that the materials were incorporated into the structure; they do not compel such a finding.

R. S., Chap. 178, Sec. 43, does not prevent the inclusion in a deficiency lien judgment of non-lienable items found to be due from the contractor.

The ascertainment of a debt underlying the lien is an essential part of the proceeding and equity should resolve all issues which are inextricably related in the controversy.

Thompson Lumber Co. v. *Heald et al.*, 78.

LIMITATION OF ACTIONS

See False Imprisonment.

MARRIAGE

M.E.S.C.

(Maine Employment Security Commission)

The M.E.S.C. has no authority or legal right to refund the total amount of taxes erroneously and illegally paid but only those amounts specifically authorized by statute, namely the amount which remained after deducting employees benefit paid. R. S., 1954, statute.

Taxes voluntarily paid cannot be refunded unless so provided by statute.

Drummond et al v. *M.E.S.C.*, 404.

MONEY COUNTS

M.R.C.P.

(Maine Rules of Civil Procedure)

Prior to 1959, the review of criminal cases was by exceptions, and in felony cases, by appeal from the denial of a motion for new trial seasonably addressed to the presiding justice. P. L., 1959, Chap. 317, Sec. 69, does *not* change the methods of review in criminal cases.

No conclusive presumption of prejudice arises from the publication of inaccurate newspaper statements. For purposes of change of venue, actual prejudice must be shown and the decision is left to the sound discretion of the presiding justice.

Under R. S., 1954, Chap. 148, Sec. 7, one charged with crime is not entitled to know of the existence of an indictment until he has been arrested.

One is not entitled to "speedy" arrest *or* extradition while a fugitive.

The right to "speedy trial" is a personal privilege which may be waived.

State v. *Hale*, 361.

MUNICIPAL CORPORATION

The municipal officers under broad legislative authority may provide for limited suspensions of a police officer by the Chief of Police for disciplinary purposes without notice or hearing. (Civil Service Ordinance, Sec. 1, Rule XI.)

In the absence of protective provisions of the ordinance or controlling legislative limitations, suspension or removal may be imposed with or without cause.

Joyce v. *Webber et al.*, 234.

A licensing board under R. S., 100, Sec. 51, is an administrative body with such power and authority as the legislature has legally and properly endowed it.

The statutory requirement of Sec. 51 on revoking licenses when the Board "shall be satisfied that the licensee is unfit" is procedural; secs. 33 and 34 provide the standards.

Operating a victualers business is a privilege not a right.

There are many instances in the Maine Statutes where the legislature has delegated to an administrative body authority to use its discretion and judgment.

Inadequacy of notice of appeal is waived by appearance and participation in the hearing.

Kovack v. *Waterville*, 411.

See Embezzlement (Town Clerk), *State* v. *Huff*, 269.
See Highways (defective road—nuisance), *Dugan* v. *Portland*, 521.
See Taxation (assessors lists), *Maine Lumber et al.* v. *Mechanic Falls*, 347.

NEGLIGENCE

Where the record sufficiently shows that a collision took place upon defendant's railroad tracks, there arises a presumption that defendant was operating the train. It is unnecessary to prove by railroad officials what was so likely to be a fact and so easily disproved if it were not.

Where a wife passenger in an automobile with her husband driving, is injured in a collision, the husband's negligence is not imputable to the wife where there is no evidence of joint control.

Where children passengers in the back seat of an automobile with their father driving are injured in a collision, the father's negligence is not imputable to the children where the children were not infants unable to care for themselves.

NUISANCE

See Highways, *Dugan* v. *Portland*, 521.

PERPETUITIES

R. S., 1954, Chap. 107, Sec. 4 authorizes the Supreme Judicial Court to determine the construction of wills; and in cases of doubt, the mode of executing a trust. While the court has refrained, as a matter of judicial policy, from prematurely deciding issues, the power of court should be exercised where the distribution of the residue is inextricably interwoven with a present issue of distribution of income which has accumulated and which will be received during the continuance of the trust, and (2) the judiciary is faced with an imminent problem, which indicates the necessity and desirability of immediate answers.

The rule against perpetuities voids a grant of property wherein the vesting of an estate or interest is postponed beyond the life or lives in being 21 years and nine months thereafter. Estates or interests dependent upon such grants are void.

Where an estate is limited on alternative contingencies, one of which offends the rule while the other does not, the invalid provision does not affect the validity of the other if the event happens upon which the taking effect of such other is contingent.

