MAINE REPORTS

158

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1962 to DECEMBER 31, 1962

CHARLES B. RODWAY, JR.

REPORTER

AUGUSTA, MAINE
DAILY KENNEBEC JOURNAL
Printers and Publishers

1962

DAILY KENNEBEC JOURNAL
AUGUSTA, MAINE

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

[1] HON. F. HAROLD DUBORD

HON. CECIL J. SIDDALL

[2] HON. HAROLD C. MARDEN

1 Retired December 10, 1962
2 Qualified December 19, 1962

Clerks

HON. FREDERICK A. JOHNSON

HON. ERSKINE L. DODGE

ACTIVE RETIRED JUSTICES

OF THE

SUPREME JUDICIAL COURT

[3] HON. EDWARD P. MURRAY

3 Retired September 21, 1962

JUSTICES OF THE SUPERIOR COURT

---

[1] HON. HAROLD C. MARDEN
HON. RANDOLPH A. WEATHERBEE
HON. LEONARD F. WILLIAMS
HON. ABRAHAM M. RUDMAN
HON. CHARLES A. POMEROY
HON. JAMES P. ARCHIBALD
HON. ARMAND A. DUFRESNE, JR.
HON. THOMAS E. DELAHANTY
HON. WILLIAM S. SILSBY
[2] HON. JAMES L. REID

1 Elevated to Supreme Judicial Court, December 19, 1962
2 Qualified, December 28, 1962

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

CHARLES B. RODWAY, JR.

TABLE OF CASES REPORTED

A

B

C

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

A. WILLMANN & ASSOCIATES
vs.
JOSEPH PENSEIRO

Oxford. Opinion, January 12, 1962

Partnership. Assignments.
Accounting. Equity. Joint Venture.
Abandonment.

Findings by a sitting justice stand unless clearly erroneous.

The rights as between joint ventures are governed by practically the same rules as govern partnerships.

The sale or mortgage by a partner of his interest passes only what remains of his share after payment of partnership debts and adjustment of the equities of the partners.

A joint enterprise is not ended by an assignment for security; but an outright disposal of one's entire interest, not by way of pledge or mortgage, destroys the arrangement, whether of partnership or of joint adventure.

ON APPEAL.

This is a bill in equity for an accounting and settlement of a partnership or joint adventure. The case is before the Law Court upon appeal from a decree ordering the requested relief. Appeal denied. Case remanded for further proceeding in accordance herewith.

Albert Beliveau, for plaintiff.

William E. McCarthy, 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 by assignees of Kenneth M. Phillips against Joseph Penseiro for an accounting and settlement of a partnership or joint adventure of Phillips and the defendant in a housing development. The sitting justice ordered an accounting to be taken with the conveyance of a one-half interest in land known as Woodland Acres by the defendant as the court might direct, and issued an injunction against the sale by the defendant of lots in Woodland Acres without the consent of counsel for the parties.

The issues are:

FIRST—Was the agreement between Phillips and the defendant assignable? If not, the plaintiffs have no standing in this suit.

SECOND—Did Phillips abandon the partnership or joint adventure before the present suit was brought in November 1957? If the partnership or joint adventure was so abandoned, then the assignees of Phillips have no claim against the defendant. They neither have nor assert greater rights than Phillips possessed. The stream rises no higher than its source. If, however, the agreement was assignable and the enterprise was not abandoned, then the plaintiffs are entitled to an accounting with suitable adjustments for the protection of the interests of the parties with proper allowance of profits and charges for losses. *Waldo Lumber Co.* v. *Metcalf*, 132 Me. 374, 171 A. 395.

The findings of fact of the sitting justice stand unless clearly erroneous. *LeBlanc* v. *Gallant*, 157 Me. 31, 40, 172

A. (2nd) 74; *Wilson* v. *Wilson,* 157 Me. 119, 133, 170 A. (2nd) 679; *Gibson* v. *McMillin,* 157 Me. 239, 170 A. (2nd) 414; Maine Rules of Civil Procedure, Rule 52 (a).

The facts may be summarized as follows:

In May 1955 Phillips interested the defendant in joining with him in a housing development in Rumford. Phillips had the opportunity to obtain the land; the defendant had the money. The parties orally agreed to develop the land in lots for sale under terms later set forth in the written agreement of December 19, 1955. The land was "jointly purchased" under this arrangement in the name of the defendant.

During 1955 Phillips directed grading and labor on the land and sold lots together with the defendant under the name of Somerset Real Estate Company. In June 1955 the Company advertised "Rumford's biggest land sale" in a local newspaper over the names of both Phillips and the defendant.

In December 1955 the defendant assisted Phillips in borrowing money on the security of the latter's interest in the development. On December 19, 1955, Phillips and the defendant entered into a written agreement to the effect that they had "jointly purchased a tract of land" for $10,000 paid by the defendant, that the defendant and Phillips "will do all things necessary to sell the land," that "the net profit shall be paid (to the defendant) until he has received the sum of ten thousand dollars, which he has paid for said property," and that "the net profit for any land sold after that shall be equally divided." It was also agreed "that nothing in this Agreement shall be interpreted to mean that there exists any Partnership of Joseph Penseiro and Kenneth M. Phillips in any other business activity."

On the same date the agreement was assigned by Phillips to one Dickson with the following provision: "This assign-

ment is to be null and void when the said Kenneth M. Phillips has paid to the Casco Bank & Trust Company, a certain note (due June 1, 1956 and) . . . endorsed by the said Thomas L. Dickson, Sr." Apparently the obligation was paid and the Dickson assignment ended prior to the Willmann assignment hereafter mentioned. In brief, on December 19, 1955, Phillips borrowed money on the security of his interest with the knowledge and consent of the defendant.

On May 26, 1956, Phillips assigned to A. Willmann & Associates (which appears to have been a partnership) his interest in the agreement of December 19, with the provision "This assignment is to be null and void when the said Kenneth M. Phillips has paid to the said A. Willmann & Associates a certain note signed by said Kenneth M. Phillips and dated May 26, 1956." The note called for payment of $8,500 without interest, or "the net profits earned by Kenneth M. Phillips as the result of the limited partnership agreement."

The defendant had no knowledge of the second assignment of May 1956, that is, the assignment to A. Willmann & Associates, until he was approached by one Barrett, a partner of the assignee in January 1957. The defendant did not desire to be associated in the enterprise with the plaintiff A. Willmann & Associates, a Maine corporation and successor to the assignee of like name, and did not consider the assignment valid insofar as he was concerned. As the sitting justice stated: "In this respect the defendant was correct as no one had the right to make him become a partner or joint adventurer with a stranger with whom he did not care to be associated."

On November 14, 1960, Phillips made an outright assignment to the plaintiff Maxwell A. H. Wakely of his interest "in a partnership with Joseph Penseiro . . . , as evidenced by a partnership agreement between me and said Penseiro

dated December 19, 1955, subject however, to a prior assignment to A. Willmann & Associates. . . ." The defendant had no notice of this assignment when the cause was heard later in November 1960. By agreement, Wakely was made a party plaintiff and the bill amended accordingly.

On May 24, 1956, the defendant in a letter to Phillips with the salutation "Dear Kenny" listed the lots which had been sold. Phillips from early 1956 did little in connection with the development. He was at that time in the contracting business and was engaged in work in and about Lewiston. In October 1956 Phillips filed a petition in bankruptcy listing his interest in the Woodland Acres development as an asset and also his debt to A. Willmann & Associates. The trustee in bankruptcy disclaimed any interest therein. In November 1956 the Somerset Real Estate Company bank account was closed by the defendant.

Whether Phillips and the defendant were in partnership or were engaged in a joint adventure is not for our purposes material. In either event, each owed to the other the obligations of a fiduciary, and further, each was entitled to an accounting of the enterprise.

> "Joint adventure is not identical with partnership but is so similar in its nature and in the contractual relations created thereby that the rights as between the adventurers are governed practically by the same rules that govern partnerships."
>
> *Simpson* v. *Richmond Worsted Spinning Co.*, 128 Me. 22, 29, 145 A. 250. Cf *Allen* v. *Kent*, 153 Me. 275, 136 A. (2nd) 540.

The sitting justice found "that the two first assignments were in the nature of a pledge or mortgage and that the assignment to Wakely was an outright one, resulting in a dissolution of the previously existing contract, whatever

may have been its nature, between Phillips and the defendant." The finding is clearly justified on the record.

The first and second assignments to Dickson and A. Willmann & Associates were in terms given as security for loans. The enterprise was not ended by the assignments for security. In *Leader* v. *Plante*, 95 Me. 343, 50 A. 53, in which a partnership was not dissolved by the mortgage, the court said, at p. 346:

> "The sale, or mortgage, by a partner of his interest in the partnership assets passes to the purchaser only his share of what may remain after the payment of the partnership debts and the adjustment of the equities of the partners."

The third assignment to the plaintiff Wakely, however, was a disposal of Phillips' entire interest. Given as an outright transfer, and not by way of pledge or mortgage, it destroyed the arrangement between Phillips and the defendant, whether they were partners or joint adventurers. *Smith* v. *Virgin*, 33 Me. 148, 156; *Cumberland County P. & L. Co.*, v. *Gordon*, 136 Me. 213, 216, 7 A. (2nd) 619.

We conclude that Phillips could properly assign his interest as security and that only on the complete assignment to Wakely did he in terms end the enterprise. Phillips, and no less the defendant, had the right in our view to terminate the partnership or adventure without loss of acquired interests with a suitable accounting.

The defendant goes further and vigorously asserts that Phillips abandoned his contract or agreement with a resulting forfeiture of any interest he had in the enterprise. The precise moment when the defendant claims the abandonment by Phillips took place is not plain. It did not take place in December 1955 when Phillips assigned to Dickson. The defendant testified that from that time he still continued to regard Phillips as the person associated with him.

It was not on May 24, 1956, when the defendant reported upon lot sales to Phillips.

The defendant urges that the abandonment took place by reason of the bankruptcy proceedings. It is to be remembered, that the trustee disclaimed any interest in the property and that not until then did the defendant close the Somerset Real Estate Company bank account. The defendant testified as follows:

> "Q When did you stop regarding Mr. Phillips as being associated with you?
>
> "A When Mr. Barrett came to Rumford early in 1957 and notified me of the assignment. To answer your question in another way, when Mr. Phillips left Rumford and went to work down to Lewiston building these hen houses, I knew that he wasn't doing the work that this agreement specified, that he should do the work of selling lots and improving the area. Since he was not doing the work, then I assumed that he wasn't connected with the Woodla*wn* Acres account."

The defendant from this evidence places the abandonment in January 1957, several months after the assignment to A. Willmann & Associates. This is certainly so unless we take the latter part of his answer which seems to relate to 1956.

The sitting justice, in finding there was no abandonment of the agreement on the part of Phillips, said:

> "During all of this period (of the bankruptcy proceedings), it is also safe to assume that the activities of Phillips in respect to selling any of his assets might well have been limited and restricted. Then this litigation started in the fall of 1957. True, he had agreed to 'do all things necessary to sell the land described in said deed.' However, a question arises as to just how much effort he had to exercise in order to comply with this portion of

> his agreement. Circumstances beyond his control, should not preclude him by forfeiture of his rights to the ultimate enrichment of the defendant."

We find no reason to put aside the finding of the sitting justice that the partnership or joint adventure was not abandoned by Phillips and was not dissolved until the assignment to Wakely in November 1960.

The result would be unchanged if it be said the enterprise was ended at an earlier date. Whenever it was terminated, either Phillips or the defendant would have been entitled to an accounting. This is precisely the situation at the present time.

The plaintiffs stand in place of Phillips in the housing development. It is immaterial to the defendant whether this interest remains with Phillips or has passed to his assignees, provided the defendant is adequately protected in an accounting and settlement. The goal will be to restore to the defendant his original investment, to fix profits and losses, and to divide the net profits one-half to the plaintiffs as their interests may appear, and one-half to the defendant.

The entry will be

Appeal denied.

Case remanded for further proceedings in accordance herewith.

DONALD V. GREEN
vs.
ALLAN L. ROBBINS

Knox. Opinion, January 12, 1962

Criminal Law. Sentence.
Reformatory. State Prison. Transfer.
Administrative Law.
Due Process. Institutions.
Habeas Corpus.

R. S., 1954, Chap. 27, Sec. 73 does not require new or additional court proceedings or orders to effectuate an administrative transfer of a prisoner from the reformatory for men to the Maine State Prison for stated security causes, where there is no change in or enlargement of sentence.

Where the administrative transfer is not for "incorrigibility" under Sec. 75 of the law, the prerequisites of that section are not pertinent.

ON EXCEPTIONS.

This is a petition for habeas corpus before the Law Court upon exceptions. Exceptions overruled.

Christopher S. Roberts, for plaintiff.

Richard A. Foley, Asst. Atty. Gen., for defendant.

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

WEBBER, J. On exceptions. The petitioner for the writ of habeas corpus seeks release from custody at the Maine State Prison. By leave of court he prosecutes these exceptions to an adverse ruling of a single justice below *in forma pauperis*. The points of law raised in his behalf have been ably presented by court appointed counsel.

The record shows that petitioner was convicted of a misdemeanor and sentenced to an indeterminate term in the Reformatory for Men; that during his incarceration there, on certificate of the superintendent of the institution that petitioner "forcibly attempted to escape from said reformatory" and on written approval of the Commissioner of Mental Health and Correction (see change of title, P. L., 1959, Chap. 360, Sec. 2), the petitioner was transferred to the custody of the Maine State prison; and that the maximum time during which the petitioner could legally be held in the Reformatory for Men has not yet expired (R. S., Chap. 27, Sec. 67 as amended).

The petitioner asserts that he is illegally detained in the Maine State Prison in the absence of any new and appropriate action of a court of competent jurisdiction. The determination of the issue tendered rests on the interpretation of certain applicable statutes and in particular upon the meaning of R. S., Chap. 27, Sec. 73.

The pertinent portion of Sec. 73 provides:

> "Whenever any inmate of said reformatory escapes therefrom, or forcibly attempts to do so or assaults any officer or other person in the government thereof, the superintendent may certify that fact on the original mittimus, with recommendation that said person be transferred to the state prison and present it to the commissioner for his approval. Upon approval of said recommendation by the commissioner, said inmate shall be transferred from the reformatory to the state prison, where he shall serve the remainder of the term for which he might otherwise be held at said reformatory, *or at the discretion of the court* he may be punished by imprisonment in the state prison for any term of years. Prosecution under the provisions of this section may be instituted in any county in which said person may be arrested or in the county of Cumberland but in such cases the

> cost and expenses of trial shall be paid by the county from which said person was originally committed, and payment enforced as provided in the following paragraph." (Emphasis supplied.)

The petitioner contends that the words "or at the discretion of the court" were intended to provide an inmate of the reformatory with an opportunity for trial upon the charge of either escape, forcible attempt or assault as the case may be, and that he should be committed to the state prison only after conviction therefor. He also asserts that he is entitled to the protection of R. S., Chap. 27, Sec. 75, dealing with the transfer of "incorrigible" inmates of the reformatory which specifically prohibits the transfer of an inmate as "incorrigible" unless he was originally convicted of a felony.

The words selected from the quoted portion of Sec. 73 for special emphasis, if read in present context, are confusing and tend to obscure legislative intent. Since the court always has discretion as to sentence within the limits imposed by statute, it becomes necessary to determine why the statute should contain a specific reference to "discretion" and whether that reference is intended to make a mere custodial transfer dependent on court action. The explanation is apparent when we review the history of this particular section. As it appeared in R. S., 1930, Chap. 152, Sec. 84, the pertinent portion thereof provided:

> "Any person lawfully committed to said reformatory who escapes therefrom or forcibly attempts so to do or assaults any officer or other person employed in the government thereof shall be punished by additional imprisonment in said reformatory for not more than one year to commence at the expiration of the term for which he might have been held as provided in Sec. 79, *or at the discretion of the court* he shall be punished by imprisonment at hard labor for any term of years. Prosecution under this section may be instituted in

> any county in which said person may be arrested or in the county of Cumberland but in such case the costs and expense of trial shall be paid by the county from which said person was originally committed, and payment enforced as provided in the following paragraph." (Emphasis supplied.)

While Sec. 84 remained in effect a new criminal prosecution was required in every case and the court upon conviction was given a discretionary choice as to sentence. He could order a new and additional sentence to the reformatory or in his discretion he could order sentence to the state prison for any term of years. In this context the words "or at the discretion of the court" have obvious meaning and their purpose can be clearly understood.

P. L., 1941, Chap. 140, Sec. 4 repealed the above-quoted language as it had appeared in R. S., 1930, Chap. 152, Sec. 84 (and which remained unchanged in the second paragraph of P. L., 1933, Chap. 1, Sec. 371), and enacted in place thereof a new section which, except for minor alterations in no way pertinent to this discussion, has now become R. S., Chap. 27, Sec. 73. We are satisfied that the retention in Sec. 73 of the phrase "or at the discretion of the court" was merely the result of inartistic draftsmanship and no significance should be attached to it. It is evident that the legislature in 1941 intended to substitute for the old theory of discretionary choice of sentence vested in the court a new theory of choice of procedural action to be exercised by the institutional authorities. It is significant that the legislature eliminated the possibility of a new sentence to the Reformatory for Men for an additional term. Under the section as it now stands the authorities may determine that nothing more than the need for greater custodial security is involved and may effect a transfer of the inmate to a maximum security institution. Alternatively, the authorities, or in an appropriate case the victim of an assault, may elect to prosecute the offending inmate for his escape,

forcible attempt or assault as the case may be. In the latter event the inmate upon conviction might be sentenced by the court to a term in the state prison. The important and determinative factor is that a mere transfer by the authorities for custodial security reasons involves no necessity for a new conviction or a new sentence. The inmate after transfer is still serving his original sentence to the Reformatory for Men with no enlargement thereof. He is in custody at the prison only because it has security facilities not available at the reformatory. We add that the petitioner retains the same right to consideration for parole which would obtain if he were in custody at the reformatory, although the conduct which led to his transfer would be a proper factor for consideration in determining whether or not parole should be granted. In our view, the legislature acted within its competence in assigning to the superintendent and the commissioner a discretionary power of transfer of custody for security reasons when the original judgment and sentence are in no way changed or affected, and in such case no further action of any court is required.

We do not consider that the provisions of R. S., Chap. 27, Sec. 75 are applicable to the case of one situated as was this petitioner. This section deals with inmates of the reformatory termed "incorrigible." The statute supplies its own definition of incorrigibility. It places in this category any inmate of the reformatory "whose presence therein may be seriously detrimental to the well-being of the institution or who willfully and persistently refuses to obey the rules and regulations of said institution." Upon certificate by the superintendent that an inmate is by him deemed and declared incorrigible within the meaning of this definition, the matter is referred for determination to a "board of transfer" comprising the commissioner, the warden of the state prison and the superintendent of the Augusta state hospital whose approval of a recommendation to transfer

must be unanimous to be effective. In such a case we are dealing with a course of conduct which may not involve any single instance of commission of a separate punishable crime. It is the total effect of such conduct which must be assessed by the board of transfer and it is for this reason that great care must be exercised and unanimous approval obtained from a board which does not include the superintendent of the reformatory. Incorrigibility as defined is in sharp contrast to the conduct which may give rise to administrative transfer under Sec. 73. The latter section deals with three specific acts, any one of which is an offense which might be the subject of a new prosecution, a new conviction and a new sentence. Each is serious in nature and is deemed by the legislature a sufficient ground for custodial transfer on approval by the commissioner alone. Whenever the superintendent is satisfied that any one of these specific acts has occurred, the assessment of the general conduct of the inmate is not involved. We note in passing that incorrigibility itself, as defined by the statute, is made a crime by Sec. 75, but an independent additional sentence therefor to the state prison can only result from a new court action and conviction. In the absence of any prosecution therefor, the incorrigible inmate transferred under Sec. 75, as in the case of one transferred under Sec. 73, would continue serving his original sentence to the Reformatory for Men without change in or enlargement of that sentence. Under Sec. 75, as already noted, one originally sentenced for a misdemeanor could not be transferred to the prison as incorrigible but could be confined there only upon a new conviction for incorrigibility and a new sentence. The petitioner in the instant case was not transferred as incorrigible and the provisions of Sec. 75 have no application to his case.

It appearing from the record that the petitioner was legally and properly transferred to the Maine State Prison under the provisions of Sec. 73 for security reasons only,

and his original term of sentence to the Reformatory for Men not yet having legally expired, we conclude that his petition for the writ of habeas corpus was properly denied.

Exceptions overruled.

EVERETT C. CARLSON
vs.
STATE OF MAINE

Knox. Opinion, January 12, 1962.

Criminal Law.
Motor Vehicles. Reckless Driving.
Pleading. New Rules. Writ of Error.

A criminal complaint charging reckless driving *per* "recklessly, to wit, at great excessive speed on said streets; failure to stop at stop signs at . . . . . streets" charges one single episode of reckless driving and adequately informs the defendant so as to preclude double jeopardy.

Writs of error in criminal cases remain in full force and effect under the New Rules. R. S., 1954, Chap. 129, Secs. 11 and 12.

ON EXCEPTIONS AND APPEAL.

This is a writ of error before the Law Court on exceptions and appeal. Exceptions overruled. Appeal dismissed.

Christopher S. Roberts, for plaintiff.

Peter S. Sulides, for state.

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

WEBBER, J. On exceptions. The plaintiff in error seeks review of an order below dismissing his writ of error. In

addition to his bill of exceptions seasonably filed and allowed, he has lodged an appeal and has indicated uncertainty as to whether the method of review is affected by the adoption of the Maine Rules of Civil Procedure. R. S., Chap. 129, Secs. 1 to 10 inclusive, which provided for the use of writ of error in civil cases, were repealed by P. L., 1959, Chap. 317, Sec. 280. R. S., Chap. 129, Secs. 11 and 12, providing for writ of error in criminal cases, remain in full force and effect. Appellate review thereof is by way of exceptions. The appeal filed in this case was unnecessary and will be dismissed as improvidently taken.

The sole issue here is whether or not the criminal complaint upon which the plaintiff in error was convicted and sentenced charged him with any specific crime. The pertinent portion thereof set forth that "on the 16th day of April, A. D., 1961 at Rockland in the County of Knox aforesaid (the plaintiff in error) did operate a motor vehicle, to wit, an automobile, on a public highway, to wit, Main St., No. Main St., Maverick St., Lake View Dr., recklessly, to wit, at great excessive speed on said streets; failure to stop at stop signs at No. Main and Birch Streets, also No. Main and Maverick Streets.

The plaintiff in error contends that the State has thereby alleged multiple offenses and that therefore the complaint is a nullity.

In *State* v. *Houde,* 150 Me. 469, we held that a charge of operation "in a reckless manner" without more would not suffice; that the respondent was entitled to know from the complaint itself "the facts from which the State will seek to prove the ultimate fact of 'reckless driving.' " However inartistic the draftsmanship in this instance, we are satisfied that the complaint before us satisfies the requirements of *Houde.* The complaint informed the respondent that he must be prepared to defend against an accusation that he

drove on certain designated streets at a "great excessive speed" recklessly and that he drove through two stop signs at identified locations recklessly. The complaint therefore, as required by *Houde*, charges one single episode of reckless driving, an offense prohibited by law, and at the same time adequately informs the respondent of the factual nature of the charge and gives sufficient detail to insure to the respondent future protection against double jeopardy. The writ of error was properly dismissed.

Exceptions overruled.
Appeal dismissed.

GEORGE HAYNES, PETITIONER
FOR WRIT OF HABEAS CORPUS
vs.
ALLAN L. ROBBINS, WARDEN
MAINE STATE PRISON

Knox. Opinion January 22, 1962.

Habeas Corpus.
Threats. *R. S., Chap. 130, Sec. 27.*

The intent of the legislature is clear in R. S., 1954, Chap. 130, Sec. 27, that it intended to make it a crime for one to make, publish or send to another any communications, written or oral, containing a threat to injure the person or property of that person.

The sufficiency of an indictment in terms of its particularity and certainty are not available in a subsequent habeas corpus proceeding after verdict of guilty on the indictment.

Habeas corpus is not a substitute for a motion to quash, writ of error, or appeal.

ON REPORT.

This is a habeas corpus before the Law Court upon report. The petition is dismissed.

Christopher S. Roberts, for plaintiff.

Richard A. Foley, Asst. Atty. Gen., for defendant.

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

TAPLEY, J. On report on agreed statement of facts. This is a procedure in habeas corpus. The petitioner is serving a sentence in the Maine State Prison of not less than 2½ years nor more than 5 years. This sentence was imposed upon him as a result of having been convicted on an indictment charging the crime of threatening by oral communication to injure the persons and property of others. The statute upon which the prosecution was based is Sec. 27, Chap. 130, R. S., 1954, and reads as follows:

> "**Threatening communication.**—Whoever makes, publishes or sends to another any communication, written or oral, containing a threat to injure the person or property of any person shall be punished by a fine of not more than $500 or by imprisonment for not more than 5 years, or by both such fine and imprisonment; and if the communication is written and is anonymous or signed by any other than the true name of the writer, the punishment shall be a fine of not more than $1,500 or imprisonment for not more than 10 years, or by both such fine and imprisonment; and if any such threat is against the person or property or member of the family of any public official, the punishment shall be imprisonment for not more than 15 years."

The case was tried at the September Term, 1959 of the Superior Court, within and for the County of Penobscot. At the time of the trial the petitioner was represented by court appointed counsel. The jury returned a verdict of guilty, whereupon the respondent was sentenced. It is not until

now that the petitioner attacks the sufficiency of the indictment upon which he was convicted.

The pertinent portion of the agreed statement of facts is as follows:

> "The petitioner contends that the indictment states no crime as defined by any law or statute of the State of Maine; that the indictment is a nullity and the conviction and sentence thereunder is illegal and void and his imprisonment thereunder unlawful.
>
> "The respondent contends the indictment states a crime as defined in R. S., Chap. 130, Sec. 27, that he was duly tried by a jury and found guilty and that the conviction, sentence and imprisonment is legal and lawful.
>
> * * * *
>
> "The case is reported on the petition for the writ, the indictment and docket entries of the original case marked Exhibit A hereto annexed, and the mittimus aforesaid marked Exhibit B, the facts taken out at hearing and docket entries and entire record of the case at bar.
>
> "If the contentions of the petitioner are sustained a writ of habeas corpus is to be issued and the petitioner released from imprisonment; if the contention of the respondent is sustained the petition is to be dismissed."

Counsel for the petitioner contends, (1) that the indictment states no crime, as defined by statute; (2) that the indictment is a nullity and the conviction and sentence thereunder is illegal and void.

Counsel for the petitioner argues that the Legislature never intended that the provisions of Sec. 27 of Chap. 130 should be applied to the circumstances of this case as a basis of prosecution; that Secs. 2 and 4 of Chap. 144 are applicable to the facts and not Sec. 27 of Chap. 130. He cites in

support of this contention Sec. 28 of Chap 130 and Secs. 1, 2 and 4 of Chap. 144.

Chapter 130:

"**Sec. 28. Threats to accuse or injure, with intent to extort or compel.**—Whoever, verbally or by written or printed communication, maliciously threatens to accuse another of a crime or offense, or to injure his person or property, with intent thereby to extort money or to procure any advantage from him, or to compel him to do any act against his will, when such offense is of a high and aggravated nature, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than $500 or by imprisonment for not more than 2 years; but when such offense is not of a high and aggravated nature, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than $100 or by imprisonment for not more than 11 months."

Chapter 144:

"**Sec. 1. Power of courts to keep the peace: security required.**—The justices of the superior court and judges of municipal courts, in term time or in vacation, and trial justices in their counties have power to cause all laws for the preservation of the public peace to be kept; and in the execution thereof may require persons to give security to keep the peace and be of good behavior, as hereinafter provided."

"**Sec. 2. Complaint that offense threatened.** Any magistrate described in section 1, on complaint that any person threatens to commit an offense against the person or property of another, shall examine, on oath, the complainant and any other witnesses produced, reduce the complaint to writing and cause the complainant to sign it; and, if on examination of the facts he thinks that there is just cause to fear the commission of such of-

fense, he shall issue a warrant reciting the substance of the complaint, and commanding the officer, to whom it is directed, forthwith to arrest the accused and bring him before such magistrate or court, subject to the provisions of section 9 of chapter 146."

"**Sec. 4. Sureties to keep peace; costs; bound over.**—When the accused is brought before the magistrate and his defense is heard, he may be ordered to recognize, with sufficient sureties, in the sum required by the magistrate, to keep the peace toward all persons and especially toward the person requiring the security, for a term of less than 1 year, and to pay the costs of prosecution; but he shall not be bound over to any court, unless he is also charged with some other specific offense requiring it."

Sec. 28 pertains to extortion. Extortion is the gist of the crime and the verbal, written or printed communication is the manner in which the extortion is committed. *State* v. *Blackington*, 111 Me. 229; *State* v. *Vallee*, 136 Me. 432. Sec. 28 describes an entirely different crime than that of Sec. 27 upon which the prosecution in the instant case is based. Secs. 1, 2 and 4 have nothing whatever to do with a chargeable crime. They are procedures designed by statute for the prevention of crime and to keep the public peace. There is no ambiguity in Sec. 27. The language is plain and understandable. The intent of the Legislature is equally clear that it intended to make it a crime for one to make, publish or send to another any communication, written or oral, containing a threat to injure the person or property of that person. We find no inconsistency in the purposes intended by the provisions of Secs. 27 and 28 of Chap. 130 and Secs. 1, 2 and 4 of Chap. 144. Secs. 27 and 28 of Chap. 130 define crimes, while Secs. 1, 2 and 4 of Chap. 144 prescribe procedures for prevention of crime.

The indictment in the instant case is based on Sec. 27 of Chap. 130. The petitioner, upon arraignment, did not de-

mur to the indictment nor request a bill of particulars but pleaded not guilty and went to trial. The indictment charges, by the use of statutory language, a crime under Sec. 27, but whether the language used alleges the crime with that degree of certainty and particularity that the process of criminal pleading requires, is not at this time available to attack by the petitioner. His right to question the sufficiency of the indictment was lost to him after verdict as the allegations in the indictment allege, in substance, a crime.

> "The respondent contends that the indictment does not allege a crime, although no motion was made to this effect by the respondent at the time of trial.
>
> "Objection is made to the indictment on the ground that each of the seven counts in the indictment alleges 'certain money to the amount of - - - -' and that there is lacking in each count a more particular description of the money. A reading of the indictment will reveal the fact that it alleges a criminal offense of the nature of embezzlement. The respondent should have attacked the indictment at the time of trial because, other than the alleged defect complained of, there were sufficient allegations in the indictment alleging in substance a criminal offense. The absence of an allegation in this indictment of a particular description of the money alleged to have been the subject of the embezzlement does not vitiate the indictment as this omission was cured by the verdict." *State of Maine* v. *Woodworth,* 151 Me. 229, 235.
>
> "A crime is charged. The words of the statute are used in charging the crime, but the plaintiff in error says the words in the statute do not describe the crime with certainty. At the most, the charge is not made with the certainty to which the plaintiff in error is entitled. He could have taken advantage of this by demurring, or he could have waived it by going to trial. He chose the latter

course, so we are not called upon to decide this as if we were doing so upon a demurrer." *Briggs* v. *State of Maine*, 152 Me. 180, 182.

The principle of law applicable to the case at bar is well expressed in 39 C. J. S.—Habeas Corpus—Sec. 20:

> "The right to attack an indictment, information, or complaint by the writ of habeas corpus is more limited than is permitted in motions to quash and in arrest. Habeas corpus ordinarily lies on this ground when, and only when, the act charged does not constitute an offense by reason of the unconstitutionality of the statute declaring it to be an offense, or where there is a total failure to allege any offense known to the law. An indictment or information charging an offense in the language, or substantially in the language, of the statute is not subject to attack on habeas corpus. Whether an act charged is or is not a crime by the law which the court administers is a question within its jurisdiction, and hence not determinable in habeas corpus. Where an attempt has been made to charge an offense of a kind over which the court has jurisdiction, mere inartificiality in pleading, or defects and irregularities in, or insufficency of, the indictment, information, or complaint constitute no ground for relief by habeas corpus, because under such circumstances the detention is not without jurisdiction and is therefore not illegal."