There is no conflict between the doctrine of "alternative contingencies" and P. L., 1955, Chap. 244 (R. S., 1954, Chap. 160, Sec. 27 as amended).

It is the law of this state that upon default of a power of appointment by a donee, a court of equity will exercise the power, if, according to the provisions of the will, such power is made imperative upon the donee.

A power is made imperative if it appears from the instrument as a whole that an obligation to exercise the power was contemplated by the donor of the power.

Where the donees of an implied trust are sufficiently identified and there has been a default of an exercise of a power, the property should be divided equally among the beneficiaries.

First Portland National Bank v. *Rodrique, et al.*, 277.

POLICE POWER

See Eminent Domain.

POWERS

See Perpetuities, *First Portland National Bank* v. *Rodrique, et al.*, 277.

PROFITS A PRENDRE

A profit a prendre in gross is treated as an estate or interest in the land itself. It is assignable and may be for life or inheritance.

A right of a profit a prendre involves a right to do anything upon the land in which the right exists that is reasonably necessary for the proper exercise of the right — the exercise of the right must be in a reasonable manner.

An owner of a profit a prendre who exceeds his rights in manner or extent of use is guilty of trespass.

Even though the pre-trial order refers to the misuse of the defendant's rights (i. e. the improper filling in of gravel boring holes) solely in terms of damages, a liberal construction of the pretrial order in the instant case properly preserves genuine issues of fact (whether gravel boring tests were conducted and soil restored in a reasonable manner). The entry of summary judgment is consequently improper.

Beckwith v. *Rossi et al.*, 532.

PUBLIC UTILITIES

Where findings of the P. U. C. are not based upon substantial evidence the decree must fail.

The burden of proving public convenience and necessity are upon the petitioner under Secs. 25 and 20 of R. S., 1954, Chap. 48.

The word "substituted" in R. S., 1954, Chap. 25, need not be construed where the findings of the P. U. C. fail for lack of proof.

In Re Bangor and Aroostook Ry., 213.

The Railway Express Agency even though not itself a physical carrier may under Sec. 25 of R. S., 1954, Chap. 48, substitute highway transportation for rail transportation provided it meets the requirements of public convenience and necessity.

Sec. 25 concerns itself with "rail express" as a carrier and the use of motor vehicles "in connection with the service of such carrier" and service "to be substituted for transportation now performed by or for any such carrier."

Sec. 20 not applicable.

Factual findings of the P. U. C. supported by substantial evidence are final.

Re Railway Express Agency, Inc., 223.

The value of the property of a public utility employed by it in intrastate business must be considered, for purposes of rate making, separately and apart from that, if any, employed in inter-state business.

Administrative bodies have no right to exercise adjudicatory or quasi judicial functions on the basis of evidence not before it. (consideration of prior proceedings of P.U.C. improper when not in evidence in instant proceeding.)

The commission has the duty to disclose the method employed to reach the prescribed rates. (Show the amount allocated to cost of fire protection arrived at.)

Calais v. *Calais Water and Power Co. and P.U.C.*, 467.

RAILROADS

See Public Utilities, *In Re Bangor and Aroostook Ry.*, 213.
See Public Utilities, Re: *Railway Express Agency Inc.*, 223.
See Common Carriers.

RAPE

The elements of the crime of rape which the state must prove beyond a reasonable doubt are, (1) carnal knowledge of a female, (2) by force, and (3) against her will.

R. S. Chap. 1954, Chap. 130, Sec. 10.

In the absence of corroboration the testimony of the prosecutrix must be scrutinized and analyzed with great care. If the testimony is contradictory, or incredible, or unreasonable, it does not form sufficient support for a verdict of guilty.

Where there are no physical facts to testify to force or resistance and testimony as to fear (as a compelling reason for submission) is meager, there remains doubt and uncertainty.

State v. *Field*, 71.

RATES

See Public Utilities, *Calais v. Calais Water and Power Co. and P.U.C.*, 467.

REAL PROPERTY

See Profits a prendre.

REAL ESTATE

See Brokers.

RECORD

See Appeal, *Gibson* v. *McMillin*, 239.

RULES OF COURT

See M.R.C.P.

SALES

See Infancy.

SCHOOLS

See Education.

SINCLAIR ACT

See Education.

SOVEREIGN IMMUNITY

The doctrine of sovereign immunity extends to the Maine Turnpike Authority.

Statutory authority to "sue" and "be sued" does not result in waiver of sovereign immunity in tort cases involving liability to the traveler for a defective highway.

Previous litigation involving torts in the nature of nuisance and situations analogous to takings by eminent domain, where the issue of immunity was not raised, are not precedent for defective highway cases.

Sovereign immunity in situations like the instant case is long established and changes should come from the Legislature.

Nelson v. *Maine Turnpike Authority*, 174.

SPECIFIC PERFORMANCE

Equitable relief in the nature of specific performance cannot be had where the negotiations entered into between the parties never developed into a contractual relationship. Whether the parties entered into a contract or were merely negotiating is a question of intention.

Masselli v. *Fenton*, 330.

STATUTES CONSTRUED

PRIVATE AND SPECIAL LAWS

P. and S. L. 1959, Chap. 150,
Winthrop v. *Foster et al.*, 22.

GENERAL LAWS

R. S., 1954, Chap. 10, Sec. 22,
Winthrop v. *Foster et al.*, 22.

R. S., 1954, Chap. 17, Secs. 2-4,
Hunnewell Trucking v. *Johnson*, 338.
Bonnar-Vawter Inc. v. *Johnson*, 380.

R. S., 1954, Chap. 17, Sec. 29,
Bouchard et al. v. *Johnson*, 41.

R. S., 1954, Chap. 23,
Williams v. *State Highway Comm.*, 324.

R. S., 1954, Chap. 41, Sec. 111,
Blackstone et al. v. *Rollins et al.*, 85.

R. S., 1954, Chap. 44, Sec. 18,
Calais v. *Calais Water and Power Co. and P.U.C.*, 467.

R. S., 1954, Chap. 45, Sec. 73,
Flood v. *Belfast Ry.*, 317.

R. S., 1954, Chap. 48, Sec. 25, Re:
Railway Express Agency, Inc., 223.

R. S., 1954, Chap. 91, Sec. 28,
State v. *Huff*, 269.

R. S., 1954, Chap. 91A, Sec. 34,
Maine Lumber et al. v. *Mechanic Falls*, 347.

R. S., 1954, Chap. 96, Sec. 89,
Dugan v. *Portland*, 521.

SUMMARY JUDGMENT

The mere denial of plaintiff's title by a defendant (who asserts no information sufficient to form a belief), raises no issue of fact under Rule 56 (e), where plaintiff under oath, in response to interrogatories, asserts his title and recites the name of his grantor, the date and record data of his instrument of title.

A confession and avoidance supported by mere hearsay does not present a genuine issue of fact. Rule 56 (e).

Brawn v. ***Lucas Tree Co., Inc.*, 242.**

TAX LIENS

See Adverse Possession, *Island Falls* v. *A. K. R. Inc.*, 147.

TAXATION

Taxation is the rule, exemption the exception. The claimant has the burden of proving his exemption.

Finding of fact shall not be set aside unless clearly erroneous. Rule 52 (a) M.R.C.P.

Records must be kept in such a manner that the assessor may determine whether the taxpayer is primarily engaged in making sales of ten cents or less, and the tax due, if any. R. S., 1954, Chap. 17, Sec. 29.

Bouchard et al. v. *Johnson*, 41.

Materials and supplies including motor vehicle parts, tires and other materials purchased outside the State of Maine and brought into this State for use upon motor trucks engaged in interstate business are taxable under the Sales and Use Tax Law. R. S., 1954, Chap. 17, Sec. 2 and 4 (as amended).

The imposition of such a tax does not unconstitutionally burden interstate operations.

Personal property in interstate transit is protected from local taxation by the U. S. Commerce clause but where there has been a break in transit for the convenience and business profit of the taxpayer, the property becomes subject to local taxation.

Hunnewell Trucking v. *Johnson*, 338.

Under R. S., 1954, Chap. 91A, Sec. 34, the taxpayers, after notice by the assessors, must furnish a true and perfect list of their poll and estates in order to qualify for an abatement unless he can satisfy them that he was "unable" to do so. "Reasonable excuse" or "good cause" does not meet the statutory standard of "inability."

The requirement of "inability" under the statute is jurisdictional and must be sustainable as a matter of law.

Maine Lumber et al. v. *Mechanic Falls*, 347.

One may be engaged in a business activity with an object of "gain, benefit or advantage" within the meaning of R. S., 1954, Chap. 17, Sec. 2 even though not for profit. The gain, benefit, or advantage may be large or small, direct or indirect.