Habeas corpus is an action of limited application and its functions must not be broadened to cover matters not contained within the restricted area of its use.

This court said in *Wallace* v. *White*, 115 Me. 513, 519:

> "If a court has jurisdiction of the person and cause, the fact that the sentence is excessive or otherwise erroneous is not ground for discharge on habeas corpus. A writ of habeas corpus cannot reach errors or irregularities which render proceedings voidable merely, but only such defects in

substance as render the judgment or process absolutely void."

Habeas corpus is not a substitute for a motion to squash, writ of error, nor can it be used instead of an appeal process. *O'Malley* v. *Wentworth,* 65 Me. 128. If the court has jurisdiction over the person and the offense, habeas corpus will not lie. In the instant case these two conditions are present. The indictment is legally sufficient, thereby giving validity to the judgment. Insofar as jurisdiction over the person is concerned, there is no issue.

We conclude the imprisonment of the petitioner is lawful.

Petition for Writ of Habeas Corpus Dismissed.

NAPOLEON DEBLOIS
vs.
JEANNE DEBLOIS

Somerset. Opinion, January 25, 1962.

Divorce.
Voluntary Dismissal.
M. R. C. P. 41. Public Policy.

After commencement of a trial a plaintiff or cross claimant can dismiss the complaint only upon order of court and such terms and conditions as the court deems proper. (Rule 41.)

Courts must encourage rather than discourage dismissal of divorce actions.

Good faith is the criterion to be applied to the motives of the party seeking dismissal. If the motives arise from a dissatisfaction with the outcome of the case the dismissal should be denied.

It is improper to deny a party a hearing on the request for dismissal.

ON APPEAL.

This is an appeal from the denial of a motion to dismiss a divorce action. Appeal sustained. Judgment of divorce

vacated. Cause remanded for hearing on motion to dismiss and such further action as may be determined—all without prejudice to either party.

Roland J. Poulin, for plaintiff.

Jerome J. Daviau, for defendant.

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

TAPLEY, J. On appeal. Napoleon Deblois filed complaint seeking divorce from Jeanne Deblois and asking for custody of their five minor children. Jeanne Deblois filed answer and a cross-complaint praying for a divorce and custody of the children. During pendency of the complaint and cross-complaint the presiding justice ordered temporary care of the four older minor children to be given to the plaintiff and custody of the youngest child to the mother, with the further order to pay the mother the sum of $25.00 per week for her support and that of the minor child in her temporary custody. On December 22, 1960 a hearing was had on the divorce complaint and cross-complaint before the justice below who, after hearing the evidence, reserved his decision.

The points of appellant's appeal are as follows:

"1. That the trial court, on the motion of the defendant, should have made special findings as requested, both of fact and of law, which it did not, in violation of the rules and to the prejudice of the defendant.

2. That the defendant's motion for special findings of fact and of law also contained a request to dismiss both the plaintiff's and the defendant's action, and the defendant's request or motion should have been granted, as a matter of law and public policy.

3. That the presiding justice made an entry of judgment while a motion was pending before him and this was error of law and prejudicial to the defendant.

4. That the defendant filed a motion for dismissal of her action, after finding by the Court, in the nature of a retraxit, which the Court denied, contrary to law and public policy.

5. A motion, filed by the defendant, for relief from judgment, denied by the presiding justice, was not according to law and highly prejudicial to the defendant.

6. That the defendant, in this divorce case, should have been permitted to withdraw her action, on grounds of public policy, if her desire to remain married was properly made manifest to the Court."

We shall first give consideration to appellant's motion to dismiss her cross-complaint.

On February 3, 1961 the justice below sent identical letters to the attorneys representing the complainant and cross-complainant informing them that a judgment of divorce might be filed in accordance with his findings. They were both advised that the cross-complainant, Jeanne Deblois, was entitled to a divorce from Napoleon Deblois for the cause of cruel and abusive treatment, and that the custody of the four youngest minor children would be given to the father as long as their physical custody remained in a paternal aunt. The mother, Jeanne, was awarded the usual rights of visitation. No judgment of divorce was presented to the presiding justice for his signature. On February 7, 1961, after receiving knowledge of the decision in detail, the attorney for the cross-complainant filed a motion with the presiding justice to dismiss the cross-complaint. The motion was dated February 6, 1961. The justice below decided, after hearing all of the evidence, that Jeanne Deblois

was entitled to a divorce but that the welfare of the children required their custody in some other person than their mother. There appeared to be no desire on the part of the cross-complainant to do anything other than to prosecute her cross-complaint until she learned that she would be granted a divorce but not custody of the children. It was then that she requested the court to dismiss her cross-complaint.

The presiding justice prepared and signed a judgment of divorce in accordance with his findings, dating the judgment February 3 to coincide with the date his findings were announced to counsel. He then mailed the executed judgment directly to the Clerk of Courts without notification to counsel. The judgment was entered by the Clerk on February 13, 1961. It is to be noted that the filing of the judgment was six days after the presiding justice had received the motion to dismiss from the attorney representing the cross-complainant. On February 27, 1961, some fourteen days after the judgment was filed, counsel for both parties appeared before the justice below to argue the motion to dismiss. At this time counsel stated they had received no notice of the filing of the judgment, whereupon counsel for the cross-complainant indicated an intention to file a motion for relief from judgment. Hearing on this motion was had on March 6, 1961. The justice below denied the motion for relief from judgment. In denying the motion for relief from judgment he stated, in reference to the motion to dismiss, "If this motion to dismiss is still before the Court, the ruling is one of denial, both upon the law and for the reasons stated below with relation to the current motion for relief from judgment."

The record demonstrates the fact that after receipt of the motion to dismiss, and before hearing date set for the motion, the justice below filed the judgment granting the di-

vorce to the cross-complainant and awarding custody to the paternal aunt of the father.

> "Under our laws a libel for a divorce is regarded as a proceeding in a civil case. Such a suit is a civil suit. Sullivan vs Sullivan, 92 Me. 84.
>
> "The correctness of the ruling that granting or refusing the motion that the libel be 'dismissed without prejudice' is tested, therefore, by the rules adopted and followed for the decision of like motions generally in civil proceedings in court." *Harmon* v. *Harmon*, 131 Me. 171.
>
> "(a) *Applicability to Divorce.* These Rules of Civil Procedure shall apply to actions for divorce, except as otherwise provided in this rule. Maine Rules of Civil Procedure, Rule 80.
>
> "*The rules are in general applicable to divorce and annulment.* A special rule is, however, necessary in order to accommodate practice under the rules to the peculiar necessities imposed by the nature of the rights adjudicated in divorce and annulment." Maine Civil Practice (Field and McKusick) Commentary 80.1. (Emphasis supplied.)

Rule 41 of Maine Rules of Civil Procedure prescribes procedures for dismissal of actions:

> "(a) *Voluntary Dismissal: Effect Thereof.*
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23 (c) and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before commencement of trial of the action, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except

that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

"(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

"- - - - dismissal is permissible in a number of jurisdictions after the submission of the case, or even after the court has announced what it intends to hold, up to the time of judgment." Marriage and Divorce (Keezer), Sec. 865.

"The notation of a judgment in the civil docket constitutes the entry of the judgment; and the judgment is not effective before such entry."

Rule 58 Maine Rules of Civil Procedure.

Rule 41 permits a plaintiff (in this case the counterclaimant) as a matter of right, to dismiss her counterclaim at any time before commencement of the trial of the action. After commencement of trial it can only be dismissed upon order of court and upon such terms and conditions as the court deems proper. The cross-complainant could not dismiss her counterclaim as a matter of right under the circumstances of this case.

It is important to recognize the fact that public policy is concerned in cases involving divorce. Courts must encour-

age rather than discourage the dismissal of divorce actions. Because of the involvement of public policy in divorce actions, they are distinguishable from other forms of litigation. The State is a party to every divorce action and has a well defined interest in the continuance of the marriage relationship on the grounds of public policy. Public policy should be and is one of the prime considerations in considering all procedures relating to divorce and is of extreme importance in its application to all aspects of actions of divorce.

Good faith is the criterion to be applied to the motives of the cross-complainant in judging her motion to dismiss. If her intentions were sincere in that she desired to attempt reconciliation to resume a marital relationship with her husband; to participate with him in making a home for the children so that they can enjoy their natural right to have the love, care and guidance of a father and mother, then her motion should receive favorable consideration. On the other hand, if it is determined her act of filing the motion to dismiss resulted from a dissatisfaction with the outcome of the case, and by this procedure she hoped to vacate the judgment of the court, then a denial of her motion would be in order. The court is entitled to have the respect of litigants in divorce cases to the end that they come to the forum in good faith and with fidelity of purpose.

We are not concerned with the question of what motivated the cross-complainant to file her motion to dismiss, whether it was that she in good faith, " - - - never wanted a divorce from the start" or that she was dissatisfied with the custody decision and was attempting by means of this motion to nullify the entire proceedings.

We are careful to point out that our function is not to determine the motives of the cross-complainant in filing her motion or to decide the merits of it, as these are decisions for the trial judge to make after hearing the evidence.

Our responsibility is to decide the procedural status of the motion and its effect on the rights of the appellant.

Although the cross-complainant did not have the right to voluntarily dismiss her action, she was, however, entitled to a hearing on the merits of the motion. The filing of the divorce judgment by the justice below, after he had actual notice of the pending motion to dismiss, destroyed her legal right to such hearing. In this respect she was aggrieved and suffered prejudice.

The conclusion we have reached on the motion to dismiss makes it unnecessary for us to consider the other questions raised by appellant's points of appeal.

Appeal from denial of motion to dismiss counter-complaint sustained.

Judgment of divorce vacated.

Case remanded for hearing and decision on motion to dismiss counter-complaint with such further action as may be determined; all without prejudice to either party.

EAST BOOTHBAY WATER DISTRICT
vs.
INHABITANTS OF TOWN OF BOOTHBAY HARBOR

Lincoln. Opinion, February 5, 1962.

Statutes. Eminent Domain.
Severance Damages. Good Will.

Grants by government are to be taken most strongly against the grantees.

Claims of exclusive rights in derogation of common rights must be clear and unequivocal.

The construction of legislative acts present matters of law.

Severance damages exist only when the property taken and the property left may fairly be considered one property.

Where a taking involves property practically exclusive, and customers have practically no choice, the element of good will should not be considered, since the court has viewed "good will" with disfavor under such circumstances.

ON REPORT.

This is a petition for declaratory judgment before the Law Court on report. Case remanded to the Superior Court for entry of declaratory judgment in accordance with opinion.

Richard B. Sanborn, for plaintiff.

James L. Reid, for defendant.

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

SULLIVAN, J. Plaintiff and defendant have reported this case upon complaint, answer and agreed statement of facts and seek a declaratory judgment. R. S. (1954), c. 107, §§

38, through 50; c. 103, § 15, P. L., 1959, c. 317, § 69, c. 378, § 67; Maine Rules of Civil Procedure, Rule 72 (b), 155 Me. 573.

Defendant is a town and a municipal corporation. R. S., c. 90-A, § 2. By special enactment of the Legislature and in a proprietary as distinguished from a governmental function (*Woodward* v. *Water District,* 116 Me. 86, 90) it has owned a public, water utility system (R. S., c. 44, § 16, IV, XII, XVI, as amended) and for scores of years has supplied water service to consumers in the Towns of Boothbay and Boothbay Harbor and to customers at Squirrel Island in the Town of Southport.

Plaintiff is a quasi municipal corporation and water district created by the Legislature (P. & S. L., 1959, c. 132) with authority to provide water for users in the southeast portion of Boothbay, in the village of East Boothbay and in a portion of Boothbay Harbor. Its assigned territory is a component of the area served for the same purposes by the defendant.

The agreed statement of facts filed by the parties together with their requests for rulings is as follows:

> "It is hereby stipulated and agreed between the parties hereto as follows:
>
> "1. The parties accept as fact for the purposes of this case the material facts found by the Court in the case of *Inhabitants of Boothbay vs. Inhabitants of Boothbay Harbor, 148 Maine 31.*
>
> "2. Boothbay and Boothbay Harbor are two adjoining and separate municipal corporations.
>
> "3. Boothbay Harbor owns and operates a water system which furnishes water for the area to the town of Boothbay Harbor and serves a portion of the town of Boothbay, all in accordance with the following chapters:

P & S Laws 1889, Chapter 381.
P & S Laws 1891, Chapter 241.
P & S Laws 1895, Chapter 56.
P & S Laws 1903, Chapter 203.
P & S Laws 1923, Chapter 7.
P & S Laws 1937, Chapter 52.

"4. The assets of the Boothbay Harbor Water System within the geographical limits of the East Boothbay Water District, which operates under P & S Laws of 1959, Chapter 132, primarily consist of surface mains and pipes and appurtenances for summer service and include one standpipe therefor, including the land on which the standpipe is located, also approximately 600 feet of underground main which cannot be used for winter service because of its shallow depth. The above lines are about one-half on public roads and one-half on private property.

The lines located on private property are not located on easements but are there by permission and consent of the owner except in the case of five houselots in which there are recorded easements.

"5. The District is presently constructing its water system, which is now half finished and is anticipated to be finished about December, 1961, and this system will furnish water on a year-round basis with underground mains.

"6. The great bulk of the assets of the Boothbay Harbor Water System in the area of the District is of no economic use to the District because of the fact that they are seasonal surface lines which are being replaced by year-round underground mains. However, a portion of the surface pipes of the Town in some of the summer cottage areas could be of use to the District if they could be purchased or condemned at a fair value.

"7. The entire plant and facilities operated by the Boothbay Harbor Water System are wholly-owned by the town of Boothbay Harbor. The water system has derived its revenues from cus-

tomers both in Boothbay Harbor, Boothbay, and other localities in the area that it serves.

"8. In order for the parties to further negotiate under Section 9 of the District's charter or to take steps with reference to eminent domain under Section 10, it is necessary that the following legal issues be decided:

1. Prior to the effective date of the District's charter did the town of Boothbay Harbor have an exclusive franchise for furnishing public water service within the area of what is now the District?

2. Following the effective date of the District charter, does the District now have an exclusive franchise within said area?

3. Is the District required to purchase or to take any of the water facilities of the town of Boothbay Harbor located in the area of the District?

4. If the District takes any of the facilities of said town of Boothbay Harbor located in the area of said District will it be required to pay simply the value of the facilities so taken or will it be required in addition to pay severance damages or consequential damages to other property of the town of Boothbay Harbor located within the area of said District?

5. If it takes any of such facilities within the area of the District may it pay only the value of the facilities so taken or must it also pay severance damages or consequential damages for other assets of the town of Boothbay Harbor located outside of the area of said District?

6. Whether or not the District takes any of the property of the town of Boothbay Harbor within the area of the district, must it compensate the town of Boothbay Harbor for the loss of the Town's investment and business as re-

sult of the town losing those customers within the area of the District?

7. May the Town, if the District does not take its property within the area of said district, remove its property from the area of said District?"

An examination of the creative private and special laws which have imparted life and have conferred authority upon the plaintiff and the defendant corporations demonstrates convincingly that neither plaintiff nor defendant has been endowed with an exclusive franchise to furnish public water service within its respective territory. There is to be found in the legislative history of both parties no affirmative grant of monopoly and this court in a case very similar in its circumstances to the instant case has eschewed mere implication.

"What construction, then, is to be given to the plaintiffs' charter? Does it in terms or by necessary implication confer those exclusive rights asserted by the plaintiffs? While it is the accepted doctrine that all grants are to be construed according to the intention of the parties, yet there are certain general rules of construction by the light of which such contracts are to be examined. These rules are well settled by numerous authorities. One is, that in all grants by the government to individuals or corporations, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. Another rule is, that one who claims a franchise or exclusive right or privilege in derogation of the common rights of the public, must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it by equivocal or doubtful provisions, or probable inferences. 'Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The

affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare.' Fertilizing Co. v. Hyde Park, 97 U. S. 666. 'Repeated decisions of this court,' remarks Mr. Justice Clifford, in Holyoke v. Lyman, 15 Wall. 512, 'have established the rule, that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation and acts extending the privileges of corporate bodies are to be taken most strongly against the corporation' - - - -

"There was no surrender on the part of the state of the right to grant other franchises of a similar character, if the interests or necessities of the public required it; - - - -

"The plaintiff's charter was was granted after the enactment of the general statute of 1831, c. 503, (R. S. c. 46, § 23,) reserving to the legislature the power to amend, alter or repeal at pleasure all acts of incorporation afterwards passed, as if they contained express provision to that effect, unless there should have been inserted therein an express limitation to the contrary. - - - -"
Rockland Water Co. v. *Camden and Rockland Water Co.*, 80 Me. 544, 563, 568, 569.

Note: General statute of 1831, c. 503 is now R. S., 1954 c. 53, § 2.

"- - - - The legislature may at any time, according to its own wisdom, grant to the municipalities within which this water system is situated franchises similar to the ones in question. It may grant similar franchises to one or more corporations like the Waterville Water Company or the Maine Water Company. (authorities cited) It has granted similar franchises to this plaintiff, a

municipal district, and has even authorized it to take away from the defendant water company all the franchises it holds within the district and Benton and Winslow. - - - - But the defendants say that the Maine Water Company was 'practically in the enjoyment of an exclusive franchise' because it had no competitor, although its franchise may not be legally an exclusive one, - - - And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. That fact is one of the characteristics of the going business, and may enhance its value. We are considering now only the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a difference between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value - - -

"Again, the charters under which the company operates are subject to repeal by the Legislature. R. S. c. 46, § 23 (now R. S. 1954, c. 53 § 2) The franchises are not perpetual and irrevocable. It may be that it is extremely unlikely that the Legislature would repeal the charters, without providing for compensation in some way. The probabilities are fairly open to consideration. But the legal condition exists. It is a factor to be considered for what it is worth."

Kennebec Water Dist. v. *Waterville*, 97 Me. 185, 206.

The plaintiff is "authorized to acquire by purchase *all or part* of the entire plant, properties, franchises, rights and privileges owned by Town of Boothbay Harbor Water System (defendant) located within the area served by the East Boothbay Water District (plaintiff) - - - - and said company (defendant) is hereby authorized to sell - - - - to said dis-

trict" (plaintiff) P. & S. L., 1959, c. 132, § 3. (Italics supplied.)

"In case the said trustees (plaintiff) fail to agree with the Town of Boothbay Harbor Water System (defendant) upon terms of purchase, then said water district (plaintiff) - - - - is hereby authorized *to take said properties, interest and franchises* of said Town of Boothbay Harbor Water System (defendant) *as set forth in section 9.*" P. & S. L., 1959, c. 132, § 10. (Italics supplied.)

The plaintiff is authorized to have appraisers fix the valuation "*of the plant, property and franchises*" of the defendant. *id.* (Italics supplied.)

The appraisers shall fix the valuation of "*said plants, properties and franchises.*" *id.* (Italics supplied.)

On payment, etc., by the plaintiff the "*said plant, properties and franchises* of" defendant become the property of plaintiff. *id.* (Italics supplied.)

Thus Section 9 of the Act of 1959 *authorized* a purchase by plaintiff of *all or part* of defendant's assets located in plaintiff's terrain of service. For want of a meeting of the minds of buyer and seller the Legislature *authorized* but did not prescribe a process of condemnation. Condemnation, if any there should be, was to be effected by the sole origination of the plaintiff. The properties to be appropriated by the plaintiff were described in section 10 referentially "as set forth in section 9." The language of section 10 as painstakingly corelated with that of section 9 preponderates very appreciably to the conclusion that in section 10 the Legislature purposed to designate "the entire plant, properties, rights," etc. of the defendant rather than to denote "all or part of the entire plant," etc. Such is the abiding and persistent impression engendered. And were that objective reality not so, the contrary would be

regrettable and grievous. An election accorded to the plaintiff to condemn selectively a portion of the defendant's franchises or assets in plaintiff's domain and to prescind at will from the remainder of such properties could be obviously productive of resultants very partial to the plaintiff and sacrificial or even crippling for the defendant whose license to function in plaintiff's territory has not been repealed.

Save for what we are to glean from the text of the Act of 1959 the record in this case affords no information of the factors and rationale which decided the Legislature to enfranchise the plaintiff's operation in part of the region of the defendant's water system. The court accredits the legislative motives as sufficient and justified. The lawmakers tendered to both District and Town fair leave and scope for a bargain and sale of defendant's localized properties to plaintiff and for an equitable and satisfying meeting of the minds. Beyond that the Legislature perhaps had resolved that rivalry in service or substitution of service was desirable and should be made possible. It is true that the Legislature by conferring upon the plaintiff the privilege of condemning or of foregoing condemnation of all of the defendant's assets so localized was in all practical effect commissioning the plaintiff sole arbiter as to whether defendant should or should not prolong its public water service in plaintiff's zone. The Legislature becomingly and constitutionally assured and secured to defendant fair and equitable worth in the event of a condemnation. The Legislature until such condemnation has not foreclosed defendant's operation in plaintiff's area. Quite possibly the Legislature in the absence of condemnation was conserving to the defendant the resource of supplanting the plaintiff by a regenerated or superior service for the public good or of inducing and accelerating condemnation by efficient service.

With the approbation of and in conformity with the conditions imposed by the Public Utilities Commission defend-

ant would be free to withdraw from the area assigned to the plaintiff. R. S., c. 44, § 48.

The Public Utilities Commission under stated circumstances may order a public utility for a fixed compensation to share with another public utility the use of the former's conduits laid upon or under public ways. R. S., c. 44, § 54.

If the plaintiff does not resort to condemnation, then the defendant here will have suffered no actionable damage.

If the plaintiff elects to condemn it must appropriate and pay the fair and equitable worth of all the franchises and assets of defendant in plaintiff's territory with the single exception of defendant's corporate franchise.

Kennebec Water District v. *Waterville,* 97 Me. 185, 199, 209, P. & S. L., 1959, c. 132, §§ 9, 10.

Construction of the legislative acts enumerated in the agreed statement of these parties litigant is a matter of law. Actual damages and the value of franchises and assets are a judicial question. Little or no evidence upon this latter issue is before us.

As for the incidence of severance damages this court for present purposes has adequately stated the norm:

> "- - - - That rule applies only when the property taken and the property left may fairly be considered one property, and not when they are separate and distinct - - - -"
>
> *Kennebec Water District* v. *Waterville, supra,* 212.

The property to be considered under existing circumstances must be regarded and appraised as having the characteristics of a going business in operation in plaintiff's territory with all proper considerations such as, without limitation thereto, the properties and franchises in themselves and as a source of income, rates, net income and profit present and prospective.

Kennebec Water District v. *Waterville, supra,* 206 through 220.

Good-will, however, this court has viewed with disfavor and somewhat peremptory logic:

> "- - - - But the term 'good-will' may be misleading. Lord Eldon said that good-will is nothing more than the probability that the old customers will resort to the old place. Crutwell v. Lye, 17 Ves. Jr. 335. See Flagg Mfg. Co. v. Holway, 178 Mass. 83. Under any possible definition it involves an element of personal choice. This phrase is inappropriate where there can be no choice. So far as the defendants' system is 'practically exclusive,' the element of 'good-will' should not be considered. Bristol v. Water Works, supra, (19 R. I. 413)."
>
> *Kennebec Water District* v. *Waterville, supra,* 216.

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

MAINE EMPLOYMENT SECURITY COMMISSION
vs.
FRANK CHAREST D/B/A
SANFORD AND SPRINGVALE CLEANERS

Kennebec. Opinion, February 9, 1962.

Taxation.
Unemployment Taxes. Penalties.
Constitutional Law. Repeal. Emergency Saving Clause.

Unemployment tax assessments at the maximum percent due to late payment are not penal in nature. A low tax rate based upon experience record is a condition to be met by an employer for entitlement to the privilege of paying at the lower rate.

Whether a statute imposes a penalty is not necessarily controlled by the designation given to it by the legislature.

A repeal of a tax statute does not operate to remit taxes accrued under the repealed section even though no saving clause is enacted.

ON APPEAL.

This is an action of debt to recover tax contributions before the Law Court upon appeal. Appeal denied. Judgment for the commission in accordance with opinion. So ordered.

Milton L. Bradford, Asst. Atty. Gen.,
Frank A. Farrington, Asst. Atty. Gen., for plaintiff.

J. Armand Gendron, for defendant.

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

DUBORD, J. This matter is before us upon an appeal from a decision of a Justice of the Superior Court in a case heard upon an agreed statement of facts.

The defendant (hereinafter referred to as "Employer"), was during the period involved an employer under the provisions of the Maine Employment Security Law. The Maine Employment Security Commission (hereinafter referred to as the "Commission"), brought an action of debt against the employer under the provisions of § 19 II, Chapter 29, R. S., 1954, seeking to recover contributions alleged to be due from the employer, together with interest at the statutory rates. In a separate count, the Commission also seeks to recover a penalty in the amount of $7.14 assessed under the provisions of the current section of the applicable statute, viz., § 19 I-A, Chapter 29, R. S., 1954.

Included in the amounts sought to be recovered are the following: Item 1, Second Quarter of 1950, $68.76; Item 2, Third Quarter of 1952, $70.34; Item 3, Fourth Quarter of 1952, $137.51; Item 4, Second Quarter of 1953, $160.29; Item 5, Fourth Quarter of 1953, $74.54; Item 6, First Quarter of 1954, $65.63; Item 7, First Quarter of 1955, $134.09, and Item 8, Fourth Quarter of 1955, $117.48.

The writ also includes charges for certain quarters in the year 1957, but it was stipulated that these items have been paid in full by the Employer, without prejudice.

It will be noted that the amount of contributions sought to be recovered total $828.64. The Employer admits that he has failed to pay the assessment based upon his experience rate for certain quarters in a total amount of $318.26. Consequently, he admits liability for this amount, but denies liability for the difference of $510.38.

At this point we digress to explain the manner in which the rate of contributions to be paid by an employer is determined.

Under the provisions of § 17 II, Chapter 29, R. S., 1954, it is provided that each employer subject to the provisions

of the Employment Security Law, shall pay contributions at the rate of 2.7% of the wages paid by him with respect to employment during each calendar year with a proviso that based upon experience classification, the rate may be reduced.

In the instant case because of good experience classification, the employer had been granted rates lower than the rate provided in § 17 II, *supra.*

During the periods for which contributions are being sought from the employer, § 17 IV C, was in effect. This section read as follows:

> "Any employer who under the provisions of this chapter would otherwise be entitled to a rate of less than 2.7% shall nevertheless pay a rate of 2.7% for any quarter with respect to which he was in arrears in the payment of contributions or interest, unless the delay was occasioned by the illness or death of the person in charge of the records of the employing unit or by other unavoidable accident which shall excuse the employing unit from said penalty."

No contention is made that the employer is excused by any of the reasons set forth in the foregoing statute.

The amount of $510.38, above referred to, is the difference between the amount of the contributions computed on the basis of the Employer's experience rate and the amount of contributions computed at the maximum rate of 2.7%, claimed by the Commission because of late payment, or complete failure to pay, on the part of the Employer.

The Employer concedes that he is liable for the amount of $7.14 set forth in the third count of plaintiff's writ. A dispute has arisen concerning the interest which should be assessed against the Employer, and the principal contention of the Employer, in respect thereto, is that he is not liable

for interest on the amounts representing the difference between the contributions computed at his basic experience rate and the increased contributions at the rate of 2.7%.

The principal issue presented and argued by counsel for both parties involves the question of whether or not the increased contributions in the amount of $510.38 are made up of penalties. The Employer contends that this amount represents aggregate penalties and that these penalties are not proportioned to the offense of failure on the part of an employer to pay on the due date and that the statute establishing these penalties is violative of Section 9, Article I, of the Constitution of Maine.

The Commission, on the other hand, argues that these amounts are not penalties and that Section 9, of Article I, of the Constitution of Maine does not apply to the case. The Commission further maintains that the provisions of the statute making it compulsory on the Commission to assess the maximum percent of the contributions, if payment at the experience rate is not made promptly, are not penal in nature. The Commission takes the position that the Maine Employment Security Law makes provision for merit rating, conditioned on payment by the employer on time. The Commission says it is not a penalty, but is a condition to be met by an employer in order that he be entitled to the privilege of paying a lower rate based on a good experience record.

To briefly recapitulate, the Employer concedes that he is liable for the amount of $7.14 as a penalty imposed under the current statute. He admits that he is liable for interest on the amount of $85.95 for the second quarter of 1950, for a period of 36 days. He concedes liability for interest on the assessment of $48.34 for the third quarter of 1952, for a period of 4 days. He admits liability for the assessment in the amount of $56.02, for the fourth quarter of 1952,

with interest from the required date of payment. In like manner, he admits liability for the assessment of $65.30 for the second quarter of 1953, together with interest from the due date. He admits liability for interest on the amount of $59.63 for the fourth quarter of 1953, for a period of 25 days. He admits liability for interest on the amount of $52.49 for a period of 18 days on the assessment for the first quarter of 1954. He admits liability for the assessment of $79.46 for the first quarter of 1955, together with interest from the due date. He admits liability for the assessment of $117.48 for the fourth quarter of 1955, together with interest from the due date and the penalty of 5% prescribed by § 19 I-A, Chapter 29, R. S., 1954. He denies liability for interest upon the increased assessments between his basic experience rate and the maximum rate of 2.7%.

It is essential that we first decide the issue of the nature of the increased assessments brought about by failure to pay, on the due date, the contributions computed at the basic experience rate. Are these increased assessments penalties, as claimed by the Employer, or is an experience rate granted an employer because of a good employment record in the nature of a reward conditioned upon prompt payment, as contended by the Commission?

A study of the applicable statute appears to be in order.

Under the provisions of Chapter 331 P. L., 1943, there was enacted § 7 (D) (3), reading as follows:

> "Any employer who under the provisions of this act would otherwise be entitled to a rate of less than 2.7% shall nevertheless pay a rate of 2.7% for any quarter during which he was in arrears in the payment of contributions or interest, and his rate shall continue at 2.7% for the remainder of the contribution year."

This section was amended with an emergency clause by Chapter 113, P. L., 1945, to read as follows:

> " '(3) Any employer who under the provisions of this act would otherwise be entitled to a rate of less than 2.7% shall nevertheless pay a rate of 2.7% for any quarter with respect to which he was in arrears in the payment of contributions or interest, unless the delay was occasioned by the illness or death of the person in charge of the records of the employing unit or by other unavoidable accident which shall excuse the employing unit from said penalty.' "

We take note of the emergency preamble which read in part as follows:

> "Whereas, if said report and contributions are delinquent, the employing unit is penalized for the entire calendar year rather than for any quarter in which delinquency occurs; and Whereas, the penalty works an undue hardship on delinquent employing units; and should be corrected etc.,"

The foregoing section is repealed by Section 8, Chapter 421, P. L., 1955 and there was enacted a new section to be known as 19 I-A, Chapter 29, R. S., 1954, reading as follows:

> "In the event quarterly contributions are not paid when due, the Commission shall assess a penalty of 5% of the amount of the contributions but such penalty shall not be less than $5 nor more than $100. The Commission may waive such penalty if it finds that the delay was occasioned by the illness or death of the person in charge of the records of the employing unit or by other unavoidable accident which shall excuse the employing unit from said penalty. Provided, however, an extension of time up to 30 days beyond the due date may be allowed by the Commission for good cause upon written request made on or before the due date."

The foregoing section has been in effect since August 20, 1955, and as of August 20, 1955 the previous existing section of the statute, under which the increased assessments

disputed by the Employer were made, was completely repealed.

The issue presented concerning the nature of the increased assessments which the Commission seeks to recover because of the delinquency of the Employer is one of novel impression in this jurisdiction. As a matter of fact, there appear to be no decisions in any jurisdiction upon the point. Counsel have cited none and the only reference we can find is in the Pennsylvania case of *Boyertown Burial Casket Co.* v. *Commonwealth*, 79 A. (2nd) 449, where the court quoted with apparent approval a statement in the opinion of the justice of the Superior Court from which an appeal had been taken, to the effect that "experience rating was a reward and not a penalty."

A study of the available annotations relating to the definitions of "penalties" leads into a labyrinth of doubt and misunderstanding insofar as such definitions may apply to the issue now before us.

In 23 Am. Jur., Forfeitures and Penalties, § 27, we are informed that the words "penal" and "penalty" have many different shades of meaning; that strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. It is said that a penalty is in the nature of a punishment for the nonperformance of an act or for the performance of an unlawful act.

In Section 28 we find the statement:

> "The determination of the question whether a statute imposes a penalty is not necessarily to be controlled by the designation which the legislature has given to it."

We are concerned with the fact that the emergency preamble contained in Chapter 113, P. L., 1945, designated the

increased assessments imposed by the prior existing statute as a penalty, and that the new section itself, enacted with the emergency clause, described the imposition of the increased contribution as a penalty.

A perusal of Section 16, Part Third, Article IV, of the Constitution of Maine, relating to emergency legislation, is of interest, and perhaps furnishes a clue for the action of the legislature in describing the increased assessments or contributions as penalties. Under the provisions of this constitutional mandate, it is essential that there be presented to the legislature, in the case of proposed emergency legislation, reasons in the preamble why the act should go into effect immediately. The foregoing section of the Constitution provides in substance that acts of the legislature shall take effect 90 days after the recess of the Legislature passing it "unless in case of emergency (which with the facts constituting the emergency shall be expressed in the preamble of the act) . . ." In other words it is necessary to recite in the preamble the facts which create the emergency and it is easy to conclude that in the instant case it was necessary to find some fact and recite that fact in the preamble which actually created an emergency. Unless the prior existing legislation was in the nature of a penalty, there probably was no emergency. Then having used the word "penalty" in the emergency preamble it was easy to pass on into the new legislation a definition of it as a penalty.

However, bearing in mind the previously quoted clause that the determination of the question whether a statute imposes a penalty is not necessarily to be controlled by the designation which the legislature has given to it, we conclude that the increased assessments are not in the nature of penalties. Perhaps in a colloquial sense, or in the language of the layman, the increased assessments might well be considered as penalties. However, we are convinced that the decreased rate of assessment, by reason of good expe-

rience rating, is in the nature of a reward or a bonus, subject to prompt payment. That these increased assessments are not to be considered as penalties, under the then existing statute, it seems to us, is also indicated by the fact that an employer who had not received the benefit of a low experience rate was not in any manner penalized for failure to pay on time, other than the general liability for interest from the due date.

Having determined that the increased assessments are not penalties, obviously it is unnecessary to consider the constitutional issue raised by the pleadings and arguments of counsel. However, there arises for consideration and opinion thereon a point which was not raised by counsel for either side, and this relates to the effect of the legislative repeal of Section 17 C, Chapter 29, R. S., 1954, enacted as Chapter 113, P. L., 1945.

This section was completely repealed without any saving clause by the 1955 legislation and the Commission's writ was instituted after the repeal.

Now, what is the effect of the repeal of the statute upon that portion of the action of the Commission which seeks to recover increased assessments? Does this repeal have a retrospective effect which wipes out the liability which the Commission seeks to enforce?

While the general rule appears to be that where a statute is repealed without a re-enactment of the repealed law in substantially the same terms, and there is no saving clause or a general statute limiting the effect of the repeal, the repealed statute, in regard to its operative effect is considered as if it had never existed, such does not appear to be the law in reference to the repeal of a statute providing for taxation.

> "The general rule is that, in the absence of clear legislative intent to the contrary, repealing acts

> are to be given a purely prospective construction * * *. Ordinarily, a repeal of a statute does not operate to remit taxes accrued under the repealed act." 84 C. J. S., Taxation, § 58 c (2).

See also, *State of Maine* v. *Waterville Savings Bank*, 68 Me. 515.

In determining the tax liability in the case before us we start with the premise that the tax on each employer, subject to the act, was at the rate of 2.7%. This is provided by Section 17 II, Chapter 29, R. S., 1954, which reads as follows:

> "Each employer shall pay contributions at the rate of 2.7% of wages paid by him with respect to employment during each calendar year, except as otherwise provided in subsection IV of this section."

Subsection IV is the one which provides for a reduction in the contributions or tax under certain conditions. In other words under the provisions of Section 17 II, *supra*, the employer in the instant case was subject to a tax of 2.7% to which he could secure a reduction based on a good experience rating provided he complied with the law and paid the contributions or tax on time. This he failed to do, so that liability against him at 2.7% became fixed and vested before the repeal of the statute with which we are now involved.

There is nothing to indicate that it was the intention of the legislature to remit any liability for taxes which had already accrued at the time of the enactment of the repealing statute.

It is, therefore, our opinion that when the employer failed to comply with the provisions of the statute, his tax liability became fixed and that he is now liable.

The appeal is denied and the cause remanded to the Superior Court for an entry of a judgment in favor of the Commission in accordance with this opinion.

So ordered.

EMILE BOULET AND ELEANOR BOULET
vs.
CARROLL BEALS

York. Opinion, February 9, 1962.

Slander. New Rules. Truth. Privilege. Damages.

A statement that one is unethical in the manner of conducting his business, unless true or privileged is the basis for an action of slander. (Restatement Defamation Sec. 573.)

The defenses of privilege and truth should be pleaded specially as affirmative defenses. (Rule 8 (c) Sec. 8.20 M.R.C.P.): cf M.R.C.P. 8 (e) (1); cf M.R.C.P. 15 (b) case tried on theory of justification without special plea.

Where a defendant fails to establish the truth of his slanderous remarks the defense of privilege requires both good faith and reasonable ground for believing in the truth.

The theory of damages in actions for defamation is fair and reasonable compensation and no more.

In the absence of malice and special damages, a slander case is based upon mental distress and humiliation.

ON APPEAL.

This is a slander action before the Law Court upon appeal. If the plaintiff remits all of the judgment in excess of $1,000.00 within 30 days after the rescript is received, the appeal is denied; otherwise the appeal is sustained and a new trial is granted.

Waterhouse, Spencer & Carroll, for plaintiffs.

J. Armand Gendron,
Harry S. Littlefield, for defendant.

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

DUBORD, J. This case is before us upon an appeal from a judgment rendered in an action for defamation by slander.

The complaint alleges in substance that the plaintiffs were proprietors of a motel business in the Town of Wells, in the County of York, and State of Maine, doing business under the name and style of Ocean Breeze Motor Court. The complaint contains the usual allegations of prior good reputation. The defendant was an employee of the Wells Chamber of Commerce and as such served in the information booth. It is alleged that on July 22, 1960, in the presence of several persons, the defendant in discussing the motel conducted by the plaintiffs with prospective customers said: "Don't go over there unless you have to, because they are unethical and if you have to go there, get a receipt or they will make you pay twice." Allegation is made of injury to the business reputation of the plaintiffs and loss of business is claimed.

The defendant, in his pleadings, denied that he used the word "unethical" and averred that he had no intention of injuring or impairing the business reputation of the plaintiffs and that his statements were made on the basis of information on file with the Wells Chamber of Commerce; and that it was his duty as representative of the Chamber of Commerce to advise and give information truthfully and as impartially as possible.

Upon trial, the jury returned a verdict for the plaintiffs in the amount of $5,000.00.

Truth was not pleaded as a defense, nor suggested at a pre-trial conference. Similarly privilege was not pleaded by the defendant, unless his allegation that any statements he made concerning the defendants were made in the line of his duty as an employee of the Wells Chamber of Commerce can be considered as pleading this affirmative defense. At a pre-trial conference, the question of privilege was not discussed.

Following the entry of judgment in the amount of $5,000.00, the defendant addressed a motion for a new trial to the presiding justice.

In his findings and order upon the motion presented to him, the presiding justice pointed out that the defense of privilege had not been advanced, but that, nevertheless, he considered this issue in his decision on the motion. He sustained the motion and granted a new trial unless the plaintiffs remitted all of the verdict in excess of $1,750.00. The plaintiff accepted this finding and remitted all damages in excess of $1,750.00. Judgment was then entered for the reduced amount.

The defendant then filed an appeal based upon the usual grounds that the verdict and judgment was against the law and the charge of the justice, and against the evidence and the weight thereof. The appeal is also based upon an allegation that the statement complained of by the plaintiffs was protected under the doctrine of qualified privilege; that it was true and that the damages as reduced by the presiding justice are still excessive.

In the action now before us, the plaintiffs charge that defendant slandered them by making false statements to the effect that they were unethical in the manner of conducting their business. The law seems to be clear that such a statement, unless true or privileged, is the basis for an action for damages.

> "One who falsely and without a privilege to do so, publishes a slander which ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, profession, or of his public office whether honorary or for profit, is liable to the other." Restatement of the Law of Torts, Defamation, § 573.

See also, 33 Am. Jur., Libel and Slander, § 68; *Barnes* v. *Trundy*, 31 Me. 321; *Orr* v. *Skofield*, 56 Me. 483; *Pattangall* v. *Mooers*, 113 Me. 412, 94 A. 561.

Now what of the defenses of privilege and truth? It is contended by the plaintiffs that these defenses are not open to the defendant at this time, because of failure on his part to plead specially these affirmative defenses.

We, therefore, ask ourselves this question. Is it necessary to specially plead privilege and truth as affirmative defenses?

Insofar as truth is concerned it was decided many years ago by this court in *Taylor* v. *Robinson*, 29 Me. 323, that under the general issue, the defendant is not permitted to give truth in evidence, as a defense to the suit, or in mitigation of damages.

M.R.C.P. 8 (c) relating to affirmative defenses reads in part as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence in actions for negligently causing death or for injury to a person who is deceased at the time of trial, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any*

> *other matter constituting an avoidance or affirmative defense.*" (Emphasis supplied.)

It is to be noted that privilege and truth in actions for defamation of character are not specifically listed, but in the commentary covering M.R.C.P. 8, in Field and McKusick, § 8.20 we find the following:

> "Other defenses that should be affirmatively set forth are those that do not 'tend to controvert the opposing party's prima facie case as determined by . . . substantive law . . .' For example, truth as a defense to an action for slander has been held in Maine to be an affirmative defense as has justification of any sort. These matters will also be affirmative defenses under the catch-all provision of Rule 8 (c).

See also, Barron and Holtzoff, Federal Practice and Procedure § 279, which lists truth and privilege as affirmative defenses which should be pleaded.

See also 51 A. L. R. (2nd) Defamation, Page 567, where it is stated: "Under the practice of many jurisdictions, privilege and fair comment are regarded as affirmative defenses which must ordinarily be specially pleaded in order to be available."

We conclude, therefore, particularly for future guidance of attorneys, that truth and privilege, to be available as matters of defense, must be pleaded affirmatively. Counsel for the defendant in an endeavor to support his contention that these defenses need not be pleaded affirmatively calls attention to Rule 8 (e) (1) to the effect that no technical forms of pleadings or motions are required. However, we are constrained to state that this particular sentence is not to be construed as voiding all necessity on the part of pleaders to comply with simple requirements of pleading as set forth in our New Rules of Civil Procedure, which have now been in effect for more than two years.

We are cognizant of the impact of M.R.C.P. 15 (b) covering situations where issues not raised by the pleadings are tried by express or implied consent of the parties, and a study of the transcript of the evidence in the case before us might lead to a conclusion that even though truth and privilege were not pleaded, the case was in fact tried upon that theory with consent of the parties involved. See 51 A. L. R. (2nd) § 6 c., Page 571 to the effect that it has been held that where the case is tried on the theory that the defense of privilege is in issue, the defendant may have the benefit of that defense, although he had failed to properly raise it in his pleadings.

A study of the charge of the presiding justice at the trial of the cause shows that he instructed the jury upon the law relating to truth as a defense even though it had not been pleaded. The finding of the jury in favor of the plaintiffs may well have determined as a matter of fact, the issue of truth.

Upon the question of privilege, if we are to conclude that the defendant may avail himself of that defense at this time, we adopt the finding of the presiding justice set forth in his order relating to the motion for a new trial, to the effect that the defense of privilege had not been sustained by the evidence in the case.

> "To be privileged, the words must have been published without actual malice, in an honest belief of their truth, and with that belief based upon reasonable or probable cause after a reasonably careful inquiry." *McNally* v. *Burleigh, et al.*, 91 Me. 22, 23, 39 A. 285.
>
> "The defendant's privilege is a qualified privilege and is a defense only if the defamatory words were spoken in good faith, without actual malice (*Sweeney v. Higgins*, 117 Maine, 415) and with reasonable grounds for believing their truth.

> (*Toothaker v. Conant*, 91 Maine, 438; *Elms v. Crane*, 118 Maine, 264). The defendant was not actuated by malice. What he said was uttered in good faith. But the case does not disclose that he had any reasonable grounds for accusing the plaintiff of stealing." *Hodgkins* v. *Gallagher*, 122 Me. 112, 113, 119 A. 68.

In returning a verdict for the plaintiffs, the jury must have believed the evidence adduced by them to the effect that the defendant had in fact published the alleged false and slanderous statement concerning their business. We have already indicated that even though the defense of truth was not pleaded, that upon instructions of the presiding justice concerning the law relating to truth as a defense, the jury resolved this issue in favor of the plaintiffs. Moreover, we have also pointed out that a study of the evidence convinces us that the defendant is not entitled to the defense of privilege. While he may have believed in the truth of the statements which he made, it is clear that he did not act as a prudent man in checking the facts upon which this serious and false statement was made.

Two questions remain for determination. Does the evidence support a jury verdict for the plaintiff; and, if so, are the damages awarded, even as reduced by the presiding justice, excessive?

The defendant seeks to overturn the verdict and on this issue the burden rests on him.

We said in the very recent case of *Knowles, et al.* v. *Jenney*, 157 Me. 392, 399, 173 A. (2nd) 347:

> "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."

Applying the foregoing rules to the case before us, we are of the opinion that upon the evidence the jury verdict for the plaintiffs was warranted and justified.

As previously pointed out, it is the contention of the defendant that the damages, even after their reduction by the presiding justice, are excessive.

The theory of damages in actions for defamation is fair and reasonable compensation and no more. See *McMullen* v. *Corkum*, 143 Me. 47, 54; 54 A. (2nd) 753.

The elements of damage in cases of this type are well set forth in *Davis* v. *Starrett*, 97 Me. 568; 55 A. 516, and in *Elms* v. *Crane*, 118 Me. 261, 265; 107 A. 852.

Giving consideration to the evidence in the instant case based upon the rules prescribed in the foregoing opinions of this court, we conclude that the damages awarded are to some extent excessive. There is no proof of actual malice

on the part of the defendant so that punitive damages are not allowable. Neither is there any proof of actual special damage. Plaintiffs' case is, therefore, based upon mental distress and alleged humiliation, and injury to their reputation. In view of all the circumstances of the case, as substantiated by the record, we are of the opinion that the amount of $1,000.00 would fairly compensate the plaintiffs.

The entry will be:

If the plaintiffs remit all of the judgment in excess of $1,000.00, within 30 days after the rescript in this case is received, the appeal is denied; otherwise the appeal is sustained and a new trial granted.

STATE OF MAINE
vs.
VINCENT E. DUGUAY

Androscoggin. Opinion, February 28, 1962

Criminal Law. Murder. Evidence. Jury. Malice. Implied.

Photographs of a deceased's brain are admissible when in the sound discretion of the court they are relevant to the issues and their probative force is not outweighed by the danger of prejudice to the defendant.

Color is a fact to be considered in determining admissibility.

Prejudice will be presumed from a separation of a jury and conversation with a third party. The presumption may be rebutted by clear and convincing proof.

The mere presence of officers in the jury room during deliberations (for the purpose of bringing food) does not render the verdict re-

versible where the presiding justice finds no suspicion of prejudice. Clear and convincing proof of "no prejudice" does not require testimony of all jurors, especially in the absence of a request for such testimony.

Unlawful killing with nothing to explain, qualify or palliate the act, implies malice aforethought.

ON EXCEPTIONS, APPEAL AND MOTION FOR NEW TRIAL.

This is a criminal action for murder before the Law Court upon exceptions. Appeal and Motion for New Trial. Exceptions overruled, appeal dismissed. Motion for New Trial denied. Judgment for the State. Case remanded for sentence.

Frank E. Hancock, Atty. Gen.,
Gaston M. Dumais, for State.

Thomas E. Day, Jr.,
John E. Kivus, for defendant.

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

WILLIAMSON, C. J. The respondent Vincent E. Duguay was found guilty of the murder of Annette Cross at the March 1960 Term of the Androscoggin Superior Court. The case comes before us on appeal and three exceptions.

EXCEPTION I

Three colored photographs, or slides, of parts of the head and brain of the deceased taken during the autopsy were admitted over objection of the respondent. They were shown to the court and jury enlarged by projection on a screen, and in like manner to the Law Court at argument.

The deceased was killed by a bullet in the brain from a rifle discharged by the respondent. The pathologist, who

conducted the autopsy and took the photographs, testified in careful detail about the course of the bullet and the cause of death. The photographs without question fairly represent the facts.

The governing principle has been stated succinctly by the Oklahoma Court in these words:

> ". . . such photographs are admissible when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant." *Glenn v. State*, 333 P. 2d 597, 601; cert. den. 359 U.S. 1014, 79 S. Ct. 1155.

Admissibility of photographs under these principles rests upon the exercise of sound judicial discretion. In other words, there is no error in the absence of abuse of discretion.

Our court has expressed the rule in these words:

> "Photographs of a dead body, although gruesome, if accurate are admissible in the discretion of the trial court, and unless there is an abuse of judicial discretion no exception lies thereto. . . These photographs met the test. There is not the slightest evidence in the case even tending to indicate that there was abuse of discretion on the part of the presiding justice in the admission of these photographs." *State of Maine* v. *Rainey*, 149 Me. 92, 94, 99 A. (2nd) 78.

> "Counsel for the respondent argues that there was an abuse of discretion by the trial justice in admitting in evidence a photograph of the dead body of the deceased; that such photograph was too gruesome and could not but have prejudiced the jury against the respondent. Although exceptions to its admission were noted, they were not perfected. Were they now before us they could not be sustained. The photograph was properly taken; it had relevancy in determining the atro-

> ciousness of the crime; it was no more gruesome than the testimony related by the respondent on the stand; in any event its admissibility was within the discretion of the trial justice. *State v. Turner*, 126 Me. 376; *State v. Stuart*, 132 Me. 107, 108." *State of Maine* v. *Turmel*, 148 Me. 1, 7, 88 A. (2nd) 367.

See also *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 132 N. E. (2nd) 294; 23 C. J. S., *Criminal Law* § 852; Annot. 159 A. L. R. 1413, 1420; 2 Wharton's Criminal Evidence (12th ed.) § 687.

Other cases cited by the respondent do no more than apply the general rule to differing factual situations. *People* v. *Redston* (D. C. Cal.) 293 P. (2nd) 880; *State* v. *Bischert* (Mont.) 308 P. (2nd) 969; *People* v. *Jackson*, 9 Ill. (2nd) 484, 138 N. E. (2nd) 528; *Craft* v. *Commonwealth* (Ky.) 229 S. W. (2nd) 465; *Oxendine* v. *State* (Okla.) 335 P. (2nd) 940.

Like principles apply to the use of colored and ordinary or non-colored photographs. As the respondent aptly points out, "It is clear that colored photographs provide superior information over non-colored ones if otherwise equally admissible." Color is a fact to be considered in determining the issue of admissibility. Color in itself, however, is not the test. The test lies in the effect of the photograph, whether colored or non-colored. *Commonwealth* v. *Makarewicz, supra.* See also *Knox* v. *Granite Falls* (Minn.) 72 N. W. (2nd) 67, 53 A. L. R. (2nd) 1091, and annot. 1102.

The photographs met the first test. Plainly they were relevant to the issues, and particularly to the issues discussed by the pathologist. *Rawley* v. *Palo Sales, et al.*, 144 Me. 375, 70 A. (2nd) 540; 20 Am. Jur., Evidence § 727.

The respondent urges that the photographs of parts of the corpse inflamed the jury, or were likely to create bias

and hate. Again we have a question for decision within the broad limits of judicial discretion.

The respondent seeks to distinguish the instant case from *State* v. *Ernst*, 150 Me. 449, 454, 114 A. (2nd) 369, in which we said:

> "The law is well settled that the mere fact that a photograph is gruesome is not a reason for its non admission. . .
>
> "The presiding justice has great latitude and discretion in determining the admissibility of photographs and unless there is shown an abuse of discretion, his ruling will not be disturbed on exceptions."

The respondent points out that in *Ernst* the parts of the body shown in the photographs had not been interfered with by incisions during autopsy, and also that evidence of various wounds and abrasions was shown. The argument goes not to the rule but to its application to the facts. The *Ernst* case did not fix a line between admissibility and rejection on its facts.

Men and women of standing to be jurors and who have passed into the jury box are not so weak and untutored that they would be influenced to return a verdict of guilty by reason of the photographs. Surely the average man and woman is not so far removed from pain and sorrow, from gruesomeness, from scenes of death and violence and the like, that photographs such as these would turn the reasoning mind into dislike of or prejudice against a respondent defending himself in the halls of justice.

The Oregon Court, in upholding the admissibility of a colored slide photograph in connection with medical testimony regarding the fatal wound in a homicide case against a charge of gruesomeness, said:

> "If a jury is incapable of performing its function without being improperly influenced by evidence having probative force, then the jury system is a failure." *State* v. *Long* (Ore.) 244 P. 2d 1033, 1053. Commented on in 53 A. L. R. 2d 1103.

We do not say that there may not be situations in which the danger of prejudice outweighs the probative value of photographs. We are convinced, however, that such is not so in the instant case. There was no abuse of judicial discretion in the admission of the photographs. Exception I is overruled.

EXCEPTION II

This exception from denial of respondent's motion for mistrial reads in part:

> "When the Jury was leaving the Androscoggin County Building during the noon recess and on their way to lunch and in the course of the trial it came to the attention of the court and counsel for the State and counsel for the Respondent that a member of the Jury trying the case had separated from the other members of that body and had a conversation with another person or two persons. It was shown that the said juror had the conversation with the wife of the Jury Foreman."

A hearing was held by the presiding justice at which the Clerk of Courts and a jury officer, both of whom saw the incident but did not hear the conversation, and a member of the jury and the wife of the foreman, who engaged in the conversation, testified. At most, the conversation was no more than a request by the foreman's wife to the member of the jury "if (her husband) needed something to tell me." The incident took no more than a moment.

The respondent contends that the separation of the jury and conversation of a juror with the wife of a foreman compel a mistrial. In our view there was no separation of the

jury which the law should notice. The juror was at all times in the sight of a jury officer, and at most departed no more than a few feet from the line in which the jurors were walking in a hall in the courthouse. In *State* v. *Woods*, 154 Me. 102, 144 A. (2nd) 259, the court, in applying the general rule, said at p. 106:

> "In our view the decision here is controlled by our determination as to what constitutes an unauthorized 'separation' which the law will notice. It is not every withdrawal of one or more jurors from their fellows that constitutes a 'separation' in the legal sense. . . The rules governing the supervision of a jury during the often protracted trials of capital cases must be realistic and practical while at the same time eliminating insofar as possible any reasonable opportunity for communication, outside influence and prejudice. Both the State and the respondent are entitled to a verdict which is the product of minds which are influenced only by the law and the evidence properly submitted to them during the trial and the jurors themselves are entitled to be protected from even the appearance of improper influence in order to be assured of public confidence in their verdicts."

In the instant case there is the fact of conversation not present in *Woods, supra.* No one condones irregularity in the conduct of a juror, but what in all fairness has the respondent suffered? Could the wife's inquiry about her husband's needs in any way have influenced his judgment, or that of the juror to whom the inquiry was addressed, or that of the ten other jurors? The maintenance of purity in the conduct of a trial does not compel the discard of common sense. The presiding justice was entirely justified in finding that there was no opportunity to prejudice or influence the jury under the circumstances.

In reaching this conclusion we apply the principle that by a separation of the jury and a conversation with a third

party by a juror, prejudice will be presumed until rebutted by the State. This burden has plainly been met by the State in this instance. *Johnson* v. *State*, 7 Ga. App. 186, 43 S. E. (2nd) 119 (two jurors mingled in courtroom; state maintained burden of no prejudice); *Gay* v. *Commonwealth*, 303 Ky. 572, 198 S. W. (2nd) 308; *Adams* v. *Commonwealth*, 310 Ky. 506, 221 S. W. (2nd) 81 (state failed to show clearly no opportunity for improper influence). See annotation on separation of jury in criminal cases in 21 A. L. R. (2nd) 1088.

The respondent cites several cases of direct interference with a jury and of gifts or gratuities to the members. The differences between such situations and the simple inquiry by the juror's wife are apparent. *Bradbury* v. *Cony*, 62 Me. 223 (error for party's son to show premises to a juror); *Ellis* v. *Emerson*, 128 Me. 379, 147 A. 761 (error for counsel to invite jury to dinner after verdict). See also *Shepard* v. *Street Railway*, 101 Me. 591, 65 A. 20; *Rioux* v. *Portland Water District*, 132 Me. 307, 170 A. 63; *State v. Brown*, 129 Me. 169, 151 A. 9; *York v. Wyman*, 115 Me. 353, 98 A. 1024.

The principle is well illustrated in *State* v. *Shawley* (Mo.) 67 S. W. (2nd) 74, 90, in which the court said:

> "But the possibility of improper influence being exerted through a sealed letter to a juror seems to us stronger than would be true in the case of a bundle or package, since the latter would hardly be turned over to a sworn officer for delivery to a juror except in the expectation that it would be inspected. Furthermore, in the instant case the defendant's own showing is that the bundle came casually from the wife of the juror on Saturday afternoon in circumstances which called for and would have been susceptible of further evidential development if there had been anything sinister in them. We have been able to find only one case that seems to be in point. In Com. v. Thompson, 4 Phil. (Pa.) 215, 220, the defendant was convicted of first

> degree murder. In his motion for new trial he complained of a separation of the jury during the trial. The proof showed that as the jury were passing through the vestibule of the Law Building one of the jurors lagged behind and had a brief conversation with his wife; he and she both testifying that her only purpose was to inquire how he was and to furnish him with a change of clothing, nothing being said about the pending trial. It was held the separation did not vitiate the verdict. Without in the least condoning the practice and granting the burden is on the state to disprove prejudice where the reasonable possibility thereof is shown, we are constrained to hold the improprieties complained of here, on their facts, were not such as to call for a new trial as a matter of law. The trial judge passed on these questions. Some measure of discretion must be confided to him, since he is in a much better situation to acquaint himself with the actual situation."

The respondent urges that prejudice will be conclusively presumed (1) from a conversation between a juror and an unauthorized person as in this case, and (2) if not conclusively presumed, then the State has not rebutted the presumption by clear and convincing proof.

We have indicated there is no conclusive presumption of prejudice arising from an incident such as the one under discussion. The continuance of a trial to verdict ought not to rest upon the chance that no one acts in a manner that might under some circumstances be considered prejudicial. A respondent is sufficiently protected if the State is compelled to rebut the adverse presumption by clear and convincing proof. The State met this burden, and the motion for new trial on this point was properly denied.

EXCEPTION III

This exception also arises from denial of a motion for new trial. The exception reads in part:

> "When the jury was deliberating following the charge of the court, it came to the attention of the Respondent's counsel and then of the court that two jury officers at one time, and three jury officers at another time had been in the Jury Room with the door closed. . ."

Hearing was held by the presiding justice at which the following witnesses appeared: Three jury officers, Mr. Bergeron, Mr. Philippon, and Mrs. Denis, and the foreman of the jury.

The court received a note from the foreman asking for sandwiches and coffee, and instructed Mr. Bergeron to ascertain the preferences of the jurors. Mr. Bergeron knocked at the door of the jury room and "the foreman opened the door and I said, 'Now what would you like to have?' So he said, 'Come in' and closed the door. Some started to say 'ham' and so forth. I said to the foreman, 'Take the number of what they want, if it is lobster or ham.' So there were two ham sandwiches, one without mustard; the others were lobster. So I said, 'Put it on the paper' and I took it out and gave it to Sheriff Bob."

Mr. Philippon testified he entered the room with Mr. Bergeron to take the orders and returned to deliver the food with Mr. Bergeron and Mrs. Denis. Mrs. Denis was in the room only to deliver the sandwiches and heard no conversation. The jury foreman did not recall the officers entering the room to take the orders. He testified:

"Q The time you recall their coming into the room was when they delivered it?

"A Yes, I believe so.

"Q Was there any talk at all by the jurors when the officers were in the room with the door closed?

"A There may have been a slight exchange of a few words like 'Put it here' or 'Move this,'

something of that nature, to my knowledge, pertaining to the food and the items brought in.

"Q Other than that, you do not know of anything else?

"A No, sir, I don't."

The respondent argues forcefully that the mere presence of a bailiff or court official with a jury during deliberation on a murder case behind closed doors creates a conclusive presumption of prejudice, and thus compels a new trial. In this view, prejudice or lack of prejudice is not to be determined as a fact, and the presence of the jury officer in the jury room is not subject to explanation.

The necessity of protecting the inviolability of a jury's deliberations and decision is not questioned. *Ellis* v. *Emerson, supra; Shepard* v. *Street Railway, supra.* The point is what safeguards are required to preserve this essential purity. We conclude the rule urged by the respondent goes beyond the need. Can there be the slightest doubt that in this instance no prejudice to the defendant could have resulted from the simple acts performed by the three jury officers? As the presiding justice well said:

"The jury wanted something to eat in this particular case, and the Court had one of two methods by which it could have been provided. One was the method used, and the other would have been to send the jury to the hotel with the jury officers. Had the jury been sent to the hotel for dinner they would have been in a separate room by themselves with the jury officers and with the waitresses, and certainly there was less contact with the jury officers or with anyone else by the method that the Court used than there would have been by sending the jury out to eat. The Court feels sure that counsel would not insist that the jury had no right to have anything to eat until they came to an agreement, and in order to give them a chance to

> eat it is necessary for someone to be in contact with the jury."

The rule is the same applied in Exception II. See *Lowrey* v. *State* (Okla.) 197 P. (2nd) 637; 53 Am. Jur., Trials § 909; Anno. 41 A. L. R. (2nd) 261 with cases.

The more stringent rule, namely, that mere presence of the court officers in the jury room during deliberation rendered the verdict reversible, was applied in *People* v. *Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, and *People* v. *Chambers*, 279 Mich. 73, 271 N. W. 556. *Rickard* v. *State*, 74 Ind. 275, also cited by the respondent, in which the bailiff remained with the jury a large part of the time while they were deliberating and considering their verdict, presents a clear case for reversal.

The respondent further urges that "if the court should feel that this presumption of prejudice can be rebutted by the State by clear and convincing proof of the lack of prejudice," then the evidence here is not sufficient to permit a denial of the motion. "Clear and convincing proof" of no prejudice does not, in our view, require the consideration of the testimony of all jurors, or more evidence than was introduced before the presiding justice. He believed the testimony offered and his decision stands. We point out also that there was no request by the respondent for the taking of testimony of other jurors.

The separation and mingling cases cited by the respondent in which several members of the jury were interrogated, or in which available testimony was not produced, illustrate the application of the rule under varying circumstances. *State* v. *Hannah*, 122 W. Va. 719, 12 S. E. (2nd) 505; *Cole* v. *State*, 187 Tenn. 459, 215 S. W. (2nd) 824; *Chappell* v. *State*, 121 Tex. Crim. 293, 50 S. W. (2nd) 327. On the evidence the presiding justice was fully justified in finding no

suspicion of prejudice in the conduct of the officers in entering the jury room. Anno. 41 A. L. R. (2nd) 227-261.

Cases cited by the respondent to the effect that it is reversible error even for the presiding justice to enter the jury room while the jury is deliberating on their verdict are not in point. See *State* v. *Murphy*, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (NS) 609, 16 Ann. Cas. 1133; *Graham* v. *State*, 73 Okla. Crim. 337, 121 P (2nd) 308; Anno. 41 A. L. R. (2nd) 227, at 271.