The charges of a subsidiary corporation for the cost, labor, materials, overhead, depreciation and taxes to the parent corporation for printing plates made in New Hampshire by the subsidiary and used by the parent corporation in Maine were for gain, benefit or advantage within the meaning of the word "business" (R. S., 1954, Chap. 17, Sec. 2.)

There is no provision in the Maine Sales Tax Law which would render the use of printing plates non-taxable on the ground that the transaction constituted a sale of services rather than personal property.

Courts have generally refused to disregard the corporate entity in order to grant relief from taxation at the expense of the state. Transactions between parent and subsidiary corporations, such as in the instant case, are considered in the ordinary course of business.

UNIFORM SALES ACT

Liability on implied warranty under Sec. 15 II of the Uniform Sales Act arises, if at all, by contract and is not dependent upon fault of the defendant.

A "hot dog" containing glass is not merchantable under Section 15 II of the Uniform Sales Act, and the test is whether they were so in fact.

Frankfurts in a sealed plastic bag were sold *by description* within the meaning of Clause II, and the fact that they were sold in a self-service market does not effect the result.

The Uniform Sales Act codified, extended, and liberalized the common law.

Under the Uniform Sales Act there is no "sealed container" exception and the Act in 1923 ended our "sealed container" rule at common law as set forth in the *Bigelow* case.

"Reasonably fit for such purpose" under Clause I, and "merchantable quality," under Clause II are equivalent with respect to food for human consumption. The test is whether the food is fit to eat.

Sams v. *Ezy-Way Foodliner Co.*, 10.

UNIFORM TRUST RECEIPTS ACT

Where asserted or undisputed facts preclude recovery, then the question is one of law and a proper matter for summary judgment.

A commercial bank, which finances the purchase and sale of automobiles for a dealer through the medium of trust receipts, cannot recover from the Bonding Company its losses caused by the dealer's failure to remit proceeds upon sale, since the Exclusion Clause of the "Banker's Blanket Bond" excluded losses suffered as the result of non-payment or default of any loan. This is so even though the dealer's default might amount to larceny and loss from larceny is otherwise covered by the bond.

Construction of insurance contracts containing ambiguities are to be construed most strongly against the insurer.

The word "trustee," as used in the Uniform Trust Receipts Act, is in an artificial sense and does not connote a true equity trustee.

Depositors Trust v. *Md. Casualty*, 493.

VENUE

VICTUALERS LICENSES

WAYS AND WHARVES

The word "land" in P. and S. L., 1959, Chap. 150, includes lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein. R. S., 1954, Chap. 10, Sec. 22.

Findings of fact shall not be set aside unless clearly erroneous. M.R.C.P. 52.

Winthrop v. *Foster et al.*, 22.

WARRANTY

See Uniform Sales Act, *Sams* v. *Ezy-Way Foodliner Co.*, 10.

WILLS

See Perpetuities, *First Portland National Bank* v. *Rodrique, et al.*, 277.

See Trusts, *Canal National Bank Exr.* v. *Chapman et al.*, 309.

WITNESSES

See Ante-Nuptial Contracts, *Wilson* v. *Wilson*, 119.

See Expert Testimony.

WORKMEN'S COMPENSATION

A medical opinion based on hearsay is as objectionable as hearsay itself.

The failure of counsel to request for inspection the production of "reports" from an attorney witness known to be in the witness' possession may result in an abandonment of his position.

Harmless error does not justify the granting of an appeal.

Brouillette v. *Weymouth Shoe Co.*, 143.

WRONGFUL DEATH

The burden of proving a decedent's contributory negligence is upon the defendant.

An $8,000.00 damage award for the widow of an 81 year old retired police captain employed as a contractor's traffic officer is excessive, where decedent's annual pension was $1,234.00 and his employment intermittent and seasonal.

Pecuniary loss to the widow in excess of $5,000.00 is unreasonable under facts of the instant case.

O'Connell v. *Hill*, 57.

Action to recover damages under R. S., 1954, Chap. 165, Sec. 10 (Wrongful Death Act) must be brought in the name of the personal representative of the deceased and the personal representative shall be the one to retain counsel. The attorney in tort claims may properly deduct his reasonable fee before remitting to his client.

A request for specific findings by a referee must be made before entry of the order of reference. Sec. 537. Field & McKusick.

A motion for supplemental findings by a referee comes too late after acceptance of the referee's original report and judgment.

Yeaton v. *Knight Admr.*, 133.