Exception III is overruled.

APPEAL

There is no doubt that the respondent shot and killed Annette Cross. The decisive question on appeal is whether the respondent was guilty of murder or manslaughter. The answer hinges on whether there was implied malice aforethought.

The reasons for the appeal are: (1) that the verdict is against the evidence, (2) that the verdict is against law, (3) that on all the evidence the jury was not warranted in finding the respondent guilty without reasonable doubt, and (4) that jury officers communicated with the jury.

The fourth ground has been discussed by us earlier in connection with Exceptions II and III.

The record shows no exceptions to the charge of the presiding justice nor in argument does the respondent before us raise any questions of law relating thereto. In our study of the case we are satisfied that the charge was proper. Further, there have been no exceptions on questions of evidence other than Exception I relating to the photographs brought forward to us.

The rule governing our consideration of the appeal has been stated in these words:

> "In this state the principles applicable to the review of civil trials on a general motion govern appeals in criminal cases. *State v. Dodge*, 124 Me. 243, 245; *State v. Stain et al*, 82 Me. 472, 489. And so in its review of criminal appeals, where the single question considered under the appeal was whether the verdict was against the evidence, this court has repeatedly ruled that the only question there to be determined was whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him. *State v. Lambert*, 97 Me. 51, *State v. Mulkerrin*, 112 Me. 544; *State v. Howard*, 117 Me. 69; *State v. Pond*, supra; *State* v. *Dodge*, supra."
>
> *State* v. *Wright*, 128 Me. 404, 406, 148 A. 141.

In the *Wright* case it was pointed out that the review was not there limited to the single question of whether the verdict was against the evidence and the court proceeded to sustain the appeal for the reason that the verdict was based upon a misconception of the law. "Such a verdict is against the law, and to allow it to stand is not justice." *State* v. *Wright, supra*, at p. 407; *State* v. *Rainey*, 149 Me. 92, 97, 99 A. (2nd) 78.

The rules governing the finding of murder under our statute have been well established over many years. In *State* v. *Turmel*, 148 Me. 1, 6, 88 A. (2nd) 367, Justice Thaxter gave clearly and precisely the governing principles:

> "Murder under our law is the unlawful killing of a human being 'with malice aforethought, either express or implied.' Rev. Stat. 1944, Ch. 117, Sec. 1. Malice aforethought does not necessarily mean that there must be specific intent to kill but our court has laid down the rule in the case of *State v. Knight*, 43 Me. 11, 137, as follows: 'But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as

> proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice, which the law raises from the act of killing, by evidence in defence.' And Chief Justice Shaw, in *Commonwealth v. Webster*, 5 Cush. 295, 322, lays down the ancient rule as taken from East's Pleas of the Crown as follows: 'but he who wilfully and deliberately does any act, which apparently endangers another's life and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense.' Manslaughter is the unlawful killing of a human being without malice aforethought, express or implied. Rev. Stat. 1944, Ch. 117, Sec. 8. Such killing may take place in various forms. It may be done in the heat of passion or on sudden provocation, or it may even be accidental."

In *State* v. *Arsenault*, 152 Me. 121, 125, 124 A. (2nd) 741, Chief Justice Fellows again set forth the principles with particular reference to intoxication in these words:

> "Where there are statutory degrees of murder (as formerly in Maine) intoxication may sometimes reduce from first to second degree murder. Intoxication will not reduce to manslaughter where there is malice aforethought, and where there is no provocation or sudden passion. Voluntary intoxication is no excuse for murder. 'Voluntary intoxication is not an excuse, or justification, or extenuation of a crime.' *Com. v. Hawkins*, 3 Gray (Mass.) 463, 466; *Commonwealth v. Malone*, 114 Mass. 295. See 26 Am. Jur. 233, Sec. 116, 'Homicide' and cases cited; 40 C.J.S. 830, Sec. 5, 'Homicide' and the cases there cited.
>
> "When the fact of killing is proved and nothing further is shown, the presumption of law is that it is malicious and an act of murder. *State v. Knight*, 43 Me. 11; *State v. Neal*, 37 Me. 468; *State v. Turmel*, 148 Me. 1; *Commonwealth v. York*, 9

Metc. (Mass.) 93; *Commonwealth v. Webster*, 5 Cushing (Mass.) 295.

> " 'Malice,' as used in the definition of murder, does not necessarily imply ill will or hatred. It is a wrongful act, known to be such, and intentionally done without just and lawful cause or excuse. *State v. Merry*, 136 Me. 243, 8 Atl. (2nd) 143; *State v. Knight*, 43 Me. 11; *State v. Robbins*, 66 Me. 324.
>
> "Voluntary intoxication is not an excuse for crime, *except in those cases where knowledge or specific intent are necessary elements.* 'Intoxication does not make innocent an otherwise criminal act.' *State* v. *Siddall*, 125 Me. 463, 464."

In *State* v. *Merry*, 136 Me. 243, 8 A. (2nd) 143, the court said, at p. 247:

> "It may be noticed here, quite as well as anywhere, perhaps, that, in murder, malice aforethought must exist, and, as any other elemental fact, be established, not beyond all possible doubt, but beyond a reasonable doubt; malice is not limited to hatred, ill will or malevolence toward the individual slain; it includes that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief."

See also *State* v. *Knight*, 43 Me. 11; *State v. Neal*, 37 Me. 468; *Com. v. Webster*, 5 Cush. 295, 322.

We start, therefore, with a presumption that the killing was with implied malice aforethought. Unless the respondent must be said to have overcome this presumption as a matter of law, then the finding of the jury stands.

It is unnecessary to review the record in detail. The jury could have found the following essential facts:

The deceased was the mistress of the respondent for about two years prior to her death. With her young daugh-

ter she had lived from time to time with the respondent at an apartment on Hines Alley in Lewiston, and for a period of about three months just prior to her death on a farm in Minot. The respondent made arrangements to leave the farm and rented an apartment on Lincoln Street in Lewiston. There the deceased with her daughter was staying on the night of December 28, 1959. The respondent had been drinking during the day and evening and had in his possession a loaded .22 rifle. The young child went to bed in the only bed in the apartment. Sometime after midnight the respondent pointed his rifle at the deceased and shot her in the head as she was standing a short distance from him at the sink in the kitchen and so caused her death. He then drove his car to the office of the sheriff in Auburn and said that he had "shot a woman." Lewiston police officers within minutes were at the apartment and found the victim with her head in the sink. She was taken to the hospital where she died. The respondent gave a written statement at the sheriff's office describing his relationship with the deceased at the time of the killing, reading in part:

> "Annette had pointed the gun at me a couple of times but she did not know whether it was loaded or not, I knew it was loaded and when she went to the sink to look out the window, I picked up the gun and let her have it. I aimed at her head, I just wanted to hurt her, not necessarily kill her, as she wanted everything that I earned. I pulled the trigger and let her have it. When she slumped down into the sink, I jacked out the shell went down and got into my car and drove to the Sheriff's Dept. If she comes out of it she will think another time before she starts beating people out of everything."

His explanation on the stand was in these words:

"Q And you just swung toward the cupboard?

"A I took just about two steps toward the cupboard and I had the gun this way. (Indicating with arms)

"Q Where were you looking then?
"A Down at the cupboard.

"Q What happened then?
"A Well, she said, 'I still am going to have you arrested, you cheap s.o.b.' and I looked at her like that, and when she said 's.o.b.' I went mad like that and pulled the trigger, I imagine with my reflexes."

* * * * * * * * *

"Q Now as to this phrase: 'I aimed at her head.' What do you mean by that? What did you mean by that?
"A Well, that was just a story I made up. I had the gun this way and it was pointed this way; she was on the left and I was on the left.

"Q It was pointed towards her?
"A It was pointed towards her or the ceiling—or I mean the wall.

"Q Did you deliberately aim it, as it says here, 'I aimed at her head.'
"A No, sir.

"Q 'After I aimed at her head I just wanted to hurt her, not necessarily kill her, as she wanted everything that I earned.' Are those your words?
"A Those are my words, yes, I said it.

"Q Are they what you meant?
"A. No.

"Q What did you mean?
"A Well, I just was tired and wanted to go to bed.

"Q Then the next words are 'I pulled the trigger and let her have it.' Are those your words?
"A Yes, they are, but I didn't mean them.

"Q What did you mean?
"A Well, I was tired and wanted to go to bed."

* * * * * * * * *

"Q And what exactly did she say to you when you

had taken the rifle away from her the second time and had turned around by the cupboard?

"A I was by the cupboard.

"Q You were by the cupboard and she was by the sink?

"A She was by the sink.

"Q What did she say?

"A She said, 'I am going to have you arrested for assault and battery, you dirty old s.o.b.'

* * * * * * * * *

"Q You said in your statement she was over looking out the window?

"A It looked like it. She started to look out the window and then she called me that again. The way my reflexes was I don't know how.

"Q Did this thing anger you so much you pulled the trigger?

"A My reflexes. She was going to have me arrested for assault and battery, which I had never done."

* * * * * * * * *

"Q After this thing happened did you go over and look at her?

"A No. After the gun went off it surprised me. She went like this and bowed her head, and her head went right on top of the faucet. It probably took about three or four seconds. I says, 'What did I do now?' I jacked the shell, threw the gun in the corner and grabbed my coat and started running out and got down half way when I got my coat on."

* * * * * * * * *

"Q You didn't go up to her and try to help her in any way?

"A Well, I didn't dare to, because I thought I had creased her or something, and you ain't supposed to touch anybody, it says in medical books, go for help, that is all."

We are satisfied from our study of the record that the jury was justified in returning a verdict of murder. The charge, to which no exceptions were taken, covered the rules largely in the language from our Maine cases cited *supra.*

We have here a respondent who sends a bullet into the brain of the deceased; a man who had "that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief." *State* v. *Merry, supra.* If we take the evidence of the respondent, we have a man quarreling with his mistress who pointed a rifle at him and called him names as shown by the extract of evidence above. These were not acts or words sufficient to compel a finding as a matter of law that the respondent killed in the heat of passion and under sudden provocation. He gains, as is shown by the *Arsenault* case, *supra,* no aid from the fact that his condition was affected or may have been affected by his voluntary consumption of beer.

The issues raised by the introduction of colored photographs have been discussed in connection with Exception I and we found no error of law in their introduction. The respondent urges in his appeal that the statement signed by him in the sheriff's office was taken under circumstances which prohibited its use against him. There was much evidence of the conditions surrounding its taking. The jury was under no obligation to believe that the respondent was not physically and mentally able to state the truth, or that he was in any way compelled to do otherwise, or was misled into giving damaging statements.

The respondent, fifty years of age, perhaps influenced by drink, angered, so he says, by his mistress whom he wished to discard, took his rifle, shot and killed the deceased. It was for the jury to say whether the act was "in the heat of

passion, on sudden provocation, without express or implied malice aforethought, . . " and thus manslaughter. R. S., c 130, § 8. The verdict was of murder and must stand.

The entry will be:

Exceptions overruled.

Appeal dismissed.

Motion for new trial denied.

Judgment for the State.

Case remanded for sentence.

STATE OF MAINE
vs.
W. THOMAS HOLT

Oxford. Opinion, March 10, 1962.

Motor Vehicles. Left Turn.
R. S., 1954, Chap. 22, Sec. 123.

Although penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.

R. S., Chap. 22, Sec. 123, prohibits a person from turning a vehicle from a direct course unless and until such movement can be made with reasonable safety.

R. S., Chap. 22, Sec. 123 does not require proof of knowledge by respondent that his view was obstructed or that the view of approaching vehicles was obstructed.

Where the court's instruction leaves the factual determination to the jury, it is not error for the court to instruct the jury to ask themselves whether a left turn could ever be made with reasonable safety.

R. S., 1954, Chap. 28, Sec. 122 does not limit R. S., Chap. 22, Sec. 123.

ON EXCEPTIONS.

This is a traffic violation before the Law Court upon exceptions. Exceptions overruled.

David R. Hastings, for state.

William E. McCarthy, for defendant.

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

SIDDALL, J. On exceptions. The respondent is charged with violating R. S., 1954, Chap. 22, Sec. 123 by making a left turn from a highway to enter an intersecting road at a time when such turn could not be made with reasonable safety. The respondent was found guilty by a jury. The case is before us on respondent's exceptions to certain portions of the charge of the presiding justice, to the refusal of the court to give requested instructions, and to the denial by the court of a motion for a directed verdict.

The testimony discloses that on October 13, 1960, after dark, the respondent was travelling easterly on U. S. Highway No. 2 from Mexico to Dixfield. The weather was clear and the road was dry. An intersecting way called Leavitt Street led northerly from U. S. Route No. 2. The respondent concedes in his argument that the evidence indicates that the center of Leavitt Street is on the top of the crest of a hill on said Route No. 2, and that a vehicle travelling westerly on said route would not be visible from one being driven easterly until the eastern traveller reached a point opposite the middle of Leavitt Street. The respondent endeavored to make a left-hand turn with the intention of entering Leavitt Street, and his vehicle came into collision with another vehicle being driven in a westerly direction on said Route No. 2.

The pertinent portion of R. S., 1954, Chap. 22, Sec. 123 reads as follows:

> "No person shall . . . turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course, or move right or left upon a roadway unless and until such movement can be made with reasonable safety."

The respondent claims that the court erred in giving the following instruction:

> "The State is not required to prove that the respondent actually knew that at that moment his view easterly along U.S. No. 2 was obstructed by the crest of the grade or that because of the crest of the grade vehicles coming in a westerly direction from Dixfield did not have an adequate view of his vehicle in order to avoid collision."

We are concerned only with the facts of this particular case in considering the correctness of the instructions given by the court. It must be borne in mind that the contention of the state was that the respondent violated the statute under which he was indicted by turning to the left at a place so near the crest of a hill that oncoming vehicles were not afforded a sufficient warning to avoid a collision. It must also be borne in mind that the undisputed facts in the case clearly reveal that Leavitt Street is located at the crest of a hill on the highway being travelled by the respondent; that the center of Leavitt Street is on the top of the crest of the hill; that a vehicle travelling westerly on Route No. 2 would not be visible from one being driven easterly until the eastern traveller reached a point opposite the middle of Leavitt Street. Having these facts in mind, we quote extracts from the charge to the jury as follows:

> "Our Legislature in passing motor vehicle laws and in an effort to promulgate highway safety has laid down certain requirements regarding the manner in which operators may drive their motor vehicles.

The particular law which we are concerned with here I will read to you, or such part as is applicable to this particular case.

'No person shall move left upon a roadway unless and until such movement can be made with reasonable safety.' I will repeat that. No person shall move left upon a roadway unless and until such movement can be made with reasonable safety. There are other provisions in regard to the manner of moving and turning in this section which I have read to you, but I have read only the part with which we are concerned with in this particular case.

* * * * *

The State charges in this indictment the movement could not be made with reasonable safety. Mr. Holt, the respondent, the State says, made a turn and moved to the left into the northerly lane of said U.S. Route #2 at a point where his view easterly along said U.S. Route #2 was obstructed by the crest of a grade, said point being so near the crest that oncoming vehicles approaching said crest while lawfully travelling westerly on said U.S. Route #2 would not be afforded sufficient warning to avoid a collision with the automobile operated by said W. Thomas Holt as it turned into the northerly lane of said U.S. Route #2.

The State does not charge that the turning of the respondent was a violation of the law but that it was in violation of the law for him to turn at that place because the State says his view of traffic coming westerly from the Dixfield area was obstructed by the crest of a grade and, in substance, that, when he turned, his car was likewise hidden by the crest of the grade from vehicles going westerly from the Dixfield area, which is the direction the car was coming which was in collision with the respondent's car, according to the State's evidence.

The question is: Did the respondent turn left upon that roadway at a place where that turn could not

be made with reasonable safety. The State is not required to prove that the respondent actually knew that at that moment his view easterly along U.S. No. 2 was obstructed by the crest of the grade or that because of the crest of the grade vehicles coming in a westerly direction from Dixfield did not have an adequate view of his vehicle in order to avoid collision. The driver of a vehicle has a duty to drive his car so that he will not violate the motor vehicle laws and endanger others. While driving a motor vehicle about to turn left upon a highway it is his duty and responsibility to turn left at a time and place when his turn can be made with reasonable safety. The Legislature has determined that public safety on our highways requires that a person shall not move to the left on a highway, such as a person in a southerly lane of a highway moving to the left or northerly lane, unless he can determine that the movement can be made with reasonable safety. Here the State contends the respondent turned into his left or northerly lane at such a place before he reached the crest of the hill that his view of on-coming traffic and the vision of on-coming traffic of him, the ability to see his car, was obstructed, and in such a manner that the turn could not be made with reasonable safety. A person wanting to cross to the left hand lane to enter a side street must cross at a point where such crossing may be made with reasonable safety.

* * * * *

As I understand the argument of the State, the State contends a left hand turn could be made with reasonable safety at a certain point. Whether it could be or not is not for me to say. The facts are for you; they are not for me."

Under these instructions the court clearly left for the determination of the jury the question of whether the respondent's view, at the time he made the turn, was obstructed by the crest of the hill in such a manner that the turn could not be made with reasonable safety.

The respondent, however, claims that the statute, being a penal statute must be strictly construed; that no evidence was presented that the respondent had knowledge regarding the crest of the hill or that he knew that the crest would prevent oncoming vehicles from seeing him enter the intersection.

Although penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *State* v. *Cavalluzzi*, 113 Me. 41, 43, 92 A. 937.

The question involved in this exception is whether the state must prove knowledge on the part of the respondent that his view ahead was obstructed by the crest of the hill, or whether the statute imposed upon the respondent the duty to ascertain that fact before making his turn.

Our court has not had occasion to interpret this particular statute in its application to criminal cases. Our court in civil cases, even before the enactment of this statute, clearly laid down the rule that the operator of a vehicle who intends to cross in front of another car, shall so watch and time the movements of the other car as to reasonably insure himself of a safe passage, either in front of or to the rear of such car, even to the extent of stopping and waiting, if necessary. *Fernald* v. *French*, 121 Me. 4, 9, 115 A. 420; *Esponette* v. *Wiseman*, 130 Me. 297, 155 A. 650.

It is noted that the statute prohibits a person from turning a vehicle from a direct course *unless and until* such movement can be made with reasonable safety. Obviously such a movement could not be made with reasonable safety if the view ahead at the time of making the turn was obstructed by the crest of a hill so near that oncoming vehicles lawfully travelling in the opposite direction would not be afforded sufficient warning to avoid a collision. The respondent turned from a direct course to cross the side of

the highway used by vehicles travelling in the opposite direction. The legislature, in enacting the legislation, undoubtedly had in mind that such a movement is often attended with danger to others lawfully using the highway, and that some precautionary restrictions on such a movement were necessary.

The statute under which the respondent was indicted is a part of the law of the road, so-called, and was enacted by the legislature in the exercise of its police power for the protection of those who lawfully use our highways. It imposes a duty upon one about to turn a vehicle from a direct course to the left to ascertain whatever facts are necessary in order to determine whether the turn can be made with reasonable safety. Under the circumstances disclosed by the undisputed evidence in the instant case, the respondent before making the turn was under the positive duty to determine whether the contour of the highway ahead of him obstructed his view of approaching traffic. If so, the view of respondent's automobile from approaching vehicles was necessarily obstructed. He acted at his peril in making the turn unless he knew at the time that his vision of approaching traffic was not obstructed by the crest of a hill on the highway upon which he was then travelling.

In accordance with instructions given by the court, it was necessary for the state to prove beyond a reasonable doubt that the respondent moved to the left at a time and place when the movement could not be made with reasonable safety. These instructions necessitated proof on the part of the state of the factual situation regarding the location of the crest of the hill and the relative location of Leavitt Street. It was not obliged to prove knowledge on the part of the respondent that his view was obstructed by the crest of the grade, or that the view from approaching vehicles on the same highway was obstructed by that crest. The instructions to which the respondent excepted were proper.

The respondent also filed exceptions to the following portion of the court's charge to the jury:

> "You may ask yourself what would happen if a side street entering a highway at such a point where because of the crest of a hill or other obstruction a left hand turn could never be made with reasonable safety. In such a case it would be the driver's duty to move on to another point where he could move left and make a left hand turn with reasonable safety and turn and come back and enter the street in a manner which could be done with reasonable safety."

Upon a careful reading of the entire charge, we find the following language after the first sentence in the above quoted instruction. "I am not saying that such was or was not the situation. You have heard the evidence." Immediately following this instruction the court said: "As I understand the argument of the State, the State contends a left hand turn could be made with reasonable safety at a certain point. Whether it could be or not is not for me to say. The facts are for you; they are not for me."

We see no error in these instructions. The court did not instruct the jury that the respondent could not under any circumstances turn to his left to enter Leavitt Street. He clearly left in the hands of the jury the question whether a left turn could have been made with reasonable safety, and if so, whether the respondent made such a turn. If the jury found that the situation was such that a left turn could never be made with reasonable safety, then the instructions of the court that the driver in such a case must move on to another point where he could make a left turn with reasonable safety and then come back became applicable. The instruction was correct and does not furnish grounds for exception.

At the conclusion of the charge to the jury, the respondent requested the court to make the following instruction:

> "If you should find that the respondent was attempting to enter an intersection on his left, which intersection is on the approach to the crest of a grade which obstructs his view within such a distance as to create a hazard in the event another vehicle might approach from the opposite direction, the respondent may turn into said intersection if the local authorities governing traffic had not caused markers, buttons, or signs to be placed adjacent to the intersection requiring a different course."

Respondent cites R. S., 1954, Chap. 22, Sec. 122, which deals generally with the method of making right- and left-hand turns on two-way roadways and on other than two-way roadways. The section authorizes local authorities to place signs at intersections and require a different course from that otherwise specified in making turns at intersections. We fail to see that this provision in any way limits the effect of the statute under which the respondent was indicted. The court was correct in refusing to give the requested instruction.

The respondent filed exceptions to the denial by the court of respondent's motion for a directed verdict. The entire evidence in the case was presented by the state. The basic facts were not in dispute. The record discloses ample evidence to justify a jury in finding beyond a reasonable doubt that the respondent turned his automobile from a direct course to the left across U. S. Route No. 2 at a time and place when such movement could not be made with reasonable safety. The motion for a directed verdict was properly denied.

The entry will be

Exceptions overruled.
Judgment for the State.

CHARLOTTE SWEET PRO AMI
vs.
ROBERT F. AUSTIN, D/B/A
AUSTIN'S GULF SERVICE

Cumberland. Opinion, March 21, 1962.

Negligence. Agency. Minors.
R. S., 1954, Chap. 22, Sec. 156.

The owner of a parking lot is not negligent in permitting and causing the operation of a motor vehicle where the defendant did no more than assist a young man, competent in the eyes of the car owner to fix a flat and to have the keys, in starting the car. R. S., 1954, Chap. 22, Sec. 156.

If the defendant in the instant case had known or should have known of the young man's age, experience, and lack of license, there would have been a jury issue whether the negligence was a proximate cause of the injury. Restatement of Torts, Sec. 390.

A young man does not become the servant or agent of a parking lot proprietor merely because he was requested to move the car (upon which he was working for the owner) away from the gasoline pumps.

The burden of proof is upon the plaintiff to prove agency and scope thereof.

ON APPEAL.

This is an appeal from a directed verdict for defendant. Appeal denied.

Peter N. Kyros,
Robert J. Melnick, for plaintiff.

John D. Leddy,
Richard D. Hewes, for defendant.

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

WILLIAMSON, C. J. This is an action by Charlotte Sweet, a minor, against Robert F. Austin, the operator of a filling station, to recover for injuries suffered in the collision of a car driven by her mother in which she was a passenger and a car driven by Fred Yerxa. The case reaches us on appeal from the direction of a verdict for the defendant at the close of the plaintiff's case.

Our decision turns on the responsibility of the defendant for the negligence of Yerxa on one or more of these grounds: (1) that the defendant was negligent in permitting and causing the operation of the car by Yerxa; (2) that Yerxa was the servant of the defendant at the time of the collision; and (3) that the defendant was liable under the statute for giving or furnishing a motor vehicle to Yerxa, a minor under the age of eighteen years. R. S., c. 22, § 156.

Contributory negligence of the plaintiff is not in issue. The record amply discloses a jury question on the negligence of Yerxa.

We take the evidence with reasonable inferences in the light most favorable to the plaintiff in testing the propriety of the direction of the verdict for the defendant. *Ward* v. *Merrill*, 154 Me. 45, 141 A. (2nd) 438. A jury could find the following facts.

Charles Rice, 23 years of age, parked a 1951 Packard in the yard of defendant's filling station on Valley Street in Portland for a fixed monthly rental. The precise ownership of the car, purchased by Rice and registered in the name of Mrs. Rice, his mother, is not material. Rice plainly had full authority to use and to control the use of the car.

On the morning of the accident in February 1959, Rice requested his mother to ask Yerxa, who lived with her, to fix a flat tire on the Packard. Yerxa was also informed of a spare set of car keys underneath the hood. The tire used

to replace the flat was in the car trunk. Rice and his mother knew that Yerxa did not have a driver's license and could not drive.

Evidence of what took place at the filling station comes from statements by the defendant to the plaintiff's father.

"Q Did you speak to Mr. Austin about the accident?

"A Yes, I did. I inquired all I could find in regard to the accident.

"Q What did Mr. Austin say?

"A He (Mr. Austin) told me that — the first inquiry, I asked Mr. Austin who was the owner of the car and he told me it was Mrs. Rice, and that they had made arrangements for parking facilities at his service station, and that on the morning of the accident that this Fred Yerxa had come up there to repair the flat tire and that he had asked Mr. Austin for the use of jacks and tools to enable him to repair the tire, and then following the repairs Mr. Austin told him that the car was in the way and would he please drive it out of the way so that he would have full access to his pumps and Yerxa had told him that the car would not start - -

MR. LEDDY: Object.

"Q Just tell us what Mr. Austin said, please.

"A This is all what Mr. Austin told me. Mr. Austin told me that Fred Yerxa had told him the car wouldn't start; and then he asked Fred Yerxa to get in the car and he would push him to get it started so that he would be able to drive the car out of the way."

Shortly before noon the Packard with Yerxa at the wheel was pushed from the premises of the filling station by a truck operated by the defendant to and along Valley Street for an uncertain distance. "Around noontime," in the

words of Mrs. Sweet, plaintiff's mother, she drove from Valley Street on D Street stopping at a stop sign at the intersection of D Street and St. John Street. Yerxa, accompanied by at least one other boy not known from the record to have been with him at the station, in proceeding along St. John Street and turning to his right into D Street, collided with the left side of the Sweet car.

Within a few minutes the police and the defendant were at the scene. The defendant told Yerxa he would push the car to the station. The police, however, would not permit Yerxa, who on inquiry had stated he had no license, to drive. The car was later towed away.

We turn to the grounds on which the plaintiff bases her case: First: We find no negligence on the part of the defendant in permitting or causing the operation of the Packard by Yerxa. For purposes of discussion we assume the defendant did so permit and cause the operation of the car. We shall later point out that such an assumption is not warranted.

As we have seen, the jury could have found Yerxa was 16 years of age, without a driver's license and without experience in driving, and that these facts were known to Rice and his mother. There is nothing in the record to indicate that such facts were known to the defendant when Yerxa was at the filling station, or that there was anything about Yerxa to indicate lack of eligibility for a license,[1] or lack of ability, or lack of a license. Yerxa was not a ten year old. He was the authorized agent of Rice to fix the flat and

---

[1] "No license shall be issued to any person under 15 years of age." R. S., c. 22, § 60, relating to operators' licenses in effect at the date of the accident. The statute has since been changed to provide that after September 1, 1960, ". . . no operator's license shall be issued to any person under 17 years of age . . ." without a certificate of successful completion of a driver education course. R. S., c. 22, § 60-A, enacted Laws 1959, c. 221, not applicable, however, to any person under 17 years of age holding a valid license issued prior to September 1, 1960.

to have the keys, and thus to have possession and control of the car. His authority was limited, to be sure, and did not include operating the car.

Yerxa, however, was apparently authorized to possess and control the car at the filling station. Of great significance under the circumstances is the fact that Rice entrusted the keys to Yerxa, and thereby the power to operate the car.

We are not concerned with liability of a parking lot proprietor to an owner for placing a car in the hands of an unauthorized person. Here the issue is whether the defendant failed to use due care in permitting and causing the operation of the Packard by Yerxa. The defendant did no more than assist a young man competent in the eyes of Rice to fix the flat and to have the keys in starting the car. He could reasonably believe that Rice was sending a man and not a child unfitted to perform the common act of driving an automobile.

In *Kelley* v. *Thibodeau*, 120 Me. 402, 115 A. 162, cited by the plaintiff, the owner of an automobile was held liable for permitting an inexperienced driver to drive his automobile in the owner's presence and under his control. The case is distinguishable from the case at bar by the knowledge of the owner of the driver's inexperience. If the defendant had known or should have known the facts of Yerxa's inexperience and lack of license, there would have been a jury issue whether negligence of the defendant was a proximate or an efficient cause of the injury. There was no failure to make a reasonable investigation of Yerxa's ability to drive. *Anderson* v. *Driverless Cars, Inc.*, 124 So. 312, cited by the plaintiff, is not applicable on the facts. See also *Gulla* v. *Straus* (Ohio), 93 N. E. (2nd) 662; Restatement, Torts § 390, comment b and illustrations; 5A Am. Jur. *Automobiles and Highway Traffic*, §§ 580, 581; annotation 36 A.L.R. (2nd) 735, on incompetent driver-donor's liability.

A jury would not be warranted in finding that there were limitations upon Yerxa's ability to drive, which the defendant should have ascertained in the exercise of reasonable care and prudence.

Second: The evidence does not warrant a verdict grounded on "respondeat superior." The defendant was under no obligation to leave the Packard parked at a place in the yard where it interfered with the use of the pumps. He could have moved the car within the yard without objection. Cf. *Howard* v. *Deschambeault*, 154 Me. 383, 148 A. (2nd) 706. He chose not to move the car himself, but to request Yerxa to do so. For reasons unknown in the record Yerxa took off to St. John Street.

To say that Yerxa was the servant or agent of the defendant is to deny the substance of the situation. Yerxa was not an employee of the station. He was not under the defendant's control and direction. If Yerxa had refused to move the car, the defendant could not have discharged him or disciplined him. Yerxa was requested to move the car, not ordered to do so. He was not a borrowed servant. To hold that the relationship of master and servant exists in the situation here disclosed would place an intolerable burden of responsibility upon the business in which the defendant was engaged. See 5 Blashfield Cyclopedia of Automobile Law and Practice §§ 2942, 2943.

If we assume that liability under the doctrine of respondeat superior rests upon the defendant for the acts of Yerxa at the station, there yet remains a flaw in the evidence fatal to the plaintiff's case. We cannot from the record trace the course of the Packard from an indefinite point on Valley Street to which it was pushed by the defendant to the place of the collision on St. John Street. Did Yerxa go on a "frolic of his own"? In driving the car did he go beyond the bounds of his authority (which for this purpose

we assume), namely, to move the car from near the pumps to another part of the filling station yard? Why, for this purpose, did he drive from Valley Street to St. John Street? We do not know the distance traveled or within broad limits the length of time during which Yerxa was driving the car. It is significant that Rice, in a written statement taken for the defendant and introduced in evidence by the plaintiff, said, "When I left the car I remember I had about ¾ of a tank of gas, and after the accident the tank was empty." Yerxa, at the time of the accident was accompanied by at least one boy. There is no mention that anyone was with him at the station.

Yerxa, it may be noted, at the time of trial was in the armed services and did not testify. It would be purely guess or conjecture to say that Yerxa was the servant of the defendant at the time of the collision, or that if he had been on a "frolic of his own," he had then returned to the defendant's service.

A finding for the plaintiff on this point could not stand. "The burden of proof is upon the plaintiff to prove the agency and the scope thereof. It cannot be presumed." *Stevens* v. *Frost*, 140 Me. 1, 7, 32 A. (2nd) 164; *Good* v. *Berrie*, 123 Me. 266, 122 A. 630; *Robertson* v. *Armour Co.*, 129 Me. 501, 152 A. 407; *Leek* v. *Cohen*, 141 Me. 18, 38 A. (2nd) 460; *Pearl* v. *Sand & Gravel Co.*, 139 Me. 411, 31 A. (2nd) 413.

Third: We conclude that the defendant did not "give(s) or furnish(es) a motor vehicle" to Yerxa within the meaning of R. S., c. 22, § 156, which reads:

> "Every owner of a motor vehicle causing or knowingly permitting a minor under the age of 18 years to operate such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by

> the negligence of such minor in operating such vehicle."

"To give or to furnish" are not the equivalent of "to permit" or "to not object to the use of." The words "give" and "furnish" are words of action based upon at least a claimed authority. The defendant furnished nothing in the sense of supplying or providing. *Strout* v. *Polakewich*, 139 Me. 134, 27 A. (2nd) 911. If he had delivered the parked car into the possession of X, having no connection with Rice or his mother, we might have evidence on which to find a furnishing. In this instance, as we read the record, Yerxa, armed with authority to fix the flat tire and with the car keys, effectively had possession of the parked car. In the reasonable belief of the defendant, Yerxa was in the car and at the wheel for Rice who had parked the car at defendant's filling station.

In *Strout* v. *Polakewich, supra,* whether a car was "furnished" under the statute was held to be a question for the jury and exceptions to a nonsuit were sustained. The jury might have found that Hunt, known to the defendant to be a minor under the age of 18 years, was employed by the defendant as a guide at the Desert of Maine, and that the defendant left his car with Hunt for the latter's use.

In *Strout* there was a positive act by the defendant owner, i.e., a "furnishing." In the case at bar, the defendant, not the owner, did no more than request Yerxa to move the car and assist him in starting it. *Smith* v. *Moroney* (Ariz.), 282 P. (2nd) 470. Other cases arising under like statutes are: *Shrout* v. *Rinker* (Kan.), 84 P. (2nd) 974; *Lowder* v. *Holley* (Utah), 233 P. (2nd) 350; *Falender* v. *Hankins* (Ky.), 177 S. W. (2nd) 382. See also *York* v. *Day's, Inc.*, 153 Me. 441, 140 A. (2nd) 730.

In holding that the verdict was properly directed, we in no way express an opinion upon the responsibility, if any,

of Rice or his mother under the circumstances. We direct our attention only to alleged liability of the defendant filling station operator.

The entry will be

Appeal denied.

EDWARD P. MURRAY
vs.
JANE MURPHY SULLIVAN, ET AL.

Penobscot. Opinion, March 25, 1962

Will. Per Capita. Per Stirpes. Distribution.

It is the intention of the testator which governs the construction of a will. In Maine there is no judicial inclination to prefer either a *per capita* or *per stirpes* distribution.

In construing the provisions of a will which direct that at the termination of a trust by the death of his five children the estate shall vest in "all my lineal descendants . . . in the same proportions as shall then be provided" by the laws of descent in the State of Maine, the statute should be applied as though the testator's death had occurred at the time of the termination of the trust.

In the instant case the six grandchildren take per capita rather than by representation per stirpes.

ON REPORT.

This is a petition for instructions in making distribution under a last will and testament. The case is before the Law Court on report. Case remanded to the Superior Court for an order for judgment in accordance with this opinion. Costs and reasonable fees to counsel for the trustee and to counsel for the several defendants to be fixed by the sitting

justice below and ordered paid by the trustee and charged to his probate account.

Gerald E. Rudman, for plaintiff.

Michael Pilot,
James E. Mitchell,
Hutchinson, Pierce, Atwood & Allen,
by Vincent McKusick
Verrill, Dana, Walker, Philbrick & Whitehouse,
for defendants.

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

WEBBER, J. On report. By his will executed on February 21, 1906 the late John Cassidy first created a trust for the benefit of his five children and their lineal descendants which should endure until the death of the last surviving child. He then disposed of the remainder of his estate in these terms:

> "Upon the termination of this trust, as aforesaid, namely, after the decease of all of my said five named children, all my estate in whatever form the estate shall then be, shall then vest in and become the property of all of my lineal descendants, if any, then living, in the same manner and in the same proportions as shall then be provided by the then existing laws of the State of Maine for the descent among lineal descendants of intestate property, real and personal."

The testator died on March 25, 1918, leaving no widow and survived by four of his children, James, Mary, John F. and Lucy, and a grandchild, Edythe Rice Dyer. The latter is the only child of the testator's daughter Rosella who had predeceased her father on May 25, 1915. The trust terminated upon the death of Lucy on June 9, 1961. The lineal descendants of the testator in the nearest degree then com-

prised the six grandchildren who are claimants here, the said Edythe Rice Dyer, Jane Murphy Sullivan, only child of Mary, and Roselle M. Flynn, Joan Stetson, Barbara Anne Cassidy and John Cassidy III, the last four being the children of John F. Cassidy.

The applicable statute, incorporated by reference into the will, is R. S., 1954, Chap. 170, Sec. 1, Subsec. II which provides:

> "**II.** The remainder of which he dies seized, and if no widow or widower, the whole shall descend in equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

The parties agree that the six grandchildren are the persons to whom the trustee must distribute the corpus of the estate in the discharge of the responsibilities imposed upon him by the will. They agree that the plaintiff trustee requires the guidance of the court in making final distribution. They disagree only as to the size of the share each claimant should receive. Mrs. Sullivan and Mrs. Dyer, hereinafter called for convenience the proponents, contend that since the testator had children living at his death, the first sentence of the quoted portion of the statute is controlling and that the grandchildren should take as the "lawful issue of a deceased child by right of representation." In short, the two proponents would each take one-third while the four opponents would each take one-twelfth. The opponents assert that the statute should be applied as of the moment immediately following the death of the last surviving child so that by application of the second sentence of the quoted portion of the statute each grandchild would take *per capita* one-sixth of the remainder.

All parties to this controversy agree upon certain fundamental principles of will construction frequently enunciated in prior decisions of this court. "It is the intention of the testator which must prevail in the construction of a will. But that intention must be found from the language of the will read as a whole illumined in cases of doubt by the light of the circumstances surrounding its making." *Cassidy, Guardian* v. *Murray, Trustee*, 144 Me. 326, 328. Since we seldom find an exact duplication in the phraseology of those wills which come before the courts for interpretation, we are not often greatly aided by prior judicial decisions involving the construction of other wills. *New England Trust Co., et al.* v. *Sanger, et al.*, 151 Me. 295, 303; *Berman* v. *Shalit*, 152 Me. 266, 268. In Maine there is no judicial inclination to prefer either a *per capita* or a *per stirpes* distribution. *Mellen* v. *Mellen*, 148 Me. 153, 159. There is further agreement that, whatever the respective shares of the ultimate takers, the remainder did not vest in them until after the death of the testator's last surviving child — such having been provided by the language of the will with great care and particularity.

The proponents vigorously contend that the intention of the testator to follow a *stirpital* testamentary pattern is clearly evidenced by the language of the trust clause providing for support payments for his children and their lineal descendants. This clause provides:

> "During the continuance of this Trust, the Trustees of my estate shall provide for the comfortable support and maintenance of each and all of my said five children (naming them), during the life of each of them, and at the decease of each of them, then to all the lineal descendants together, if any, of each of them, a sum, not exceeding for each of them, or all the lineal descendants, if any, of each of them, four thousand dollars (later increased by codicil to ten thousand dollars) per year, beginning at the time of my decease. And upon the de-

> cease of each of my said five children, without leaving any lineal descendants living at the time of the death of each of them, then said payment of a sum not exceeding (ten) thousand dollars per year, as aforesaid, for each for each year, shall immediately cease."

This clause clearly and unequivocally provided for a *stirpital* distribution of support payments and the will was so construed in *Cassidy, Guardian v. Murray, Trustee*, 144 Me. 326. There were other provisions of the will which preserved absolute equality among the children and as between living children and the lineal descendants of deceased children until the death of the last surviving child. The proponents find it inconceivable that the testator might "shift gears" and suddenly depart from a pattern of rigid equality among family groups to adopt a pattern of equality among individuals. We do not view such a transition as either surprising or unnatural. The testamentary pattern embraced two distinct phases. In the first phase one or more of the testator's children would in a sense be competing for shares. In such case the testator would be concerned lest any child suffer a diminution of his share in competition with the lineal descendants of deceased children. No such consideration would be involved in the second phase in which no child of his would be living to receive his bounty. We think it most natural and normal that the testator, having discharged his obligation to his children, should view his own lineal descendants of equal degree as a new class standing on a basis of individual equality. In short, we are not persuaded that the pattern which the testator adopted for the first phase of his will was necessarily intended by him to constitute the pattern for his entire will.

When we examine the language employed by the testator in the above quoted support payment clause, we note that a *stirpital* distribution was directed with care and precision. The annual payments to each child were to be continued "at

the decease of each of them, then to all the lineal descendants together, if any, *of each of them*" in an amount "not exceeding for each of them, or all the lineal descendants, if any, *of each of them*, (ten) thousand dollars per year." (Emphasis ours.) This language must be compared with that used in the termination clause above quoted in which the testator used the words, "of all of my lineal descendants, if any, then living." It is apparent that although the testator had shown in the support payment clause that he was aware of the language requirements for directing a *stirpital* distribution, no words of similar import appear in the termination clause. This will reflects careful draftsmanship and we view the omission of any clearcut direction of a *stirpital* distribution in the termination clause as significant. See *Mellen* v. *Mellen*, 148 Me. 153, 160 *(supra)*. It is contended that the phrase "lineal descendants" had taken on a meaning in the support payment clause which carries over into the termination clause. In the two phases of his testamentary plan the testator had two distinct classes of lineal descendants in mind. In the support payment clause he was providing only for the lineal descendants of those of his children who should die prior to the termination of the trust. If, for example, the last surviving child had left lineal descendants, they would have had no benefit from the trust. Key words in producing this result were as we have noted the italicized "of each of them." In the termination and final distribution phase the testator's concern was for all of his own lineal descendants, a class or group more broadly based and restricted only by the limitations fixed by the incorporated statute. In short the "lineal descendants" provided for in the support payment clause were by no means intended by the testator to comprise the "lineal descendants" who were to divide the corpus of the estate.

In *Lermond* v. *Hyler*, 121 Me. 54, the will before the court for construction contained the provision, "and after the

death of (a niece) and (a nephew) I give, bequeath and devise all of my property *to my then heirs, as provided by law.*" (Emphasis ours.) There were in fact two other persons who were also named as beneficiaries during their respective lives. Upon an analysis of the testamentary plan, the court concluded that the true intent of the testatrix was not precisely expressed by the language employed in the termination clause. The court interpreted the will as though it had provided that after the death of all of the life tenants the remainder should be distributed to those persons who would have been the heirs of the testatrix if she had died immediately after the death of the last surviving life tenant. The court cited with approval *Proctor* v. *Clark* (1891), 154 Mass. 45, 27 N. E. 673, in which a similar result was reached.

In *White* v. *Underwood* (1913), 215 Mass. 299, 102 N. E. 426, the will provided that upon the death of the life tenant a trust should terminate and the remainder be distributed "among my heirs at law, according to the statutes which shall then be in force." The court held that the statute should be applied as though the testator had died immediately after the death of the life tenant. A like result was reached in *Welch* v. *Howard* (1917), 227 Mass. 242, 116 N. E. 492.

Where a trust terminated at the death of a life tenant, the remainder over was to "those persons to whom it would be distributed and to whom it would pass by descent under the statutes of the State of Maine regulating the descent and distribution of intestate estates." The court held that the statute should be applied as of the date of death of the life tenant and implicitly as though the testator's death had occurred at that time. *Trust Co.* v. *Perkins, et al.*, 142 Me. 363. See also Annotation in 30 A. L. R. (2nd) 406; Restatement of the Law of Property, Sec. 308, Page 1719 *et seq.*

While conceding that the results in the above cited cases are all correct on their particular facts, the proponents contend that a different conclusion must be reached when, as here, the testator uses the words "lineal descendants" rather than the words "heirs" or "next of kin" or similar words importing death.

In Pennsylvania the court had occasion to consider the same problem. A statute provided that a remainder over after a life estate conditioned to vest at the termination of the life estate in the testator's heirs or next of kin or the persons thereunto entitled under the intestate laws "or other similar or equivalent phrase" should be construed as passing to the persons qualifying under the statute as of the termination of the life estate and not to the persons qualifying as of the time of the testator's death. The will before the court for construction vested the remainder over at the termination of a life estate "in (the testator's) lineal descendants according to the intestate laws of the state of Pennsylvania." The court held that the language employed in the will constituted a phrase "similar or equivalent" to the specific expressions found in the statute. *In Re Bonsall's Estate* (1927), 288 Pa. 39, 135 A. 724. We are satisfied that whatever rule of construction would have had application if Mr. Cassidy had made his gift over to his heirs or next of kin as of the time of vesting should have like application where as here he described the ultimate takers as comprising "all of my lineal descendants, if any, *then* living, in the same manner and in the same proportions as shall *then* be provided by the *then* existing laws of the State of Maine *for the descent among lineal descendants* of intestate property, real and personal." (Emphasis ours.)

The proponents direct our attention to the fact that in the original will the above quoted portion of the termination clause was followed by this sentence (later revoked by codicil) :

> "But if at the termination of this Trust, as aforesaid, that is to say after the decease of all of my said five named children, there should not at that time, namely, at the decease of the last survivor of my said five named children, be any of my lineal descendants then living, then, and in that event, all my said estate shall be divided among those persons that shall then constitute my heirs at law, under the laws of the State of Maine, as they shall then exist for the descent of intestate property, real and personal."

The proponents argue that since this clause alone, appropriately phrased, would under the rule in *Lermond* have sufficed to effectuate a *per capita* distribution among the lineal descendants of equal degree, the testator must have had some definite purpose in mind when he provided first for the lineal descendants and then for his heirs at law. This purpose, they contend, could only have been to provide a *stirpital* distribution among lineal descendants. The proponents would read the phrase in the above quoted portion of the termination clause, "of all of my lineal descendants, if any, then living," as though the testator had said, "of all of my *groups of* lineal descendants, if any, then living." We are struck at the outset by the fact that the testator did not use the words, "groups of" or any other equivalent words even though, as already noted, he had recognized the necessity in the support payment clause of making clear a *stirpital* intention. In our view the testator placed his potential heirs in two categories, lineal heirs and collateral heirs. That by his reference to "heirs" in the last sentence of the original termination clause he meant "collateral heirs" finds some support in the fact that when by codicil he revoked this last sentence, he substituted a gift over to his sister who was of course a potential collateral heir. The testator, having resorted to the descent statute for the determination of the takers after the death of his children, may have wished to forestall even the remote possibility that the

statute might be so changed as to destroy the priority afforded to lineal descendants over collateral heirs. The language of his will would preserve that priority for his lineal descendants even though the statute by some later amendment might not.

We can discover no sound or compelling reason for reaching any different result in the construction of this will than was reached in *Lermond* v. *Hyler*, 121 Me. 54 *(supra)*. Certainly Mr. Cassidy did not intend to incorporate by reference portions of the descent statute which would serve no useful purpose in resolving the dilemma for which it was invoked. Since he had called the statute into action to deal with a situation which could only arise after his children had died, it would be incongruous to permit the statute to operate as though at least one child were still living. If on the other hand we apply the rule in *Lermond*, the second sentence of the quoted portion of the descent statute has logical application. As already noted, the sentence reads, "If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation." To effectuate the testator's intention as disclosed by his testamentary pattern, the statute must be applied as though the testator's death occurred immediately after the death of his last surviving child so that the condition that "no child is living" is satisfied. In support of this conclusion we take note of the fact that the legislature itself in enacting the descent statute was providing for two very different situations. In the first sentence of the quoted portion it established the flow of property in cases where children are competing for shares or lineal descendants of more remote degree are competing with one or more children. The legislature provided in the second sentence a very different result to obtain when no children are competing and the takers are all lineal descendants of more remote degree. The latter

situation is the very one for which the testator was providing when he invoked the statute to fix the shares of his own lineal descendants of more remote degree. We are satisfied that it was the future legislative method of resolving this dilemma which the testator desired and intended to employ and adopt as a part of his testamentary plan. He had already provided his own scheme of distribution where his children were involved and required the aid of no legislative plan in so doing.

Both proponents and opponents vigorously assert that the language of the will is clear and unambiguous and requires no resort to outside circumstances to resolve ambiguities. Since, however, the claimants reach diametrically opposite results in their interpretation of this language, we must assume that the will may in some respects be ambiguous and some examination of the background against which it was conceived may not be amiss. At the time Mr. Cassidy executed his will he had no grandchildren. When he executed his codicil he had but one, the present Jane Murphy Sullivan. The marriage of her mother, the then Mary Cassidy, seems to have evoked a storm of protest and disapproval as a result of which the testator virtually cut himself off from any association with either this daughter or her child. Mr. Cassidy never knew his other grandchildren. We think it most unlikely that the testator ever intended that a grandchild who suffered some loss of his affection because of her mother's disregard of his wishes should receive substantially more of his estate than other grandchildren whose parent had never seemingly incurred such marked parental displeasure. We think that it is normal and natural for a testator to think of his prospective grandchildren, yet unborn, in terms of individual equality as recipients of his bounty so long as they are not in competition with any child or children of his. The legislature seems to have made the same assumption in establishing its pattern in the second sentence

of the quoted statute. We find nothing in the attendant circumstances which would tend to resolve any ambiguity in favor of a *stirpital* distribution among the testator's grandchildren.

We conclude that the net estate should be distributed by the trustee among the six claimants *per capita.*

Case remanded to the Superior Court for an order for judgment in accordance with this opinion. Costs and reasonable fees to counsel for the trustee and to counsel for the several defendants to be fixed by the sitting justice below and ordered paid by the trustee and charged in his probate account.

STATE OF MAINE
vs.
OTTO BENNETT

Knox. Opinion, April 5, 1962

Criminal Law. Rape.
Carnal Knowledge. Minors.
Evidence. Exceptions.

Corroboration beyond the testimony of the prosecutrix is not required in proving rape.

Ruling on discretionary matters are not exceptionable.

A letter from the defendant to the prosecutrix several months after the alleged crime was relevant to the disposition and relationship between the parties.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the refusal to direct a defendant's verdict and

exceptions to certain rulings on evidence. Exceptions overruled. Judgment for the state.

Peter Sulides, for state.

A. Alan Grossman,
John L. Knight, for defendant.

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

SULLIVAN, J. Respondent was accused by indictment of having carnally known a female child of eleven years in contravention of R. S., c. 130, § 10. During his trial by jury respondent excepted to several judicial rulings. The verdict was guilty and respondent now prosecutes his exceptions.

EXCEPTION 14

At the close of all evidence the respondent unsuccessfully moved for a directed verdict.

The principles applicable and controlling upon this issue are well established:

> "To the refusal of the Justice to direct a verdict of not guilty, upon the grounds suggested, the respondent excepted, and these exceptions were filed and allowed. The only issue raised by the exceptions is, whether there was sufficient evidence to warrant the jury in rendering a verdict of guilty. - - - - If the jury believed the defendant, their verdict should have been in his favor. If they did not believe him, then there was ample testimony to sustain the verdict which they rendered."
> *State* v. *Clancy*, 121 Me. 363, 364.

> " - - - - Although corroboration of her (prosecutrix's) testimony was not necessary - - - "
> *State* v. *Morin*, 149 Me. 279, 281.

> "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. *Field*, 157 Me. 71, 76.

Inferentially there were no observers of the crime with which the prosecutrix charged this respondent. The child narrated the consummated event and circumstances and identified the respondent as the violator. No spiteful or malicious motive of the girl seems to have been discoverable. Collateral real evidence and ancillary testimony of witnesses were credible, of unusual quantity and amply sufficient when believed to verify the wrong imputed. Occasion and opportunity, personal relationship, a medical examination of the victim, an expertly analyzed bloodstain, prosecutrix's blood test and grouping, communicated writings in a code known to both principals, depraved and pertinent utterances attributed to the respondent by listeners constitute some of the corroborative proof which the jury was justified in concluding to be trustworthy and authentic. The respondent roundly asserted his innocence and in addition to his voiced denials, distinctions and refutations supplied some medical testimony which would have made possible at least the conclusion that respondent had been physically incapable of the offense. But real and spoken evidence and their advantage in observing the principals and witnesses completely vindicate the jurors in their verdict of guilt beyond a reasonable doubt.

There was no error in the refusal to direct a verdict of not guilty. *State* v. *Allen*, 151 Me. 486, 490.

EXCEPTION 1.

The child prosecutrix was asked a pertinent question which respondent's counsel challenged as leading. The presiding justice in his discretion permitted an answer. The witness was a girl of 12 years at the time of trial. Wigmore on Evidence, 3rd ed., Vol. III, § 778. The examination was no doubt thus "made more brief and pertinent" and the action of the justice is not exceptionable. *Blanchard* v. *Hodgkins,* 62 Me. 119, 120; *Harriman* v. *Sanger,* 67 Me. 442, 444.

EXCEPTIONS 2, 3, 4, and 5.

The prosecutrix in redirect examination was interrogated against objection as to whether she had directed the attention of anybody to a bloodstain. Defense protested that the inquiry should have been earlier addressed in direct examination. The justice administering the trial had discretionary authority to permit such questioning by special leave. Maine Criminal Rules, 5, 155 Me. 645.

EXCEPTION 6.

Defendant challenged the propriety of a question designed to reveal the identity of a chattel in a photograph taken a year or more after the asserted crime. Defense was overruled.

The order of proof to demonstrate fact is within the bounds of sound judicial discretion. *Billings* v. *Inhabs. of Monmouth,* 72 Me. 174, 177. Later considerable evidence was supplied by the State to justify a jury finding that the chattel photographed had not changed appreciably in condition or status from the date of the imputed crime to the time of the photographing. The respondent in fact subsequently placed in evidence 8 photographs of the same object, taken by the same person and at the same time.

EXCEPTION 7.

A wooden board containing a bloodstain had been detached by the State from a "hen nest" or coop and was offered in evidence as a relevant property in the perpetration of the alleged offense. Defense disputed the admissibility of the exhibit because of the elapsing of a year since the event the board purportedly evidenced, because the pathologist had only succeeded in confirming a general grouping of A for the blood comprising the stain and had been unable to assign any definite age to the blood except an assurance that it was more than a week, because expert testimony revealed that 44% or 45% of the American population has A blood and persons other than the prosecutrix had had access to the hen nest, because the board had not been reaffixed to the rest of the hen nest which had already been admitted in evidence and because some cleats had been somewhat displaced from their original positions upon the coop.

The board and its blood stain stood in a milieu of connected circumstances. The constant situation of the board from September, 1959 until trial, its unchanged condition throughout and the position of the board prior to its severance from the coop had been detailed in evidence to the jury. The stain was of blood group A. The prosecutrix had been determined by a testifying medical laboratory technician to possess type A, RH positive blood. During several months subsequent to September, 1959 and during the course of his employment by the father of the prosecutrix respondent had an almost daily occasion to observe and utilize the hen nest in his work. The hen nest save for the controversial board had already been admitted in evidence. The prosecutrix had related that the board had constituted part of the plane surface upon which the crime had been enacted and had sworn that her blood had stained the board's top side. The relation of the board to the trial issue had become by an aggregation of circumstances quali-

fied for jury consideration. That decision was the well-acquitted duty and responsibility of the presiding justice.

> "Whether the evidence of the witness was too remote, was within the discretion of the presiding judge. Ferron v. King, 210 Mass., 75. Discretion does not appear to have been exercised wrongly. An excepting party, to have his exceptions sustained, must show himself aggrieved. Davis v. Alexander, 99 Me., 40. That, these exceptors do not show."
>
> *Masse* v. *Wing*, 129 Me. 33, 36.

EXCEPTION 8.

Prosecutrix testified that several months after the charged offense the respondent drove past her and threw to her a letter written in the characters of the Morse Code. She produced the letter in court and related that she had read the letter, had continuously preserved the letter in her personal possession and had placed upon it deciphering letters of the English alphabet to which she directed attention. The letter professed enraptured love.

The letter was ostensibly relevant with respect to disposition and relationship between prosecutrix and respondent. *State* v. *Williams*, 76 Me. 480, 481. In view of its imputed source, the testimony of the prosecutrix as to its safekeeping and her accounting for the specified additions the letter was proper for jury ponderance after cautionary explanations which we are to assume the presiding justice rendered. *State* v. *Witham*, 72 Me. 531, 535.

EXCEPTION 9.

The sheriff of the county qualified as a translator of Morse Code. He deciphered into written English the letter which is the subject of Exception 8, *supra*. Defense objected to the reception into evidence of the Sheriff's tran-

scription because the code letter itself had not been demonstrated to have been written by the hand of the respondent and the Sheriff's translation only served to emphasize a remote matter. This exception contained no merit.

EXCEPTION 10.

The sheriff was asked and suffered to respond that he had detected one or two incorrectly used characters in the Morse coding upon the letter considered under Exception 8, *supra*. The exception is devoid of gravity.

EXCEPTION 11.

The sheriff after the admission in evidence of his translation of the code letter was permitted to read his rendition aloud to court and jury. Defense contended that the reading would unduly emphasize the subject and that the sheriff's decipherment spoke for itself as the best evidence. We can detect no exceptionable error.

EXCEPTION 12.

The mother of the prosecutrix was questioned in cross-examination as follows:

> " - - - - did (prosecutrix) read magazines?
>
> "Yes.
>
> "And the magazines she did read would be these romantic and sexy magazines?"

The court excluded the latter question as:

> " - - - - an unfair characterization and might not give the witness an opportunity to describe what magazines the young lady may read."

Such a ruling is not censurable. In fact defense in the wake of the above exclusion interrogated the witness to an

apparent satisfaction upon the subject matter of the magazines read by the prosecutrix.

EXCEPTION 13.

Defense counsel inquired of the prosecutrix:

> "What were some of the magazines you read this summer? Is there anything funny about that question, - - - - ?

The court interrupted:

> "I don't think you need to ask the witness whether there was anything funny, - - - - It is not proper for you to characterize on the record any expressions on the witness' face. You may inquire."

The jury was observing the facial reactions of the prosecutrix. Nothing of any possible benefit to the defense therefrom was calculated to pass unseen. Defense later enjoyed the full privilege of argument at which time full characterizations were doubtlessly availed of. From the lifeless printed record we cannot tell whether the attitude, tone or demeanor of inquiring counsel consciously or unconsciously excited some sensation in the witness. This restraint imposed by the court upon a cross examination was of trifling import in this case.

EXCEPTION 15.

This exception is stated upon the record as follows:

> "After charge of the Justice and before the jury retired to deliberate, respondent's counsel took exception to that part of the Judge's charge in which he stated: 'I take judicial notice of the fact and instruct you that Hope is in the County of Knox,' which was prejudicial to the respondent there having been no testimony to this effect, said comment being in violation of Chapter 113, Section 104 of the Revised Statutes of Maine, 1954, as amended."

In *State* v. *McKrackern*, 141 Me. 194, 209, this court decided:

> "Exception that 'there is no proof that the offense alleged was committed in the County of Sagadahoc.' But there was ample testimony to show that this offense was committed in the Town of Topsham, and judicial notice must be taken that the town of Topsham is in the County of Sagadahoc. Harvey et al., Petitioners, v. The Towns of Wayne, Readfield, and Winthrop, Appellants, 72 Me., 430, 432; Coffin v. Freeman, 84 Me., 535, 540, 21 A. 986."

The mandate must be:

Exceptions overruled.

Judgment for the State.

STATE OF MAINE

vs.

CHARLES F. BARNETTE

Penobscot. Opinion, April 5, 1962.

Criminal Law. Lesser Offense. Double Jeopardy. Rape. Delinquency. Minors.

R. S., 1954, Chap. 138, Sec. 13-A.

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

Statutory rape is "aiding" juvenile delinquency plus the different criminal factor. Correlatively, statutory rape and aiding child delinquency are the greater and lesser offenses. They are not the same offense. One is a felony; the other a misdemeanor. The court which adjudicated the misdemeanor had no jurisdiction of the felony; therefore in the Municipal Court respondent was not in jeopardy for statutory rape.

ON EXCEPTIONS.

This is a criminal action before the Law Court upon exceptions to the overruling of a plea of double jeopardy. Exceptions overruled. Judgment for the state.

Ian MacInnes, for state.

Neil D. MacKerron,
Freeman A. Robinson, for plaintiff.

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

SULLIVAN, J. Respondent has excepted to the overruling of his plea of former jeopardy in bar to an indictment accusing him of having unlawfully and carnally known and abused a female child of 12 years of age. R. S., c. 130, § 10.

Respondent had been adjudged guilty in the Municipal Court of having aided in the delinquency of the child prosecutrix in contravention of R. S., c. 138, § 13-A, Additional; c. 138, § 14; (P. L. 1955, c. 414, §§ 1, 2.) Sentence had been imposed. Thereafter the respondent was indicted for statutory rape of the child, interposed his rejected plea and pleaded *nolo contendere*. He was adjudged guilty and sentenced.

Both convictions were rested upon the same facts, acts and transaction. The issue is the sufficiency of respondent's plea against the latter prosecution.

Aiding in the delinquency of a minor is a misdemeanor. The legislative act outlawing such subversive evil is notably inclusive and comprehensive.

> "Any person who shall be found to have caused, induced, abetted, encouraged or contributed toward the waywardness or delinquency of a child under

> the age of 17, or to have acted in any way tending to cause or induce such waywardness or delinquency, shall be punished - - - - "
> R. S., c. 138, § 13-A, additional, P. L., 1955, c. 414, § 1.

> "In order to find any person guilty of violating the provisions of sections 9, 12 and 13-A, it shall not be necessary to prove that the child is actually in delinquency or distress, provided it appears from the evidence that through any act or neglect or omission of duty or by any improper act or conduct on the part of the accused the distress or delinquency of any child may have been caused or merely encouraged."
> R. S., c. 138, § 14, P. L., 1955, c. 414, § 2.

The felony of rape upon a child younger than the age of consent is proscribed as follows:

> "Whoever - - - - unlawfully and carnally knows and abuses a female child under 14 years of age shall be punished by imprisonment for any term of years."
> R. S., c. 130, § 10.

By definition in the statutes just quoted aiding in the delinquency of a minor is logically and necessarily contained as an ingredient in statutory rape which is uncontrovertibly an improper act causing or encouraging the distress or the delinquency of the child victim. All statutory rape is aid to juvenile delinquency. But all aid to juvenile delinquency is not statutory rape. Evidence sustaining an accusation of statutory rape must incidentally and infallibly prove the offense of aiding juvenile delinquency but proof verifying a complaint of aiding child delinquency will very seldom attain in kind or amount to a justification of the charge of statutory rape.

Sexual intercourse is an indispensable element in the crime of statutory rape. *State* v. *Morin*, 149 Me. 279, 285.

But such carnal knowledge is not requisite for a conviction of the incidental offense of aiding in juvenile delinquency. Statutory rape is aiding juvenile delinquency plus the different criminal factor. Corelatively, statutory rape and aiding child delinquency are the greater and the lesser offenses.

The common law and constitutional prohibition against former or double jeopardy is contained in the Constitution of Maine, Article 1, Section 8:

> "No person, for the same offence, shall be twice put in jeopardy of life or limb."

In *State* v. *Lawrence*, 146 Me. 360, 361, this court said:

> "- - - - The key words in the case at bar are 'for the same offence.' Are the offences the same both in fact and in law, or different? The answer is not found in the fact that the acts of the defendant were the same in both cases or that the charges arose from the same transaction."

In the decided authorities great confusion and diversity of reasoning and judgment are found in the resolving of the complex problem of identity of criminal offenses. A sufficient and random example of such nonconformity in theories and tenets is contained in the note at page 212, volume 12 of *Cornell Law Quarterly.*

The two offenses under deliberation in the instant case are not interchangeably the same. The necessary presence of the fact of carnal knowledge in the greater offense constitutes the disparity. Aiding in juvenile delinquency was apprehended by the Legislature as a category of acts or omissions which while reprehensibly baneful and scandalizing may be condignly punished by fines or jail sentences. Statutory rape, however, has been immemorially regarded by mankind as a most abhorrent crime and is punishable in Maine by imprisonment in the State prison for an unlimited

number of years. For one to consign statutory rape by the characterization of just another species of aiding child delinquency would for all listeners and readers be a vacuous and unintelligible understatement. By practical standards the offenses of aiding child delinquency and statutory rape are distinguishable and not identical. They are not the same offense.

This respondent was tried upon complaint in the municipal court and found guilty of aiding in child delinquency. The charge is classified as a misdemeanor and the court was competent to entertain it unto judgment. The municipal court was never possessed of jurisdiction to adjudge an accusation of statutory rape beyond a determination as to probable cause. The Superior Court was the sole tribunal for the trial of felonies. R. S., c. 145, §§ 1, 5, as amended; c. 146, § 2, as amended. In the municipal court respondent was never placed in jeopardy for statutory rape. *State* v. *Elden*, 41 Me. 165, 170.

Commonwealth v. *McCan* (1931), 277 Mass. 199, 178 N. E. 633 is a decision upon the same issue as that of the instant case. The defendant had been tried and found guilty by a municipal court of the misdemeanor of having made an indecent assault upon and having beaten a female child. Later the defendant was indicted for the felony of having assaulted and of having carnally known the same child. The defendant pleaded former jeopardy in bar to the indictment. Both cases concerned the same transaction and acts. The Massachusetts Court held:

> "- - - - The precise question, therefore, is whether the conviction of the defendant of the crime of assault and battery in a court having no jurisdiction finally to try or to convict of rape is a bar to a prosecution of the defendant upon the present indictment for the latter crime in a court of competent jurisdiction, the female child and the general event as to time and place being the same in both instances.

"Doubtless an assault is involved as subsidiary and incidental to rape, and an indictment for rape charges substantially and formally an assault and battery; and, under our present statutes, upon an indictment for rape, a defendant, if the proof falls short of the charge of the felony, may be found guilty of simple assault and battery, - - - The two crimes, however, differ radically. An assault and battery is the intentional and unjustified use of force upon the person of another, however slight or the intentional doing of a wanton or grossly negligent act causing personal injury to another. - - - - Rape is the carnal knowledge of any woman above the age of consent against her will, and of a female child under the age of consent with or against her will; its essence is the felonious and violent penetration of the person of the female by the defendant - - - - It is difficult to conceive of two crimes more fundamentally different in nature and distinct in legal character. Assault and battery is and always has been a misdemeanor and may be insignificant in character. Rape was in this commonwealth a capital offense until the enactment of St. 1852, c. 259, § 2, and is still one of the very few crimes punishable by imprisonment for life in the state prison.

"- - - - Any defendant in this plight has it within his own power to protect himself from any danger of being twice put in jeopardy for the same offence. He may plead his former conviction in bar of the assault and battery embraced in the indictment, and 'not guilty' as to the rest of the crime charged. Then, if acquitted of the latter charge, he will have the benefit of his plea in bar and be entitled to a discharge. - - - - *State v. Littlefield, 70 Me. 452,* - - - -

"The principle was succinctly stated in People v. Townsend, 214 Mich. 267, 275, 183 N. W. 177, 180, 16 A. L. R. 902, as follows:

'A conviction in an inferior court of a misdemeanor does not constitute former jeopardy so as to bar subsequent prosecution for a felony arising

> out of the same transaction. The felony here charged being beyond the jurisdiction of the inferior court, and not included in any sense within the charge there laid, the defense of former jeopardy fails.' The great weight of authority is to the same effect. - - - -
>
> "We think that on principle a defendant in these circumstances ought not to escape punishment for the grave offence with which he was charged and has been found guilty. To reach that result does not impair the essential protection against double trial for the same offence. The assault of which the defendant was earlier convicted was no essential part of the high felony here charged, but merely an incident. The two crimes were separate and distinct."

Commonwealth v. *Mahoney* (1954), 331 Mass. 510, 120 N. E. (2nd) 645 is authoritative upon our immediate issue. The defendant had been charged in the municipal court with assault and battery, with petit larceny and with robbery from the victim's person. He had been adjudged guilty and sentenced for the assault and battery and the petit larceny. No probable cause had been found in the matter of the alleged robbery and the defendant had been discharged upon the robbery complaint. Defendant was later indicted for robbery. The crime for which he was indicted and the offenses of which he had been convicted in the municipal court all arose out of and were parts of the same transaction. Defendant pleaded autrefois convict in bar to the indictment. The court holding the plea invalid said:

> "The misdemeanor and the felony were not the same offenses even if they arose out of the same occurrence - - - - - The assault and battery and the larceny of the personal property from Matheson were parts of the robbery from him of the same property. Robbery at common law is a felonious taking of the personal property of another from his per-

son or in his presence, against his will, by the exertion of force actual or constructive - - - - Assault and a larceny are essential elements of the crime of robbery. A charge of robbery cannot be sustained if there is no evidence of violence, actual or constructive, exerted upon the one on whose person or in whose presence the goods are. Nor can it be sustained if there is lacking any of the elements necessary to constitute larceny. - - - - The question then is whether the prosecution for the misdemeanors which were lesser offenses than the felony but which constituted parts of the greater offense bars the prosecution for the felony.

"The general rule is that a prosecution for a part of a single crime which results in a conviction or acquittal of a defendant is a bar to a subsequent prosecution for another part or the remainder of the crime. Where a lesser offense is included in a greater offense, a prosecution for the former bars a prosecution for the latter - - - -

"The present case does not come within this rule even if each of the two misdemeanors upon which the defendant was found guilty comprised an essential part of the felony for which he was subsequently convicted. As the Municipal Court did not have jurisdiction over the offense of robbery, the defendant was not put in jeopardy until after he was indicted for this felony. - - - - "

The Ohio Court in *Crowley* v. *State* (1916), 94 Ohio St., 113 N. E. 658, approved the overruling of a plea of former jeopardy. The respondent had been convicted in the mayor's court for the offense of having unlawfully committed an assault and battery upon the person of the prosecutrix and of having unlawfully struck and wounded her. Subsequently, out of the same affair the respondent was indicted for assault with intent to commit rape. *Inter alia* the court held:

"In this case, the mayor, concededly limited in his jurisdiction in criminal matters, was wholly with-

> out jurisdiction to try one charged with a felony, and consequently could not have tried plaintiff in error on the charge of assault with intent to commit rape - - - -
>
> "So, in the instant case, before plaintiff in error could be in jeopardy on the charge of assault with intent to commit rape, it must have been in a court with jurisdiction to try the charge."

The presiding justice of the Superior Court in the case at bar properly overruled the respondent's plea of former jeopardy.

Exceptions overruled.
Judgment for the State.

UNITY TELEPHONE COMPANY
vs.
DESIGN SERVICE COMPANY OF NEW YORK, INC.

Waldo. Opinion, April 5, 1962.

Evidence. Customs and Usages. Appeal and Error. Contracts. Equity. Witnesses. Instructions. Directed Verdict. M. R. C. P. 17 (a).

Letter written by official of defendant's company was properly admitted in evidence as basis for admission of reply letter and other letter containing particular reference to contents of reply letter.

Instruction that certificate of supervision and inspection was not part of contract in action for breach was not erroneous.

When contract is clear and unambiguous, custom and usage may not be proved.

Equity will not suffer wrong without remedy.

Failure to rule on motion for directed verdict at close of plaintiff's evidence can be construed as denial of motion.

Bonding company should have been joined as party plaintiff where it had agreed to pay plaintiff sum on condition plaintiff exhaust remedies against defendant. (M. R. C. P. 17 (a).)

ON APPEAL.

This is an action for breach of a contract of supervision. Defendant appealed from the denial of its motion for judgment notwithstanding verdict and for new trial. Appeal sustained and new trial granted.

Brann & Isaacson,
Frank W. Linnell,
G. Curtis Webber, for plaintiff.

Herbert T. Silsby, II, for defendant.

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

DUBORD, J. This case is before us on defendant's appeal from the refusal of the presiding justice to grant its motion for judgment notwithstanding the verdict and for refusal to grant its motion for a new trial.

Sometime in 1955 the Unity Telephone Company, hereinafter referred to as "Unity," entered into a contract with the Rural Electrification Administration under the terms of which it was to obtain funds to finance conversion of its telephone plant to a dial system. Subsequently, the defendant, Design Service Company, Inc., hereinafter referred to as "Design" was engaged to provide all engineering services for the project. A written contract for such services was signed on January 18, 1956 by both parties.

Part of the project consisted of the construction of two small buildings, one in Albion and one in Newburgh, Maine, to house the dial equipment. Plans and specifications for the project, including the two dial equipment buildings were prepared by Design and the entire project was under the

supervision of, and subject to inspection by, an engineer sent by Design to remain at the site until completion of the work.

The contract to construct the two dial equipment buildings was given to L. W. Lander, Inc., hereinafter referred to as "Lander."

The American Surety Company issued a performance bond to Unity in the usual form conditioned on proper and faithful performance of Lander's agreement.

In the declaration in Unity's writ, which was brought before the promulgation of the New Rules of Civil Procedure, Design was charged with liability based upon failure to comply with the provisions of its contract with Unity relating to supervision and inspection.

The record indicates that before Unity brought its action against Design, it had initiated an action for damages based upon improper construction, against Lander. Admittedly, Lander breached its contract in relation to the construction of the two small dial buildings.

The record does not indicate what disposition was made upon the court docket of Unity's suit against Lander. However, prior to the institution of the cause now before us, the American Surety Company, which had issued Lander's bond, entered into an agreement with Unity reading as follows:

> "American Surety Company, a company organized under the laws of the State of New York, has agreed to pay Unity Telephone Company the sum of $4500 on the following terms and conditions:
>
> "1. Unity Telephone Company is to retain the $900 held back by it from L. W. Lander, Inc. as liquidated damages for Lander's breach of its construction contract.

> "2. Unity Telephone Company agrees, as a condition precedent to any payment by American Surety Company, to exhaust all of its legal remedies against Design Service Company for breach of the contract of supervision between the parties, and any recovery from its own service is to be applied against any amounts due from American Surety Company under the agreement."

Design filed an answer denying liability and setting forth specifically by way of defense that Unity was not the real party in interest, or at least was not the only real party in interest; that as a result of the agreement between Unity and American Surety Company, Unity had waived any claim it might have had against the defendant and had been paid for any damage to which it might be entitled.

Pursuant to this defense relating to the real party in interest, Design properly filed a motion that the American Surety Company be substituted as the real party in interest as plaintiff in the action instead of Unity Telephone Company, or in the alternative, that Lander and/or American Surety Company be joined as party plaintiff in the action.

The motion was denied.

Following the agreement between Unity and American Surety Company, the instant suit was instituted.

The case was tried before a jury which returned a verdict for the plaintiff in the amount of $5,244.72, which was the amount expended by Unity in constructing the foundations omitted by Lander.

During the course of the trial Design objected to the introduction of certain exhibits, objected to a portion of the charge of the presiding justice, and also objected to the refusal of the presiding justice to allow testimony by a witness for Design relating to custom and usage.

Design's motion for judgment *n.o.v.* and for a new trial, which motion was denied by the presiding justice reads as follows:

> "The Defendant moves that the Court set aside the verdict entered April 28, 1960, (and the judgment entered thereon on April 28, 1960), and direct entry of judgment in accordance with the Defendant's motion for a directed verdict made at the close of all the evidence on the ground as stated in that motion that:—
>
> "(1) That the Plaintiff has not shown the duty of inspection.
>
> "(2) That the Plaintiff has not shown a breach of the duty of inspection.
>
> "(3) That the evidence is insufficient to sustain a verdict for the Plaintiff.
>
> "(4) That the Plaintiff has not shown that the Defendant failed to use reasonable effort to correct discovered defects.
>
> "Alternatively, the Defendant moves that the Court set aside said verdict (and the judgment entered thereon) and grant the Defendant new trial on the following grounds:—
>
> "(1) The Court erred in admitting irrelevant, incompetent and prejudicial and hearsay exhibits offered by the Plaintiff over Defendant's objections as follows:— Plaintiff's Exhibit #21, Plaintiff's Exhibit #22, and Plaintiff's Exhibit #23.
>
> "(2) The Court erred in instructing the jury over the specific objections of the Defendant, that Certificate of Supervision and Inspection in Plaintiff's Exhibit #1 was not a part of the contract between the Plaintiff and the Defendant being said Plaintiff's Exhibit #1.
>
> "(3) The Court erred in not allowing into evidence the Defendant's cross-examination of Plaintiff's witness, Harry Brown, Manager of the

Plaintiff Corporation, that Plaintiff Corporation had made an agreement with the American Surety Company whereby the American Surety Company was to receive any recovery from the Defendant against any amount due from the American Surety Company to the Plaintiff.

"(4) The Court erred in not allowing into evidence the Defendant's testimony by its witness, Frank Geis, the custom and usage with respect to the quantum of inspection under contract between the Plaintiff and Defendant, being Plaintiff's Exhibit #1.

"(5) The Court erred in not allowing Defendant's motion that the American Surety Company be substituted as party plaintiff as the Plaintiff was not the real party in interest or not the only real party in interest because of an agreement made between the Plaintiff and the said American Surety Company whereby the said American Surety Company was to receive the proceeds of any recovery against the Defendant.

"(6) The Court erred in that the verdict was against the law and evidence.

"(7) The Court erred in that the verdict was against the weight of the evidence.

"(8) The Court erred in failing to rule on motion for directed verdict at close of Plaintiff's evidence.

"(9) The Court erred in not allowing the Defendant's motion to strike as prejudicial and hearsay, the testimony of the Plaintiff's witness, Harry Brown, (manifestly counsel meant Frank Geis) with respect to allegations by certain people in the REA that the fee for services rendered by the Defendant was excessive and percentage-wise was 75% more than average.

"(10) The Court erred in ruling over the Defendant's objection that the Plaintiff's witness, Glines, Secretary and Treasurer of the Plaintiff

> Corporation, that Plaintiff had performed all its part of the contract between the Plaintiff and Defendant, marked Plaintiff's Exhibit #1, on the part of the Plaintiff to be performed."

We propose to first dispose of the issues raised in Design's motion for a new trial relating to questions of evidence.

(1) The first objection related to the admission of plaintiff's exhibits 21, 22, and 23. Plaintiff's exhibit 21, was a letter written by an official of the Rural Electrification Administration to Design. Plaintiff's exhibit 22, was a reply to this letter and plaintiff's exhibit 23, was a letter sent by Unity to Design with particular reference to the contents of plaintiff's exhibit 22. Design objected to the admission of these exhibits on the theory that particularly exhibit 21 was hearsay. Exhibit 21 was admitted by the presiding justice as a basis for the admission of the other two letters. We perceive no error in this action:

> "Where a writing offered *refers to another writing*, the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former. The same principle would apply to another writing, not expressly referred to, but *necessary* by the nature of the documents to a proper understanding of the one offered. Much, therefore, will depend upon the circumstances of each case and the character of each document, and no fixed rule can fairly be laid down; the trial Court's discretion should control." Wigmore on Evidence, Vol. VII, § 2104, Page 502.

The court's discretion was properly exercised and Design takes nothing by this objection.

(2) The second objection relates to instructions given by the presiding justice in his charge relating to the certificate of supervision and inspection.

The record indicates that at the conclusion of the charge to the jury, counsel for Design stated: "We would like our objection noted to the part of the charge as to the certificate of inspection." No reason was assigned for the objection so that it would appear that there had been no compliance with the provisions of M. R. C. P. 51 (b). However, even assuming that a reason for the objection had been specified, we see no error in this portion of the charge of the presiding justice. Design takes nothing by this objection.

(3) We pass temporarily over objection number 3.

(4) Contention is made that the court erred in refusing to allow the testimony of a witness relating to custom and usage with respect to the quantum of inspection under the contract between Unity and Design.

The rule appears to be well settled that when a contract is clear and unambiguous, custom and usage may not be proved. Custom and usage may be proved to ascertain the intention of the parties only when it cannot be ascertained by the terms of the contract. 55 Am. Jur., Usages & Custom, § 30; *Gooding* v. *Northwestern Mutual Life Insurance Company*, 110 Me. 69, 85 A. 391; *Everett* v. *Rand*, 152 Me. 405, 131 A. (2nd) 205.

A study of the contract between Unity and Design leaves no uncertainty or ambiguity.

(5), (6), and (7) Subsequent consideration will be given to these alleged errors.

(8) Contention is made that the court erred in failing to rule on a motion for a directed verdict at the close of plaintiff's evidence. The New Rules of Civil Procedure do not seem to cover the point as to whether or not the presiding justice may reserve his ruling. However, in the instant case no objection was made on the part of counsel

for the defendant to the failure of the presiding justice to rule, so that the failure to rule may well be construed as having been waived. Moreover, failure to rule may also be construed as a denial of the motion. In any event, Design was not prejudiced by the failure of the presiding justice to act.

(9) Contention of error is made for the reason that the presiding justice refused to strike out as prejudicial and hearsay the testimony of one of the plaintiff's witnesses. While perhaps this evidence was not strictly admissible, its admission and failure to strike was a harmless error.

(10) One of the witnesses for Unity was permitted to answer that his company had performed its part of the contract between Unity and Design. Objection was made to this line of testimony. Bearing in mind that this witness was in court and subject to cross-examination, we perceive no error in this procedure.

In its motion for judgment *n.o.v.*, Design sets forth that the plaintiff has not shown a duty on the part of Design to inspect; has not shown a breach of the duty of inspection, that it was not shown that the defendant failed to use reasonable efforts to correct discovered defects and that the evidence is insufficient to sustain a verdict for the plaintiff. Similar objections are raised in the motion for a new trial to the effect that the verdict was against the law and the evidence and against the weight of the evidence. A careful study of all of the evidence satisfies us that the verdict of the jury was warranted. There was ample proof of breach of Design's agreement to supervise and inspect the project. The amount of the verdict is also supported by the evidence. Consequently, the ruling of the presiding justice in denying the motion for judgment *n.o.v.* and for a new trial in respect to the alleged errors so far discussed was proper. This paragraph disposes of the errors alleged in

the motion for judgment *n.o.v.* and of errors numbered (6) and (7) filed under the motion for a new trial.

We direct our attention now to the only remaining issues which concern the motion of Design that the American Surety Company be made a party plaintiff as the real party in interest (alleged error #5); and that counsel for Design should have been permitted to cross-examine the manager of Unity concerning the agreement between Unity and American Surety Company (alleged error #3).

We have already pointed out that the instant action was instituted by Unity against Design following the execution of an agreement between American Surety Company and Unity providing, in substance, that American Surety Company in its capacity as surety for Lander, would pay Unity the sum of $4500.00 upon the condition that Unity should exhaust its remedies against Design and give credit to the American Surety Company for whatever recovery it might obtain against Design. In other words, if recovery were obtained for an amount less than $4500.00, the liability of American Surety Company to Unity would be reduced proportionately and if the recovery were equal to or in excess of $4500.00, the liability of American Surety Company would be exonerated.

In its answer, Design pleaded that the American Surety Company was the real party in interest and then at the proper time filed a motion addressed to the presiding justice praying that the American Surety Company be made a party plaintiff, which motion was denied.

We are, therefore, presented with a most unusual and novel set of facts, which seems to be without precedent in this jurisdiction.

We start out with the premise that we are involved with two contracts. One is the construction contract between

Unity and Lander, and the other is the contract between Unity and Design relating to supervision and inspection. Under the provisions of the contract between Unity and Lander, Lander was under an obligation to comply with the requirements of proper construction. Likewise, Design was under a legal duty of properly supervising and inspecting the work performed by Lander. Failure on the part of Lander to comply with its obligation would and did give rise to an action for damages on the part of Unity. Failure of suitable inspection and supervision by Design would also give Unity a cause of action. The liability on the part of Lander and Design was not joint, but several, and many difficult and unusual questions relating to contribution and subrogation are presented which it may be unnecessary for us to resolve in this opinion.

Design filed its motion asking that the American Surety Company be made a party plaintiff under the provisions of M. R. C. P. 17 (a), which reads as follows:

> "*(a) Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maine. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated."

Manifestly, the last sentence in the above rule is designed to continue the policy which has been in force in this jurisdiction to the effect that the names of insurance companies are not ordinarily to be mentioned in litigation.

In the commentary in Maine Civil Practice, Field and McKusick, § 17.4, it is stated that probably a bonding com-

pany which is suing by way of subrogation to recoup its loss on a fidelity bond is to be regarded as an insurer within the purview of Rule 17 (a).

However, we are of the opinion that the situation created by the uncommon set of circumstances brought about by the agreement between American Surety Company and Unity is not analogous.

Undoubtedly the last sentence in M. R. C. P. 17 (a) provides for the ordinary situation where, for example, a liability insurance company has paid its insured a collision loss brought about in an accident with a third party. The liability company may then seek to recoup its loss by bringing action in the name of its insured.

Counsel for the plaintiff, in support of its position that the surety company is not a party in interest, argues that the situation created is not unlike that of the so-called loan receipt procedure. By means of this device an insurance company loans to the assured the amount due under its policy instead of paying the claim outright. The loan is made on condition that the assured promptly bring action in his own name to enforce his rights against a third party stemming from the same transaction. The insured pledges with the insurance company as security for the loan any recovery he may secure against the third person. If the suit fails, the loan is never repaid. We do not consider the procedure relating to loan receipts in any way analogous to the situation now before us.

In sum and in substance, we are constrained to state that as a result of the agreement between the American Surety Company and Unity a serious problem of inequity and injustice has been created and in its creation, Unity is not without being subject to censure.

If this judgment is permitted to stand, then the court is lending its approval to a situation where a bonding com-

pany, which has been paid a premium to insure the engagements of Lander, is to be allowed to go free of liability even though its insured may well have been in greater degree responsible for the loss which was suffered by Unity.

It seems unnecessary for us to decide whether the agreement between Unity and American Surety Company was in the nature of an assignment of Unity's claim against Design or whether the American Surety Company stood in the position of a subrogee of any rights that Unity might have had against Design.

However, the agreement between Unity and the insurance company has all of the aspects of an assignment, although it does not contain words of an assignment. If the agreement is construed as an assignment, then surely the American Surety Company was the real party in interest, and if it can be construed that as a result of the agreement, the American Surety Company has been placed in the position of a subrogee, the result is the same.

This is clearly a case where the court may apply equitable principles and intervene in order that justice may be done.

It is a well known maxim that equity will not suffer a wrong without a remedy, and absence of precedents does not prevent the application of equitable doctrines.

> "The absence of precedents, or novelty in incident, presents no obstacle to the exercise of the jurisdiction of a court of equity, and to the award of relief in a proper case. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions and mold its decrees so as to do equity between the parties." 30 C. J. S., Equity § 12.

Another maxim is that equality is equity and this principle is the source of equitable doctrines relating to contribution.

> "It is a familiar doctrine of the law, that when a creditor has a single claim against several persons, each of such debtors is regarded as so completely and individually liable that the creditor may enforce payment of the entire demand from any one of the number. The law will not interfere with the action of the creditor; it will not compel him in any manner to obtain satisfaction from all of the debtors *pari passu*; and after one of the number had thus been obliged to pay the whole amount, the ancient common law, prior to its adoption of doctrines borrowed from equity, failed to give him any right of recourse upon his co-debtors by means of which the burden might finally be distributed among them all in just proportions. The rules of the modern law giving such right of reimbursement are a direct importation from the equity jurisprudence. * * * * Under all these conditions of fact, equity proceeded upon a very different principle, upon the principle that equality is equity, that the right or burden should be equalized among all the persons entitled to participate." Pomeroy's Equity Jurisprudence, Vol. 2, Fifth Edition, § 406.

See also Pomeroy's Equity Jurisprudence, Vol. 4, Fifth Edition, § 1418.

> "Contribution originated in equity, and is based on natural justice. It is generally held not to rest upon contract express or implied. It applies where equity between the parties requires equality of burden. It is the mode by which equity compels the ultimate discharge of a debt by the one who as a matter of right should pay it." *Gates* v. *Fauvre*, Indiana, 119 N. E. 155, 162.

As a result of the most careful consideration of the unprecedented situation now before us, we are convinced that equity and justice cannot be rendered without a new trial in which the American Surety Company may appear in its real role as the party in interest. Only in this manner can

the rights of all the parties involved be adjusted in one decree. By no other mode can complete relief be accorded.

It is, therefore, our ruling that the motion of Design that the American Surety Company should have been joined as a party plaintiff was erroneously denied, and that Design's objection should now be sustained.

Having thus ruled that the American Surety Company should be made a party plaintiff, then there was also error in refusing counsel for Design an opportunity to cross-examine the Manager of Unity concerning the agreement between Unity and the American Surety Company. This allegation of error on the part of Design should also be sustained.

The entry will be:

Appeal sustained.

New trial granted.

Costs to be awarded the Defendant.

EUGENE N. BRADSTREET, ET AL.
vs.
ESTELLE M. BRADSTREET

Kennebec. Opinion, April 27, 1962.

Evidence. Appeal and Error. Real Estate. Conveyance. Deeds.

Plan referred to in deed becomes part of description of premises conveyed.

Declarations of owner of land, made against interest, pertaining to nature, character, or extent of his possession, are admissible against him, with exceptions in certain cases.

Where bound mark cannot be found because of physical changes in land, parole evidence of starting point is admissible.

Declarations of former owner are not admissible to deny or disparage title in broad sense.

ON APPEAL.

This is an action to quiet title to real estate. The plaintiffs appealed from an adverse judgment below. Appeal sustained.

Frank E. Southard,
Lewis I. Naiman, for plaintiff.

Richard B. Sanborn, for defendant.

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

SIDDALL, J. On appeal. The plaintiffs, by so-called summary proceedings, brought an action to quiet title to certain property located on the northerly side of North Belfast Avenue in Augusta. The defendant filed a counterclaim alleging trespass upon the disputed area and sought a de-

cree establishing her title thereto. For convenience, unless otherwise designated, Eugene N. Bradstreet, Beatrice A. Bradstreet and Joseph A. Bradstreet will hereafter be referred to as plaintiffs, and Estelle M. Bradstreet as defendant, in matters affecting either the original complaint or the counterclaim. The plaintiffs, Eugene N. Bradstreet and Beatrice A. Bradstreet, are the owners of certain property located on the northerly side of said North Belfast Avenue. This property was conveyed to them by deed with covenants of warranty by the plaintiff, Joseph A. Bradstreet, and lies adjacent to and easterly of property of the defendant. In the hearing below the plaintiffs contended that the dividing line between the properties was 31.8′ westerly of two iron pipes driven into the ground by one John L. Collins, engineer and witness for the defendant. The defendant claimed that the division line between the properties is that shown on a plan made by said John L. Collins, identified as defendant's Exhibit #1, and is 31.8′ easterly of the line claimed by the said plaintiffs to be the division line. The case was heard by the court without a jury. The court found for the defendant Estelle M. Bradstreet in both the original complaint and in the counterclaim. The plaintiffs appealed.

On July 23, 1948, the defendant conveyed to her son, Joseph A. Bradstreet, one of the plaintiffs, a parcel of land 147 feet square on the northerly side of North Belfast Avenue in Augusta. The property conveyed by this deed was a part of a larger tract then owned by the defendant. The location upon the face of the earth of the westerly line of the property conveyed is in dispute in the instant case. The property as described in the deed started at the southwest corner thereof. We quote from the deed as follows: "Beginning at a stake or bound on the northerly side of Bolton Hill on North Belfast Avenue, in said Augusta, at the southwest corner of the intersection of the right of way over the premises hereinafter conveyed . . ."

The factual issue in the trial below was the location, at the time of this conveyance, of the intersection of the northerly line of North Belfast Avenue and the westerly line of the right of way. No stake existed at that time at the starting point of the property described, and none was ever installed jointly by the parties. No bound mentioned in the deed was marked by an existing monument, and stakes referred to in the deed as marking the other corners of the property conveyed were never installed jointly by the parties. A right of way, leading to land to the north was then in existence. The right of way, wherever located at the time of the conveyance, was covered with fill at the time of the hearing. The defendant contended that the right of way, as it existed in 1948, was in the same location as a way in use at the time the proceedings were instituted. The plaintiffs claim that in 1948 the right of way was 31.8′ westerly or downhill from such right of way.

By deed dated December 19, 1955, the plaintiff Joseph A. Bradstreet conveyed to the State of Maine a strip of land 12 feet in width along the front of this property adjacent to the northerly side of the highway. The conveyance recites that the property conveyed was "parcel 53 as shown on a Right of Way map, State Highway '210' Augusta, Federal Aid Secondary Project S-0210 (6) dated January 1955, on file in the office of the State Highway Commission (S.H.C. File No. 6-71) and to be recorded in the Registry of Deeds of Kennebec County." The starting point of the property described in this deed began in the easterly line of land of the defendant at a point fifty (50) feet northerly from and as measured along a line at right angles to the base line shown on said map at about Station 166+43, and the first course ran S77° 17′ E about one hundred forty-seven (147) feet to a point in the westerly line of other land of the defendant fifty feet northerly from and as measured along a line at right angles to the base line at about Station 167+90. The property line then ran southerly about 12 feet to a point

in the northerly line of State Highway 210; thence westerly along the northerly line of the highway 147 feet to the southeasterly corner of the land of defendant; thence northerly along the easterly line of said defendant's property about 12 feet to the point of beginning. The deed recited that the property was a portion of the premises conveyed to Joseph A. Bradstreet by Estelle M. Bradstreet (the defendant) by deed dated July 23, 1948.

In 1959, the plaintiff Joseph Bradstreet conveyed the premises to the other two plaintiffs, using the identical description contained in his own deed, with a minor variation immaterial to the issues in the case, and then excepting the land conveyed by him to the state.

In the course of the hearing below there was admitted in evidence and marked for identification as defendant's Exhibit #1, a plot plan of the plaintiffs' lot made on July 27, 1960, by John L. Collins, engineer, who testified as a witness for the defendant. The defendant offered in evidence and identified as defendant's Exhibit #5 a plan marked in the identical language as the plan referred to in the deed from Joseph A. Bradstreet to the State of Maine. John L. Collins, defendant's witness, identified defendant's Exhibit #5 as a copy of the plan referred to in deed of the defendant Joseph A. Bradstreet to the State of Maine. Plaintiffs' counsel stated that he did not question that the plan was the plan referred to in that deed. He also stated that he had no objection to the admission of the plan so far as it depicted station numbers, but did object so far as it tended to show property lines. The court admitted the plan "for the purpose of identification as referred to in the chain of title, and the station numbers shown on the plan."

Defendant's Exhibits #1 and #5 were drawn to scale. Among other points indicated on defendant's Exhibit #1, the exhibit shows the location of Stations 165+50, 166, 167, and 168. This exhibit also shows the location of a monu-

ment on the northerly side line of North Belfast Avenue as the line existed after the taking of 12 feet by the state, this monument being located 50 feet northerly from Station 165+50 and 93 feet westerly of the starting point in the deed from the plaintiff Joseph A. Bradstreet to the state. The location of this monument as well as the stations mentioned are shown on defendant's Exhibit #5.

The property conveyed by the plaintiff Joseph A. Bradstreet to the state was clearly defined on defendant's Exhibit #5. It seems unnecessary to make any extended comment on the testimony relating to defendant's Exhibits #1 and #5. The engineer who prepared Exhibit #1 started his survey at the southwest corner of the intersection of a right of way, then well defined, with the main highway as it existed prior to the taking of 12 feet of land of the plaintiff Joseph A. Bradstreet. He then went around the property in accordance with the calls in the deed. Upon the completion of his survey, he placed irons at all corners of the land surveyed after reducing the side lines of the property 12 feet because of the sale of that area by Joseph A. Bradstreet to the state. He determined the location of the original northerly side line of North Belfast Avenue from defendant's Exhibit #5, and checked the starting point of his survey with measurements and a monument shown on that exhibit, from which the location of the property taken by the state and conveyed to it by the plaintiff Joseph A. Bradstreet could be determined. The evidence clearly shows that the strip of land 12 feet in width, conveyed to the state by the plaintiff Joseph A. Bradstreet, lies adjacent to and southerly of, for its entire width, the property shown on the plan prepared by the engineer Collins (defendant's Exhibit #1) and marked with irons at each corner.

The testimony relating to the location of the right of way in 1948 marking the division line between the properties was conflicting indeed. Some of the conflicting evidence

pertains to the location of a certain spring with relation to the southwest corner of the land in dispute. The plaintiffs in their complaint place that corner sixty feet more or less northwesterly of this spring. The engineer placed that corner about 25 feet northwesterly of the spring.

The plaintiffs contend that the court erred in ruling that it "cannot say, after hearing the testimony, that it has a clear conviction that either contention carries greater weight, based on the oral testimony of the so-called disinterested witnesses." This statement did appear in the court's decree. This was not, however, the only reference made by the court to the testimony considered by him in the process of arriving at his final conclusion. He also stated without qualifying words that "the oral testimony in the case did not carry greater weight, one way or the other." He used similar language in other parts of his decree. It is obvious from the language of the entire decree that in making this ruling the court considered all oral testimony presented in the case.

Findings of fact by a court in actions tried without a jury, 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. R 52 (a) M. R. C. P.

The court below saw and heard the testimony of the witnesses in this case. He was the sole judge of the credibility and weight of their testimony. We cannot say that his ruling that neither contention carried greater weight, based on the oral testimony, was clearly wrong.

The court ruled that the state's plan adopted by Joseph A. Bradstreet by his deed to the state, and, by inference, not questioned by the defendant at the time of taking, is the evidence which added sufficient weight to the defendant's position so that she had a preponderance of the testimony

in her favor; that from the plan it appeared that both Joseph A. Bradstreet and the defendant adopted a starting point in 1948 which at the time of hearing was represented by the southwest corner of the lot as shown on that plan. He also ruled that the locus of this starting point must be determined from the intention of the original grantor and grantee in 1948, and considering the stand-off in the oral testimony, that this plan furnished the clue from which this intention could be determined. He thereupon dismissed the plaintiffs' complaint and gave judgment for the defendant Estelle M. Bradstreet in the counterclaim filed by her.

The plaintiffs contend that the court erred in giving weight and probative value to the defendant's Exhibit #5 and in giving probative value to deed references subsequent to 1948. They also contend that the court erred in ruling that Exhibit #5 furnished a clue to the intention of the grantor and grantee in 1948 in fixing the locus of the starting point.

When a conveyance expressly refers to a plan, that plan becomes a part of the deed, with the same force and effect as if copied into the deed, and is subject to no other explanation by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the deed. *Perkins* v. *Jacobs*, 124 Me. 347, 349, 129 A. 4; *Bradstreet* v. *Winter*, 119 Me. 30, 38, 109 A. 482. It is not necessary that the plan be recorded. *Danforth* v. *Bangor*, 85 Me. 423, 428, 27 A. 268.

Declarations of a former owner, made while the owner of property and against his interest, when they relate to the nature, character or extent of the declarant's possession, *or the identity of monuments or the location of boundaries called for in a deed*, are admissible against those claiming under the declarant. Such declarations may be made in a deed of conveyance. *Farnsworth* v. *Macreadie*, 115 Me. 507, 510; 99 A. 455.

The application of this rule is limited. Such declarations are not admissible to deny or disparage title in the broad sense. The rule only applies where the subject matter involved is subject to parol proof and does not apply to matters which can only be proved by written evidence. It is not competent to prove declarations made out of court by the predecessor in title of a party to an action in court, to the effect that a deed which appears to be sufficient in all respects, which is duly recorded and which a purchaser has been led to rely upon as one of the necessary links in its chain of title, from the fact of its being recorded, is not what it, and the record of it, purports to be. *Fall* v. *Fall*, 100 Me. 98, 60 A. 718.

For a further discussion of these principles see *Shaw, et al.* v. *McKenzie*, 131 Me. 248, 160 A. 911; *Phillips* v. *Laughlin*, 99 Me. 26, 58 A. 64; 20 Am. Jur. Evidence, p. 516, *et seq.*

The deed from Joseph A. Bradstreet to the state described the land conveyed and referred to a State Highway map, known in this case as defendant's Exhibit #5. The deed given later by Joseph A. Bradstreet to the other plaintiffs referred to this deed, and excepted from the terms of the conveyance the property conveyed therein. The deed to Joseph A. Bradstreet and the deed from him to the other plaintiffs had the same starting point. The stake or bound marking this starting point cannot be found, and the right of way also mentioned as the starting point has been filled in and its location is in dispute. Under these circumstances parol evidence relating to the location of this starting point is admissible. The plan became a part of the deed to the state and its use to determine the location on the face of the earth of the property conveyed to the state was proper. That determination disclosed that the westerly side line of that property, as described in the deed, was 31.8′ easterly of the line now claimed by the plaintiffs to be the true line. Furthermore, according to the calls in the deed the south-

erly line of the property conveyed ran to the southeasterly corner of land of the defendant and the westerly line runs along the easterly line of land of the defendant. Under these circumstances the deed, considered in the light of the location of the property conveyed therein, constituted a declaration or admission against interest with reference to the location of monuments and boundaries in dispute, and was admissible for that purpose, not only against the plaintiff Joseph A. Bradstreet but also against the other plaintiffs who claim title under him by a subsequent conveyance. The declaration did not necessarily establish the true line, but was evidence to be considered with other evidence as bearing on the location of the disputed line. The weight, if any, to be given to the declaration or admission was for the court below. It could only be considered in the light of the purpose for which it was admissible. In the instant case the decree below clearly indicates that the court considered the plan as evidence that the grantor and grantee in the deed of July 23, 1948, adopted a starting point which is now the southwest corner of the lot shown on the state's plan. Furthermore, the court stated that the plan furnished the clue from which could be determined the intention of the grantor and grantee in the 1948 deed in regard to the locus of the starting point in that deed. The language used by the court in this respect is as follows:

> "The State's plan, adopted by Joseph A. Bradstreet by his deed to the State, and, by inference, not questioned by Estelle M. Bradstreet at the time of the taking, both of which events preceeded the deed to the other two Plaintiffs, is the evidence which adds sufficient weight to the Defendant's position so that this Court feels she has a preponderance of the testimony in her favor. In other words, from the plan it would appear that both Joseph A. and Estelle M. Bradstreet adopted a starting point in 1948 which is today repre-

> sented by the southwest corner of the lot as shown on the State's plan.
>
> * * * * *
>
> In the mind of the fact-finder, the locus of this starting point must be determined from the intention of the original Grantor and Grantee in 1948 and, considering the stand-off in the oral testimony, this plan furnished the clue from which this intention can be determined."

The defendant, the grantor in the 1948 deed, was not a party to the deed to the state. There was no evidence that she had any knowledge that the deed had been given. Neither the deed nor the plan mentioned therein was admissible for the purpose of proving the intention of the defendant in regard to the starting point of the 1948 deed. Likewise, the deed and plan have no probative value in proving that the defendant in the 1948 deed adopted a starting point which is now the southwest corner of the lot shown on the state's plan. Thus, in his evaluation of the evidence in the case the court gave consideration and weight to the deed and plan for a purpose not authorized by their admission in evidence. The plaintiffs were prejudiced thereby. We are unable to determine from the decree what conclusion would have been reached by the court, either in the complaint or the counterclaim, had he considered the deed to the state and the plan as declarations or admissions against interest. We think it should be emphasized that it is not our view that the assignment of proper weight to the State's deed and plan would necessarily produce a different result. Viewed as what in effect amounted to an admission by Joseph A. Bradstreet that his westerly line is and at all material times has been located physically upon the earth in accordance with the defendant's contention, the State's deed and plan would in all probability tip the scales whenever the other evidence produced a standoff. We cannot ourselves reach this result since we are dealing

with the finding of an essential fact as to which the evidence is in dispute. The issue here is not what the "intention" of the parties was in 1948. That "intention" is clear. The factual issue is as to where the starting point clearly defined by the parties to the 1948 deed was physically located on the face of the earth, and as to this disputed fact the admission of Joseph A. Bradstreet might be most persuasive in the mind of any fact finder.

A further discussion of the point raised in the appeal is unnecessary.

The entry will be

Appeal sustained.

RALPH TUTTLE, PETR. FOR WRIT OF ERROR
vs.
STATE OF MAINE

Knox. Opinion, May 4, 1962.

Constitutional Law. Courts. Statutes. Informations. Waiver of Indictment. Writ of Error.

Person assailing constitutionality of a statute has burden of demonstrating that the statute offends constitutional guaranties.

Criminal statutes and rules are to be strictly interpreted in favor of defendant where substantial rights are involved.

Statutes providing for waiver of an indictment by an accused are constitutional.

ON REPORT.

This is a Writ of Error submitted upon report. The Petitioner contends that the Information statute, providing the right of a respondent to waive Grand Jury indictment,

is in violation of the provisions of the United States Constitution. R. S., c. 147, § 33, as amended is constitutional. Writ of Error dismissed.

Berman, Berman, Wernick & Flaherty,
by Sidney W. Wernick, for plaintiff.

Frank E. Hancock, Atty. Gen.,
Richard E. Foley, Asst. Atty. Gen., for State.

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

SULLIVAN, J. A writ of error is submitted to this court upon report. R. S. (1954), c. 103, § 15, P. L., 1961, c. 317, §§ 321, 322; R. S., c. 129, §§ 11, 12.

Plaintiff in error had been bound over by the Municipal Court upon a complaint charging a felony. He thereupon petitioned a Justice of the Superior Court for prompt arraignment by information instead of indictment. His request was granted and, in painstaking compliance with the provisions of R. S., c. 147, § 33 as last amended by P. L., 1959, c. 209, the Superior Court Justice permitted plaintiff's waiver of indictment, accepted the latter's plea of guilty to an information and sentenced him to prison. Plaintiff has obtained this writ of error upon the contention that R. S., c. 147, § 33, as amended, is invalid in that it violates Article I, Section 7 of the Constitution of Maine and the 14th Amendment to the Constitution of the United States.

> "No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases or offences, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger. The legislature shall provide by law a suitable and

impartial mode of selecting juries, and their usual number and unanimity, in indictments and convictions, shall be held indispensable."

Constitution of Maine, Article I, Section 7.

In the instant case the crime for which the plaintiff is committed is "infamous." R. S., c. 133, § 11, P. L., 1961, c. 40; c. 145, § 1; *Butler* v. *Wentworth*, 84 Me. 25, 33.

"- - - - No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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."

14th Amendment, United States Constitution.

The burden is upon the plaintiff in error who assails the constitutionality of R. S., c. 147, § 33, as amended, to demonstrate that the act offends constitutional guaranties, to justify this court in pronouncing such statute invalid.

"In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is 'a presumption of great strength.' State v. Pooler, 105 Me. 224, 228; Laughlin v. City of Portland, 111 Me. 486; Village Corporation v. Libby, 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. Warren v. Norwood, 138 Me. 180. - - - -

- - - - The Legislature of Maine may enact any law of any character or on any subject, unless it is prohibited either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State. - - - -"

Baxter v. *Waterville Sewerage District*, 146 Me. 211, 214, 215.

See also, *State* v. *Webber*, 125 Me. 319, 321.
There is, too, the rule:

> "- - - - the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved."
> *Smith* v. *U. S.*, 360 U. S. 1, 9.

See, also, *Smith* v. *State*, 145 Me. 313, 326.

R. S., c. 147, § 33, as amended, the waiver of indictment statute, affords an optional and voluntary procedure to a respondent and not an adversary process or one *in invitum*. A person bound over for an alleged felony not punishable by life imprisonment must be notified by the lower court magistrate of the provisions of this statute and if the accused decides of his own free will to avail himself of a prompt arraignment, he may affirmatively and in writing petition the Clerk of the Superior Court to be arraigned on information forthwith or at the earliest opportunity. In open court a Superior Court Justice is obligated to advise the accused of the nature of the offense with which the latter is charged and of the latter's rights to grand jury consideration, presentment or indictment, to jury trial, to counsel, to confrontation, witnesses, to a privilege against self incrimination, etc. Only then in open court and upon the record may the accused waive an indictment and only then may the prosecutor proceed against him by a signed and sworn information containing a plain, concise and definite written statement of the essential facts constituting the offense charged. The Superior Court Justice thus acquires jurisdiction as if upon indictment to file the case with or without plea or to entertain a nol pros. But the accused may plead not guilty, guilty or *nolo contendere*. Only after either of the latter two pleas may the justice sentence. A not guilty plea necessitates a continuation of the matter for later trial.

It is difficult to conceive how the Legislature could have expressed a more meticulous consultation of the rights of liberty inhering in man and a more appreciative recognition of and deference to, their dignity and validity than it has set forth in the waiver of indictment act. By that statute a criminal respondent is deprived of no right. He may appropriate or reject the alternatives afforded. If he accedes to them he is accorded a further and deferred opportunity midway in the arraignment for reconsideration and retrieval. He may yet plead not guilty and exact his jury trial, thus surrendering only his right to Grand Jury consideration. The oath bound justice must conscientiously sustain and execute the responsibility of enlightening the accused and of safeguarding the free as well as intelligent action of the respondent. The statute is calculated to procure desirable effects for the State in less expensive and briefer, albeit fair and just, criminal process. But the act notably secures for an accused with consciousness of guilt—and often times and more creditably remorse—a dependable method of accelerating his condign punishment without the otherwise unavoidable delay, languishment and misery of awaiting in jail or on bail Grand Jury consideration and court scheduling. The Legislature, however, could never have harbored any purpose to supply short shrift for impecunious or resigned criminals by the statute but was at full pains to guarantee to each waiving respondent attentive and plenary justice.

R. S., c. 147, § 1, P. L., 1959, c. 342, § 19 is as follows:

> "No person shall be held to answer in any court for an alleged offense, unless on an indictment found by a grand jury, except for contempt of court and in the following cases:
>
> "I. When prosecutions by information are expressly authorized by statute.

"II. In proceedings before municipal courts, municipal courts acting as juvenile courts, trial justices and courts martial."

The plaintiff in error argues that grand jury presentment or indictment is an indispensable preliminary and condition requisite to the jurisdiction of the Superior Court for the arraignment, trial, condemnation or punishment of one accused of an infamous crime and that such grand jury consideration is a fundamental public right and not a personal privilege to be waived by a respondent. Plaintiff maintains that the language of the first sentence of Article I, Section 7, of the Maine Constitution is absolute, peremptory and inevitable even against all demonstrable advantages to the accused to elude or eschew it. Plaintiff contends that R. S., c. 147, § 33, as amended, is invalid, too, because it violates the 14th Amendment to the United States Constitution to the extent that such 14th Amendment incorporates the grand jury requirement of the 5th Amendment to the United States Constitution.

There can be no doubt that Article I, Section 7, of the Maine Constitution was meant to be adamant in making indispensable grand jury consideration as a *sine qua non* to prosecution for an infamous crime as such prosecution might be instigated and furthered by the aggressive sovereign State. Historical abuses and outrages had rendered righteously sensitive the inspired framers of our organic law. But as those drafters and statesmen recited in the paragraphs of Article I of the Constitution of Maine the precious Declaration of Rights it would be unreal to conclude that those Constitutional framers did not assume or foresee that many of those fundamental rights so catalogued could and would be on occasion waived by the individuals in whom they inhered under propitious circumstances safeguarding the State and the individual.

This court has sanctioned several such waivers. A respondent fully aware of his right to the assistance of counsel and of the propriety of requesting the court for it may waive such right. *Pike* v. *State*, 152 Me. 78, 82. The privilege against self incrimination has been adjudged personal and may be waived. *Gendron* v. *Burnham*, 146 Me. 387, 404. The right to a speedy trial may be waived by a respondent. It is a personal privilege and must be claimed. *State* v. *Boynton*, 143 Me. 313, 323. An accused may waive his right to trial by a plea of guilty to an indictment and the court may accept such a plea. *Jenness* v. *State*, 144 Me. 40, 45. This last waiver relinquishes by inclusion the privilege of being confronted by the witnesses against the accused and the right to have compulsory process for obtaining witnesses in his favor. The right to trial would seem to be quite as grave in its consequences as a right to presentment or indictment by a grand jury who can decide only as to probable cause. The protection against double jeopardy may be waived. *State* v. *Verrill*, 54 Me. 581, 583.

It cannot be doubted that a person may waive the right to compensation for his private property taken for public uses.

R. S., c. 147, § 33, as amended, was adapted from Federal Rules of Criminal Procedure, Rule 7, Page 53, Vol. 4, Federal Practice and Procedure, Rules Edition, Barron.

> "(c) - - - the rule - - - was approved and projected by the (U. S.) Supreme Court under purported authorization by Congress;
>
> "(d) - - - Congress reserved the power to veto the rule but failed to do so, thereby according to it the sanctity of legislative acquiescence and rendering it appropriate that we consider it as a legislative enactment of the usual pattern, carrying with it the shield of presumptive validity.
>
> "The fact that the rule was approved and proposed by the (U. S.) Supreme Court, also supplies it with an armor of great, but not complete, invinci-

bility. The fact that a rule was promulgated by the (U. S.) Supreme Court does not raise it above the Constitution, nevertheless, the source of the rule is such as to suggest strongly that all who enter into its forum of controversy should tread lightly even though we consider it merely as a congressional enactment - - -"

Barkman v. *Sanford* (1947), 162 Fed. (2nd) 592, certiorari denied, 332 U. S. 816.

The United States Supreme Court in *Smith* v. *United States* (1959), 360 U. S. 1, 6, 9, commented as follows:

" - - - The Fifth Amendment provides in part that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury', except in cases not pertinent here. But the command of the Amendment may be waived under certain circumstances, (Barkman v. Sanford, 162 F. 2d 592; United States v. Gill, 55 F. 2d 399) and the Federal Rules of Criminal Procedure, Rule 7 (a), provide as follows:

'An offense which *may* be punished by death *shall be* prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court' (emphasis added)."

" - - - The use of indictments in all cases warranting serious punishment was the rule at common law. *Ex parte Wilson, 114 U. S. 417; Mackin v. United States, 117 U. S. 348.* The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings. *Ex parte Bain, 121 U. S. 1; Hale v. Henkel, 201 U. S. 43; Toth v. Quarles, 350 U. S. 11, 16.*

> Rule 7 (a) recognizes that this safeguard may be waived; but only in those proceedings which are noncapital - - - -"

In *Frank* v. *Mangum* (1915), 237 U. S. 309, 340, the Supreme Court of the United States observed:

> " - - - But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process.
>
> (Hurtado v. California, 110 U. S. 516, 532, 538; Lem Woon v. Oregon, 229 U. S. 586, 589 and cases cited.) - - - -"

In *United States* v. *Gill* (1931), 55 F. (2nd) 399, 403 (Dist. Ct., New Mexico), it was said:

> "It would seem that - - the provision of the Fifth Amendment requiring an indictment in capital or other infamous cases creates a personal privilege which the defendant may waive."

In *Martin* v. *U. S.* (1948), 4th Cir. 168 F. (2nd) 1003 (certiorari denied, 335 U. S. 872), the court *per curiam* held that an application to vacate a judgment and sentence and issue a writ of habeas corpus had been properly denied to the respondent who had been accused of violation of the motor vehicle theft act and had waived indictment and pleaded guilty on an information.

In *Barkman* v. *Sanford, supra,* 162 F (2nd) 592, C. C. A., 5th Ct. (certiorari denied, 332 U. S. 816), the court held in effect that the provision for an indictment is not jurisdictional but a personal right which may be waived by a respondent as may the other 4 rights guaranteed by the Fifth Amendment.

In *Smith* v. *U. S.* (1956), 238 F. (2nd) 925, 929, the court decided:

> "Under the authority so conferred, (Rule 7a, U. S. Congress), when the district attorney elected to proceed by information with the defendant's consent thereto, the filing of the information conferred jurisdiction upon the court to hear and determine the offense charged in it and to impose upon the defendant any punishment except death. - - - -"

The Constitution of the State of New Jersey, Par. 9 read, "No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury - - - -" The New Jersey court ruled:

> " - - - and exemption from prosecution without a presentment or indictment is essentially a personal right of the same nature and quality as exemption from trial and conviction except upon the verdict of a jury. Both these provisions were designed for the security of the personal rights of the individual by exempting him, as a person, from conviction upon a criminal accusation otherwise than is declared in the constitution, - - - - Both provisions are provisions made for the benefit of the accused, and both are subject to that fundamental rule of law that a person may renounce a provision made for his benefit, and to that maxim *quilibet potest renunciare juri pro se introducto,* which applies as well to constitutional law as to any other. Baker v. Braman, 6 Hill 47; United States v. Rathbone, 2 Paine 578."
>
> *Edwards* v. *State* (1883), 45 N. J. L. 419, 423, 426.

The Massachusetts Constitution does not contain the same phraseology as that of the first sentence of Article I, Section 7 of the Maine Constitution. But Massachusetts decided cases expounding the 12th article of the Massachusetts constitutional Bill of Rights had affirmed the general rule that no person shall be held to answer for a felony unless upon indictment. The Legislature of Massachusetts enacted

a waiver of indictment statute basically comparable with R. S., c. 147, § 33, as amended. A petitioner who had waived indictments, had pleaded guilty and had become sentenced sought a writ of error to reverse the judgments imposed. The case was reported to the Supreme Court of Massachusetts which in denying relief held:

> "We are of opinion that the provisions of art. 12 of our Bill of Rights, which have been held to mean that a presentment by the grand jury is required where a person is accused of a felony, like the provisions for a jury trial, were intended to secure a benefit to the individual for his protection and security, and that the privilege therein asserted may be waived. - - - We find nothing in that document that declares or manifests an intention to deprive the individual of power to refuse to assert his constitutional right to a presentment by the grand jury."
>
> *DeGolyer* v. *Commonwealth* (1943), 314 Mass. 626, 632.

Plaintiff in error has advocated the theory that the juxtaposition of the second with the first sentence of Article I, Section 7 manifests an intention of the drafters of our Constitution to tabulate the right to grand jury presentment or indictment for infamous crime as a jurisdictional necessity and thus distinguishes such right from others of a personal nature and accordingly susceptible of waiver. We have been unable to accept that view.

In view of the prevailing resort to post conviction remedial process for sharp scrutiny of criminal judgments we consider it appropriate to add that we have observed the record in the case at bar with special attention. We take occasion to state that the presiding justice who attended upon the grave rights of the petitioner in the Superior Court was most thorough in his administration. No more fair

and exhaustive concern for a respondent has come to our notice.

R. S., c. 147, § 33, as amended, is constitutional.

The mandate must be therefore:

Writ of Error dismissed.

STATE OF MAINE

vs.

GEORGE O. TRIPP, JR.

(2 CASES)

Knox. Opinion, May 4, 1962.

Criminal Law. Automobiles. Intoxication. Blood test. Evidence. Consent. Corpus delicti. Reckless Driving.

Evidence of results of blood test is admissible even though taken without consent, if consent is given after consciousness is regained.

Corpus delicti is established if evidence demonstrates probability that crime has been committed.

Evidence as to whether defendant, who was found unconscious near badly wrecked automobile, had been guilty of reckless driving was sufficient for jury.

ON EXCEPTIONS.

This case is on exceptions to the admission of testimony as to the obtaining and analyzing of blood samples, failure of the State to establish corpus delicti, and the refusal of the presiding justice to direct a verdict. Exceptions overruled. Judgment for the State.

Peter P. Sulides, County Attorney, for the State.

Harold J. Rubin, for defendant.

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

TAPLEY, J. On exceptions. Respondent was tried on complaints charging him with operating a motor vehicle while intoxicated and reckless driving. The offenses, because they were based on the same facts, were tried together with consent of the respondent. The jury returned a verdict of guilty in each case. The cases are before this court on three exceptions:

Exception I concerns the admission of the testimony of a doctor and a chemist testifying as to the obtaining and analyzing of the blood of the respondent for the purpose of ascertaining its alcoholic content. The result of the blood test was admitted over the objection of the respondent.

Exception II attacks the admission of extra-judicial statements made by the respondent on the ground that the State had failed to prove the corpus delicti.

Exception III attacks the refusal of the presiding justice to direct a verdict of not guilty for the respondent in the case charging him with reckless driving.

The respondent on the night of September 4, 1959, at approximately 10:30 P. M., was operating his motor vehicle on Route 131 in the Town of St. George, traveling in the direction of Port Clyde. The respondent's car was a 1954 Ford, green in color. There was an accident to which there were no witnesses insofar as the actual circumstances immediately surrounding the accident were concerned. Three young people driving on the St. George Road, in the direction of Port Clyde, came upon the respondent's car which was on the left-hand side of the road, badly damaged, with

no occupant therein. The respondent was found in an unconscious condition lying in a ditch by a stone wall some distance from the edge of the highway and being approximately 50 or 60 feet from the Ford car. Some 390 feet ahead of the Ford was a sheriff's patrol car. This car was off the right-hand side of the road against a tree in the vicinity of the Reynold's property, so-called. The two deputy sheriffs occupying the sheriff patrol car were dead. The respondent was taken to the Knox County Memorial Hospital at Rockland in a state of apparent unconsciousness. While administering emergency treatment a medical doctor, at the request of a lieutenant of the Maine State Police, took a quantity of blood from the body of the respondent for the purpose of ascertaining its alcoholic content. An issue developed in the trial of the case charging the respondent with operating a motor vehicle while intoxicated, concerning whether the respondent was unconscious or in such a mental state that he could not have appreciated the significance of the act of withdrawing the blood from his person and, therefore, unable to consent.

Exception III goes to the denial of a motion for a directed verdict of not guilty as to the complaint charging reckless driving.

EXCEPTION I

The respondent contends that the results of the blood test were not admissible for the following reasons: (1) That the respondent was unconscious when the sample of blood was taken from his person and, therefore, it was not done with his permission and consent; (2) that the circumstances under which the blood sample was taken were such that he was not given a reasonable opportunity to protect his rights; (3) that at the time the blood sample was taken the respondent was not under arrest and later, when he is alleged to have consented to the analysis of the blood, he

was not then charged with crime and, not having then been charged with crime, he was providing evidence against himself, thereby giving the State evidence upon which to prosecute; that a subsequent analysis of the blood which was made after the lapse of an appreciable length of time subsequent to the operation of the motor vehicle, would not have fairly indicated his condition of sobriety at the time of the operation of the car.

The statutory provision regarding blood tests in cases involving the operation of motor vehicles by operators suspected of being under the influence of intoxicating liquor is contained in Chap. 22, Sec. 150, R. S., 1954, as amended. That portion of the section pertinent to blood tests reads as follows:

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

There is no question, according to the record, that the respondent was in such a mental condition that he was in-

capable of giving his permission to take a sample of his blood for the purpose of analysis. The blood sample was taken shortly after midnight. That same morning, at approximately eleven o'clock, two state troopers, the county attorney and the director of the hospital were present in the respondent's hospital room for the purpose of obtaining his permission to analyze the blood sample and to interrogate him as to his version of the accident. The jury on the evidence submitted would be justified in determining, at this point, that the respondent was conscious and fully aware of what he was saying. It was at this time that the respondent, after having been advised of his rights as to the analysis of the blood sample and the fact that the results could be used as evidence against him in court, consented to its analysis. We are not required to determine whether the taking of the respondent's blood from his body while he was unconscious or semiconscious was in violation of his constitutional rights because later when in full possession of his mental faculties, and after having been fully advised of his legal rights, he consented to the blood test and the use in court of its results.

The respondent, in contention, further says that the analysis of the blood sample was too remote from the time of the alleged operation of the motor vehicle that it would not fairly reflect the degree of sobriety of the respondent at the time of the accident. The blood sample was taken approximately 1¾ hours after the accident. In *Toms* v. *State,* 239 P. (2nd) 812 (Oklahoma), the court held that urine and breath tests taken at 5 P. M. following an accident which took place at 3:30 P. M. were not too remote in point of time to be inadmissible in evidence to show alcoholic content of the blood at the time of the accident. See also *Augusta* v. *Jensen, et al.,* 42 N. W. (2nd) 383 (Iowa) wherein there was a period of approximately one hour and twenty minutes involved which did not cause the results

of the tests to be inadmissible. Lapse of time between the taking of the blood sample and the consumption of the intoxicant works to the advantage of a respondent and not to his prejudice.

Counsel for the respondent argues that the respondent was not under arrest when the blood sample was taken, therefore it was error for the analysis to be admitted in evidence. It is true that the respondent at the time the blood sample was obtained was not under arrest nor was he accused of a criminal offense. No one could determine before the analysis whether the result would be favorable to the respondent or evidence against him. The respondent was involved in a motor vehicle accident of serious proportions and one of the results of the accident was the death of two men. It was incumbent upon the investigating officials to obtain all of the evidence available to determine whether a criminal prosecution was in order. It was important in the interests of a complete investigation to determine the condition of the respondent as to his sobriety. This, along with other evidence, would provide the information as to whether he should be vindicated or stand accused of a criminal offense. He was informed that a blood sample had been taken when he was admitted to the hospital; that if the sample was analyzed the result of the analysis could be used in court. He then agreed and consented to the analysis. There is no evidence that he was coerced, intimidated, threatened or in any other manner forced to consent. At the time of consenting he had the mental capacity to appreciate and realize the significance of what he was doing and a knowledge of possible consequences. The respondent was not held by virtue of legal process or in any other manner restrained of his liberty. His consent came from a mind free of any influence on the part of the investigators that would tend to destroy his freedom of

choice. See *Willennar* v. *State*, 91 N. E. (2nd) 178 (Indiana); *Hicks* v. *State*, 213 Ind. 277.

There is no merit in respondent's Exception I.

EXCEPTION II

The second exception pertains to the admission in evidence of certain statements or admissions made by the respondent on September 5, 1959 while he was in the hospital. Counsel for the respondent claims the statements were inadmissible because there was no proof of the corpus delicti which is required before respondent's admissions are competent as evidence. It is important to note, that by agreement, the two criminal charges were tried together as they both were based on the same facts.

An officer, a witness for the State, testified that the respondent, while in the hospital, made the following statements:

"A. Mr. Tripp stated that he was on his way to Port Clyde from Cushing, and that after he turned going up the hill, I believe Monticello was the word Mr. Tripp used, that is as you turn off Route 1, he first saw a red light flashing and that was the first that he knew of being pursued by officers.

Mr. PAYSON: Did he say anything else?

A. He stated that he had been drinking and that he took off at a fast rate of speed due to the fact he had been drinking. When questioned as to how fast, he stated a little later about sixty, and then stated just cruising.

Q. Did he say anything about how the accident occurred?

A. Yes.

- - - - - -

A. He stated during the pursuit they had met two or three cars; had met one or two cars and

> had passed I believe two or three cars, and stated that due to the speed he lost control of the vehicle and that was what caused the accident."

Corpus delicti is established if evidence, either circumstantial or direct, demonstrates the probability that a crime has been committed. *State* v. *Hoffses*, 147 Me. 221. The following facts, as disclosed by the record, sufficiently prove the corpus delicti. The respondent, at about 10:30 on the night of September 4th, was recognized by a witness as driving the automobile that was later involved in the accident. Approximately ten or fifteen minutes later a woman living on Route 131 was attracted to the passage of two automobiles on the highway headed in the direction of St. George. Her attention was drawn to the cars by the sound of a siren and in looking she saw two cars going quite fast and close together. The latter car was equipped with a blinker in operation. Three young people were in an automobile driving on Route 131 in the direction of Port Clyde when two cars passed them, the second one being the officers' car with the blinker. The estimated speed of the first car was 80-90 miles an hour. The young people continued along for about a mile and a half when they ran upon a badly damaged automobile sideways of the road on the left hand side. It had no occupant. In searching the premises nearby they found the respondent in an unconscious condition lying off the road about 50 or 60 feet from the location of the car. The respondent, on the afternoon of the accident, was using crutches. Crutches were found in the Ford car. The sheriffs' car was off the road on the right hand side toward Port Clyde about 390 feet from the Ford car. The respondent, according to the testimony, had consumed, at least, one bottle of beer in the afternoon and another about ten o'clock in the evening. The neck of a broken beer bottle, with the cap on, was found in the car and also an empty beer carton. After the accident a strong

odor of alcohol was detected on the respondent's breath. The blood test showed .238 per cent by weight of ethyl alcohol. The circumstantial evidence of such a convincing nature establishes the corpus delicti. The facts in the instant case bear much similarity to those obtaining in *State* v. *Hoffses, supra,* which held that the corpus delicti was amply proven. The admission of the extra-judicial statements of the respondent was not error.

EXCEPTION III

This exception attacks the refusal of the presiding justice to direct a verdict of not guilty on the charge of reckless driving. A careful review of the record discloses that the presiding justice was not in error when he denied the motion for a directed verdict of not guilty on the reckless driving charge.

Exception III is overruled.

Exceptions overruled.

Judgment for the State in each case.

ROBERT G. ANDERSON,
PETITIONER FOR WRIT OF ERROR
vs.
STATE OF MAINE

Knox. Opinion, May 9, 1962.

Writ of Error. Information. Double jeopardy. Larceny. Pleading. Constitutional Law. Waiver of Indictment.

A respondent has a constitutional right to be informed of the charges against him with sufficient detail to apprise him of the offense with which he is charged.

R. S., c. 147, § 33, as amended, which provides for a respondent to waive Grand Jury Indictment is constitutional.

An indictment alleging larceny should adequately describe the alleged stolen property so that the respondent would be able to plead the judgment in bar of another prosecution for the same offense.

ON EXCEPTIONS.

The Petitioner for Writ of Error excepts from an adverse ruling made by the justice below. Exceptions overruled.

Leonard M. Nelson, for petitioner.

Richard A. Foley, Asst. Atty. Gen., for State.

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

TAPLEY, J. On exceptions. Petitioner for writ of error excepts to an adverse ruling made by the justice below. The writ of error attacks the sufficiency of an information to which the petitioner pleaded guilty and thereupon was sentenced to the State Prison. The justice below ruled that the information was sufficient in law. The information reads as follows:

> "On the thirteenth day of September in the year of our Lord one thousand nine hundred and sixty, with force and arms at Lincolnville, in the County of Waldo aforesaid, one automatic electric pay telephone model 8610 of the value of one hundred seventy-five dollars, and one automatic electric pay telephone model 8610 of the value of one hundred seventy-five dollars all of the aggregate value of three hundred fifty dollars, all of the property of Center Lincolnville Telephone Company, a public utility duly existing under the laws of the State of Maine with a place of business in Lincolnville, Maine, feloniously did steal, take and carry away."

The petitioner complains that the information does not describe the property alleged to have been stolen with sufficient particularity to inform him of what he is charged with stealing and, further, that the description is so inadequate that there is no protection afforded him should he again be put in jeopardy for the same offense.

The information charges him with the larceny of "one automatic pay telephone model 8610 of the value of one hundred seventy-five dollars, and one automatic electric pay telephone model 8610 of the value of one hundred seventy-five dollars all of the aggregate value of three hundred fifty dollars."

The waiver of indictment statute (R. S., 1954, Chap. 147, Sec. 33, as amended) provides in part that the information, "- - - shall be a plain, concise and definite written statement of the essential facts constituting the offense intended to be charged in the complaint."

The general principles of criminal pleading governing the requirements for a proper description of personal property alleged to have been stolen is stated in 52 C. J. S. — Larceny — Sec. 77 (1):

> " - - - More specifically, the property must be described with sufficient particularity to enable the

> court to determine that such property is the subject of larceny, to enable the court and jury to decide whether the property proved to have been stolen is the same as that involved in the indictment or information, to advise accused with reasonable certainty of the accusation he will be called on to meet at the trial, and to enable him to plead the judgment rendered in bar of a subsequent prosecution for the same offense."

See also 32 Am. Jur. — Larceny — Sec. 106.

Property which is the subject of larceny is sufficiently described in an indictment or information if it enables the court and the jury to determine whether the evidence offered, on which the indictment was founded, relates to the same property thus preventing one from being tried for an offense other than that for which he was indicted. The description should also be adequate enough in order that the respondent would be able to plead the judgment in bar of another prosecution for the same offense. *State* v. *Dawes*, 75 Me. 51; *State* v. *Thomas*, 126 Me. 163.

In *State* v. *Leavitt*, 66 Me. 440, the indictment alleged larceny of "two oxen of the value of one hundred eighty dollars." The case was presented to the Law Court on exceptions to the overruling of a special demurrer. Although sufficiency of description of the oxen was not specifically an issue, the demurrer did allege that "- - - the said indictment is in other respects informal and insufficient." The court found the indictment to be good.

The information in the instant case informed the petitioner that he was charged with the larceny of two automatic pay telephones, each bearing the model number 8610; that these telephones were each of the value of one hundred seventy-five dollars; that they were the property of Center Lincolnville Telephone Company and that they were stolen by him at Lincolnville, in the County of Waldo in the State

of Maine, on the thirteenth day of September, 1960. The petitioner says in effect that from the language used in the information he was unable to prepare his defense, was not sufficiently informed as to what he was charged with having stolen; that in the event of conviction he could not plead former jeopardy as the subject of the larceny was not described with certainty. A respondent in a criminal action has a constitutional right to be informed of the charges against him with that detail and particularity in pleading that apprises him of the offense with which he is charged. The State is not, however, in describing the subject of the larceny, held to a detail of such minute description that it falls within the category of an absurdity. When property is described in an indictment or information charging the offense of larceny, with that degree of sufficiency that its character, its nature and its kind, can be recognized by persons of common understanding, then it is adequate to acquaint a respondent with what he is charged with stealing.

The complaint in this case meets the requirements of good criminal pleading. The justice below was not in error in his ruling.

Counsel for the petitioner argued that the waiver of indictment statute (Chap. 147, Sec. 33, R. S., 1954, as amended) is unconstitutional. The fact that this court, in the case of *Ralph Tuttle, Plaintiff in Error* v. *State of Maine*, argued at the same term as the instant case, decided that Chap. 147, Sec. 33, R. S., 1954, as amended, is constitutional, makes it unnecessary for us to consider petitioner's argument of unconstitutionality of the statute.

Exceptions overruled.

STATE OF MAINE
vs.
GEORGE R. BECKWITH

Cumberland. Opinion, May 11, 1962.

Criminal Law. Witnesses. Incest. Evidence. Instructions.

Finding of presiding justice as to competency of child to testify is largely discretionary.

Admission, in incest prosecution, of evidence of previous incestuous acts with the same person, in another county and in another state, objected to on grounds of remoteness, was discretionary.

Instruction that evidence of previous incestuous acts was admissible "for such help as that testimony may be to you" was too broad and prejudicially erroneous.

Evidence of prior incestuous acts between accused and complainant is admissible for limited purpose of showing relationship between parties, their mutual disposition and incestuous disposition of defendant.

ON EXCEPTIONS AND APPEAL.

This case is upon Exceptions to alleged erroneous instructions. The Respondent contends that the court's instruction to the jury that evidence of prior similar criminal acts could be considered was too broad, and therefore prejudicial. Respondent's second exception sustained in part. New trial granted.

Arthur Chapmen, Jr., County Attorney,
Theodore Barris, Asst. County Attorney, for the State.

Casper Tevanian, for defendant.

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

DUBORD, J. This case is before us upon exceptions taken by the respondent to the admission of certain evidence, and to alleged erroneous instructions on the part of the presiding justice, and upon general appeal.

The respondent was indicted, tried and convicted upon a charge of incest with his thirteen year old daughter.

The indictment was laid in the County of Cumberland and alleges that the offense was committed in the Town of Scarborough. There is no need of reciting the sordid details which were developed in the evidence, but over the objections of the respondent, testimony was introduced to the effect that the respondent had previously committed acts of a similar nature upon his daughter in the County of Androscoggin and in the Commonwealth of Massachusetts.

The State relied for conviction upon one incestuous act in the County of Cumberland.

At the close of all the evidence, the respondent filed a motion addressed to the presiding justice for the direction of a verdict of not guilty. This motion was denied and the respondent seasonably took and filed his exceptions.

This procedure serves as the basis for respondent's first exception.

After a verdict of guilty, the respondent filed a motion for a new trial upon the usual grounds that the verdict was against the evidence and the weight thereof, and also that a child of immature years alleged to be incapable of understanding, knowing, and appreciating the consequences of an oath, was permitted to testify.

This motion was denied and the respondent appealed.

During the process of the trial, the respondent objected to the admission of prior incestuous acts between the respondent and his daughter on the grounds that the acts sought to be proven were too remote.

After the charge of the justice, exceptions were also taken to a portion of the charge upon the theory that the instructions were improper in that the jury was not informed that evidence of prior incestuous acts was admitted for a limited purpose only; and that in fact, the jury was told that the evidence could be considered for a broader purpose.

Respondent's exception to the admission of evidence of prior acts, because of remoteness, and to the alleged insufficient and improper charge of the justice form the basis for respondent's second exception.

Denial of a respondent's motion for a directed verdict, and exceptions taken thereto, raises the same question as that presented upon appeal following the denial of a motion for a new trial. *State* v. *Jordan*, 126 Me. 115, 117; 136 A. 483; *State* v. *McKrackern*, 141 Me. 194; 41 A. (2nd) 817.

In view of the manner in which we propose to dispose of the case now before us, we shall not discuss the first exception of the respondent, nor his appeal, except to say that the question of the competency of a child to testify is addressed largely to the discretion of the presiding justice.

> "It has long been recognized in Maine that a child of tender years, capable of distinguishing between good and evil, may in the discretion of the court be examined on oath." *State* v. *Ranger*, 149 Me. 52, 55; 98 A. (2nd) 652.

In the instant case the presiding justice after an adequate examination permitted a nine year old boy to offer testimony. We can discover no abuse of discretion and, therefore, can perceive no error.

The second exception of the respondent raises the issue of remoteness. In *State* v. *O'Toole*, 118 Me. 314; 108 A. 99, this court held that when the issue of remoteness is raised, reception of the evidence is largely within the discretion

of the presiding justice. In the case now before us we find no error on the part of the presiding justice in the exercise of his discretion and respondent takes nothing by this portion of his second exception.

In argument, counsel for the respondent contended that the evidence contained inadequate proof of the relationship between the respondent and the complaining witnesses. Proof of relationship insofar as the evidence is concerned was limited to statements on the part of the child that the respondent was her father. She identified him in court before the jury and in cross-examination the respondent admitted that she was his daughter.

It is our opinion that this evidence is sufficient to prove the relationship.

> "The kinship between the parties may be proved by the evidence of relatives and friends and by family reputation. It is for the jury to determine what degree of consanguinity or affinity has been shown, * * *." Underhill's Criminal Evidence, 5th Edition, Vol. 3, § 745.
>
> "The defendant's admission of relationship with the person with whom he holds incestuous intercourse is sufficient proof of such relationship; and the proof, also, may be by reputation." Wharton's Criminal Law, 12th Edition, Vol. 2, § 2117.

Upon the issue of the admission of evidence of prior incestuous acts between the respondent and the complainant, text books and court opinions are replete with decisions to the effect that such evidence is admissible for the limited purpose, however, of showing the relationship between the parties, their mutual disposition and the incestuous disposition of the respondent.

> "Evidence tending to show illicit intercourse by the defendant with the same person charged in the indictment, both before and after the day laid, is

> competent to prove the relation and mutual disposition of the parties." *State* v. *Williams*, 76 Me. 480, 481.
>
> "But evidence of other crimes of a precisely similar nature to that charged, and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge, is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act and the legal character of the offense by illustrating the intent with which the act was committed. *State* v. *Acheson*, 91 Me. 240, 244; 39 A. 570.
>
> "The respondent complains as to the admission of testimony that the female minor named in the indictment was permitted, over objection, to testify to acts of earlier happening between the parties, similar to the offense charged, and relies upon *State v. Acheson*, 91 Me. 240, 39 A., 570. The principle declared in that case is not applicable to the present. There evidence of offenses similar to the one charged was admitted not for the purpose of showing intent or relationship between the parties but as proof of such other substantive offenses, * * *." *State* v. *Berube*, 138 Me. 11, 13; 26 A. (2nd) 654.

See also *State* v. *Norton*, 151 Me. 178; 116 A (2nd) 635; 167 A. L. R. 606; Wharton's Criminal Evidence, 12th Edition, Vol. 1, § 242, Page 554.

Now let us look at that portion of the charge of the presiding justice to which objection is made.

The record indicates that the court charged as follows:

> "There has been some discussion of the date. The indictment alleges, I believe, the 30th day of March, 1960. The Court now instructs you that the State has to allege a date, but the proof of the act on a date other than that, if it occurs within a period within the statute of limitations, that is, within

> six years prior to the date of this indictment, that would satisfy the requirement. That is, you do not have to prove that particular date. Of course, the State does have to prove a specific act, and we are only trying this respondent for one act, but under our law other acts, if there were such, and you determine there were, have been admitted for the purpose of showing the relationship between the parties *and for such help as that testimony may be to you* (emphasis supplied) in arriving at your determination of the facts. Are there any requested instructions?"

We are convinced that this instruction is erroneous in that it failed to admonish the jury that the evidence in question was admissible only for a limited purpose, and also in that the statement: "and for such help as that testimony may be to you" was much too broad.

In the case of *State* v. *Seaburg*, 154 Me. 162, 170, 145 A. (2nd) 550, is to be found a quotation from the charge of the presiding justice in relation to evidence which was admitted of prior acts of similar nature between the respondent and the complainants. In that case the presiding justice, in a proper instruction, said:

> "There are some phases of the evidence that I want to briefly discuss with you. In the first place there was testimony in this case, against the objection of counsel for the respondent, of acts of indecent liberties upon Mr. Skinner by the respondent after the offense relied upon by the State. Now I will say to the jury at this time that this evidence, if you should find it to be true — it is denied by the respondent — but if you should find it to be true, that has no bearing upon the commission of the offense charged, except to show the relationship between the parties. The respondent is not on trial here for any of these acts which were charged by the State to have been performed after the main act, and because he may have committed another act later — of course the respondent de-

> nies he did — but if this jury should find he did commit another later act, it does not show he committed the prior act * * * * *. In other words, if a man commits one offense it is no reason for determining that he has committed another. This particular testimony was only admitted for the purpose of showing the relationship between the two parties involved."

We are of the opinion that the respondent was aggrieved by the nature of the charge of the presiding justice and we, therefore, sustain in part respondent's exception number two.

Respondent's second exception sustained in part.
New Trial granted.

HANBRO, INC.
vs.
ERNEST H. JOHNSON
STATE TAX ASSESSOR

Cumberland. Opinion, May 23, 1962.

Taxation. Sales. Use. Constitutional Law. Legislative Intent. Statutory Construction.

The receipt of rentals, under a lease executed in another state, of property bought and physically located in that state, is not a "use" of tangible personal property in the state where the rentals were received, within the contemplation of the Sales and Use Tax Law.

When interpreting legislative intent, a complete examination and consideration of the entire statute must be given and not a particular word or phrase that may be contained in it.

Where a tax statute is susceptible of more than one interpretation, the court will incline to the interpretation most favorable to the citizen.

ON REPORT.

This case was reported to the Law Court for an interpretation of the Sales and Use Tax Law, with reference to the ownership of a Maine Corporation of income producing personal property located outside the State. Appeal sustained.

Robert F. Preti, for plaintiff.

Ralph W. Farris, Sr., Asst. Atty. Gen.,
Richard A. Foley, Asst. Atty. Gen., for defendant.

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

SIDDALL, J. On Report. This is an appeal from the assessment of a use tax by the State Tax Assessor, hereafter called the Appellee, against Hanbro, Inc., hereafter called the Appellant. The case was reported from the Superior Court for decision upon the pleadings, affidavits and other instruments of record, and agreed statement of facts. The agreed statement discloses that in 1960 the Appellant purchased in New Hampshire certain store fixtures and other items of personal property upon which the tax assessment was based. The Appellant at that time, and at the time of the assessment of the tax, was a Maine corporation, having its established place of business in South Portland and authorized to do business in New Hampshire. The property so purchased has never been physically present in the State of Maine. The property was installed in a place of business in Gorham, New Hampshire, under a bona fide lease, executed in New Hampshire, from the Appellant to the owner of the business. The State of New Hampshire had no sales or use tax at the time of the purchase and lease. The only act of the Appellant in the State of Maine with reference to the personal property was the receipt of rental monies paid in accordance with the terms of the lease.

It was stipulated that the issues raised on report are (1) whether the provisions of R. S., 1954, Chap. 17, known as the Sales and Use Tax Law, and amendments thereto, with special reference to Section 4, authorized the Appellant to make the tax assessment, and (2) if so, whether those parts of the legislation granting such authority are constitutional.

We take up at this time the first issue raised on appeal.

The pertinent provisions of R. S., 1954, Chap. 17, and amendments thereto, are as follows:

> "**Sec. 3. Sales tax.**—A tax is imposed at the rate of 3% on the value of all tangible personal property, sold at retail in this state, and upon the rental charged for living quarters in hotels, rooming houses, tourist or trailer camps, measured by the sale price, except as in this chapter provided."
>
> "**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."
>
> "**Sec. 2. Definitions.**—The following words, terms and phrases when used in this statute have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:"
>
> " 'In this state' or 'in the state' means within the exterior limits of the state of Maine and includes all territory within these limits owned by or ceded to the United States of America."
>
> " '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."
>
> " 'Storage' or 'use' does not include keeping or retention or the exercise of power over tangible personal property brought into this state for the purpose of subsequently transporting it outside the state."

> " 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership."
>
> " '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."

The question is whether the legislature intended to authorize the assessment of a use tax under the circumstances set forth in the agreed statement. For illustration see *Trimount Co.* v. *Johnson*, 152 Me. 109.

The Appellee contends that the Appellant exercised in this state a right and power over tangible personal property incident to the ownership, within the meaning of the word "use" as defined in the statute, by collecting rentals in Maine from tangible personal property which it purchased at retail sale in New Hampshire and leased to a New Hampshire corporation for use in New Hampshire.

The fundamental rule of statutory construction is to ascertain and carry out the legislative intent. *Cushing* v. *Inhabitants of Bluehill, et al.*, 148 Me. 243, 92 A. (2nd) 330.

In construing statutes courts will take into consideration the legislative intent, the object it had in view, and the mischief it intended to remedy. *Hamilton, et al.* v. *Littlefield*, 149 Me. 48, 51, 98 A. (2nd) 545.

The intention of the legislature in enacting a statute must be sought by an examination and consideration of all its parts and not from any particular word or phrase that may be contained in it. Such a construction must prevail as will form a consistent and harmonious whole. *Rackliff* v. *Greenbush*, 93 Me. 99, 104, 44 A. 375.

Where a tax statute is susceptible of more than one interpretation, the court will incline to the interpretation most favorable to the citizen. *Acheson et al.* v. *Johnson*, 147 Me. 275, 281, 86 A. (2nd) 628.

The Sales and Use Tax Law embraces two distinct types of taxes. One section of the law deals with the imposition of a tax, known as a sales tax, on the value of tangible personal property sold at retail in this state, and on certain rentals. Another section of the act imposes a tax, known as a use tax, on the storage, use or other consumption in the state of tangible personal property, purchased at retail sale. The necessity of a use tax is obvious. It is well known that much personal property is purchased outside the borders of the state and brought into the state for use here. This State is without authority to tax sales beyond its territorial limits. Without some tax to complement and supplement the sales tax, not only would a tax advantage be enjoyed by the buyer who purchases outside of the state and uses that property here, but also local merchants would be at a disadvantage against competition by out of state merchants who may be able to offer lower prices by reason of lower tax burdens. A typical illustration is the purchase of an automobile in a non-taxable state by a citizen of this state for use here. A Maine dealer is obliged to collect a sizeable tax on such a transaction when made in this state. Without a use tax the aggregate purchases of this character would result in a severe tax loss to the State, and present a serious handicap to Maine dealers.

R. S., 1954, Chap. 17, Sec. 4, as amended, without referring to the definition of the word "use" contained therein, conveys the impression that a use tax is imposed upon the use of tangible personal property located in the State of Maine. The difficulty in the present case is the application of the word "use" as defined in Section 2. The word as there defined includes the exercise within this state of

any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale. A similar definition is found in sales and use tax legislation in many jurisdictions. We have, however, found no case, and none has been called to our attention, in which a claim has been made that the receipt of rentals, under a lease executed in another state, of property bought and physically located in that state, was a use of tangible personal property in the state where the rentals were received.

In an endeavor to determine the legislative intent, we have examined the entire text of the Sales and Use Tax Law. It seems clear that the purchase of intangible personal property outside of the state, by a citizen of this state, and the subsequent use or sale thereof in the other state, is not a taxable transaction under our law. If a sale under such circumstances is not taxable here, we see no reason why in the present case a lease of the personal property in New Hampshire, which became an executed contract in that state, should subject the lessor to a use tax, unless the receipt of rentals in this state constitutes a use of the property, within this state.

It was stipulated that the lease was executed and became an executed contract in New Hampshire. It was also stipulated that the only act on the part of the Appellant in this State with relation to the personal property located in New Hampshire was the receipt of rental monies due under the terms of the lease. By the lease transaction, which became an executed contract in New Hampshire, the Appellant exchanged the right to the use and possession of the tangible personal property in New Hampshire in return for a contract in the form of a lease, which is a species of intangible personal property. The right to receive rentals when due was acquired by virtue of the terms of the lease, and the receipt of such rentals, under the circumstances set forth in the agreed statement did not constitute the exercise of a

right or power in this State over the tangible property itself within the definition of the word "use."

This decision is based upon the facts presented to us for consideration. We express no opinion under what circumstances, if any, a person may be subject to a use tax by exercising in this State a right or power incident to ownership over tangible property located in another jurisdiction.

It is unnecessary to determine the constitutional question raised by the Appellant.

The entry will be

Appeal sustained.

STATE OF MAINE
vs.
ARTHUR STECKINO, JR.

Androscoggin. Opinion, May 24, 1962.

Evidence. Directed Verdict. Arrest. Due Process. Statutes.

R. S., 1954, Chap. 147, Sec. 4 does not require an officer to wear a uniform in order to make an arrest.

A Deputy Sheriff shall arrest and detain persons found violating any law of the State until a legal warrant can be obtained.

ON EXCEPTIONS.

The respondent, convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor, excepts to the refusal of the justice below to suppress evidence and to direct a verdict. Exceptions overruled. Judgment for the State.

Laurier T. Raymond, Jr., Asst. County Attorney, for state.

John A. Platz, for defendant.

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

SIDDALL, J. On exceptions. The respondent was found guilty in the Superior Court for Androscoggin County of the crime of operating an automobile while under the influence of intoxicating liquor. The case came here on two exceptions: (1) To the refusal of the presiding justice to suppress the evidence offered by the arresting deputy sheriff, (2) to the refusal of the presiding justice to direct a verdict for the respondent.

An agreed statement of facts contained in the record discloses that the arresting officer, a deputy sheriff, not in uniform, was operating his personal motor vehicle along the streets in Auburn. The respondent was also operating his motor vehicle in the same area. At a street intersection the officer illuminated his flashing dome signal and halted the respondent's vehicle after following it for a short distance. The officer introduced himself to the respondent as a deputy sheriff, arrested the respondent and charged him with the crime for which he was convicted. The officer wore no uniform. He wore a badge pinned to his inner shirt and underneath his opened outer jacket. The badge may or may not have been visible to the respondent.

At the hearing below the officer identified the respondent and gave evidence of the operation of the automobile by him. He also related his observations as to the respondent's physical coordination and expressed an opinion as to the respondent's condition of sobriety. The basis for this testimony of the officer was the result of information obtained by him after halting and arresting the respondent. At the

conclusion of the officer's testimony, the respondent moved to suppress all of the evidence offered by the officer on the ground that the evidence was unlawfully obtained, and that its admission constituted a denial of due process of law to the respondent. Upon denial of this motion, exceptions were taken by the respondent. At the close of all evidence, respondent moved for a directed verdict on the ground that he could not be found guilty beyond a reasonable doubt on the basis of the competent and admissible evidence in the case. Exceptions were apparently taken to the denial by the presiding justice of this motion of the respondent, although the record does not disclose such action. We must assume that if the officer's testimony was admissible there was sufficient evidence to justify the verdict of the jury.

The respondent claims that the officer, not being in uniform was acting contrary to the law prescribing his duty, and that the evidence obtained by him under such circumstances is inadmissible.

R. S., 1954, Chap. 147, Sec. 4 provides, *inter alia,* that a deputy sheriff shall arrest and detain persons found violating any law of the state until a legal warrant can be obtained.

R. S., 1954, Chap. 89, Sec. 151, provides that a sheriff shall require his deputies, while engaged in the enforcement of the provisions of R. S., 1954, Chap. 22, Sec. 153, to wear a uniform sufficient to identify themselves as officers of the law.

The pertinent provisions of R. S., 1954, Chap. 22, Sec. 153, read as follows:

> "**Police officers in uniform may stop motor vehicles for examination; may examine stationary vehicles.** —All police officers in uniform may at all times, with or without process, stop any motor vehicle to examine identification numbers and marks thereon, raising the hood or engine cover if necessary to ac-

> complish this purpose, and may demand and inspect the driver's license, registration certificate and permits.
>
> It shall be unlawful for the operator of any motor vehicle to fail or refuse to stop any such vehicle, upon request or signal of any officer whose duty it is to enforce the motor vehicle laws when such officer is in uniform."
>
> * * * * *
>
> "Any such officer may in like manner and under like circumstances examine any vehicle to ascertain whether its equipment complies with the requirements of this chapter."

R. S., 1954, Chap. 22 is composed of some 166 sections. It sets forth the laws of this state relating to the use of motor vehicles, and defines and provides penalties for motor vehicle violations.

Section 153 of that chapter is the only section that requires an officer to be in uniform. That section obviously deals with stopping and examining vehicles for the purpose of determining identification numbers or marks and for the inspection of the driver's license, registration certificate and permits. It also permits an officer in uniform to stop a vehicle and examine it to ascertain whether its equipment complies with the requirements of law. The necessity of wearing a uniform is limited to the purposes set forth in this section. The record discloses that the officer was not performing any of the duties enumerated therein. We may assume that the officer followed the respondent because he was suspicious of the manner of his driving. He stopped the vehicle, and, after talking with the respondent and observing his condition, arrested him for driving under the influence of intoxicating liquor. He had a right and the duty to arrest the respondent by virtue of R. S., 1954, Chap. 147, Sec. 4, set forth above. He was not required to be in uniform, and his testimony was rightfully received.

We do not attempt to rule on the admissibility of evidence obtained by an officer not in uniform, but in the performance of duties prescribed in Section 153.

The entry will be

Exceptions overruled.

Judgment for the State.

VINCENT G. DOYON
vs.
STATE OF MAINE

Kennebec. Opinion, June 14, 1962.

Error Coram Nobis. Evidence. Recordings. Intoxication. Murder. Manslaughter. Commutation of Sentence.

It is not the purpose of a Writ of Error Coram Nobis to re-try issues which were tendered and fully tried prior to conviction.

Writ of Error Coram Nobis does not give the respondent the opportunity to reconsider his earlier decisions as to what evidence to offer in his own behalf and what evidence to seek to have excluded.

One who objects to the admission of evidence cannot complain if the evidence is excluded.

Intoxication will not reduce murder to manslaughter where there is malice aforethought. Voluntary intoxication is no excuse for, justification of, or extenuation of crime *except* where knowledge or specific intent are necessary elements of the crime.

Court is without jurisdiction to grant commutation of sentence. Such authority is vested exclusively in the Governor and Executive Council.

ON APPEAL.

This is an appeal from the dismissal of a Writ of Error Coram Nobis. The court held that the appellant cannot on

appeal object to the exclusion of evidence where at the original trial he objected to its admission. Appeal denied.

Vincent G. Doyon, Pet'r. for Writ of Error Coram Nobis, pro se.

Richard A. Foley, Assistant Attorney General, for state.

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

WEBBER, J. In October, 1959 the appellant was tried by a jury and convicted of the murder of his divorced wife, Alice Doyon. He was represented by competent counsel of his own choosing. Although certain exceptions were saved during the trial, no effort was made to obtain a new trial either by way of exceptions or appeal. It is not suggested that there was any deterrent to appeal. Appellant is now serving a life sentence at the Maine State Prison.

In November, 1960 a petition was filed in the Superior Court for a writ of error coram nobis alleging a deprivation of constitutional rights. The matter was fully heard by a justice of that court in February, 1961 and the writ dismissed. Appeal from this decision brings the matter before us.

It may be noted that the appellant, although found not to be indigent, elected to conduct his hearing upon the writ of error coram nobis and his subsequent appeal to the Law Court without the aid of counsel. He has submitted an exhaustive written brief which, although understandably lacking in precise legal form, fully and clearly sets forth his legal position.

Excerpts from the record of the original trial incorporated into the record here reveal the factual situation. On

the morning of the day on which the homicide was committed the appellant appeared at a hearing in the Superior Court at which the amount of weekly support to be provided by him for his daughter was in issue. The court ordered a weekly payment of $50. In what appears to have been an attitude of anger and despondency as a result of this order the appellant passed the remainder of the day drinking and contemplating revenge. In the evening hours he called upon his divorced wife and in the presence of his twelve year old daughter shot and killed her. He fled directly to the home of relatives and informed them of the homicide. A few minutes later he was arrested by the police. The assistant county attorney was called and there followed an interrogation which culminated in the signing of a written confession by the appellant. During the progress of the interrogation and with the approval and consent of the appellant a blood sample was taken by a doctor for the purpose of testing the appellant's condition as to sobriety. The analysis of this sample disclosed that there was then 16/100% by weight of alcohol in his blood. During much of the interrogation the conversation was preserved by means of a tape recording now a part of this record.

In the course of the original trial the State sought the admission of the signed confession into evidence. An issue was at once tendered as to whether the alleged confession was voluntarily given without coercion and under circumstances such as to make it properly admissible. The nature and course of the interrogation as well as the mental state and degree of sobriety of the then respondent were fully explored by direct and cross examination. After repeated reference by counsel both for the State and the respondent to the existence of the tape recording, the State moved that it be admitted in evidence. The respondent and his counsel had previously listened to the recording and knew its contents. Upon objection raised by counsel for the respondent

the tape was excluded from the evidence. The confession was admitted and was submitted to the jury.

In the instant matter before us the appellant seeks to attack the admission of the confession at his original trial as being in violation of his constitutional rights. Specifically he avers that the confession was obtained from him by coercion and was not his voluntary act. He further asserts that the State knowingly employed perjured testimony in the prosecution of its case against him. A further allegation that the State knowingly withheld evidence favorable to the appellant finds no support in the evidence and seems to have been abandoned by the appellant.

It is now apparent that appellant relies almost entirely upon the contents of the tape recording to support his allegations. Even if the transcribed conversation tended to cast any doubt on the voluntariness of the confession, which it clearly does not, its attempted use for that purpose at this stage would come too late. It is not the purpose of a writ of error coram nobis to re-try issues which were tendered and fully tried prior to conviction. Nor is it a device by which the respondent may reconsider his earlier decisions as to what evidence to offer in his own behalf and what evidence to seek to exclude from consideration by the jury. As was stated in *Dwyer* v. *State of Maine*, 151 Me. 382 at 396: "The matter involved in the original trial is not open on writ of error coram nobis, but only the questions presented relating to alleged errors of fact, which fact if known at the time of trial would have prevented the judgment from being made." The appellant cannot be permitted to blow hot and cold as to the use of the tape recording and we emphasize again the fact which seems to us decisive that appellant and his counsel were fully cognizant of all that would be revealed by the recording *before* their objection was entered to its admission in evidence at the original trial and *before* the evidence was closed and they

had lost their own opportunity to offer it. If it has a bearing now on the issue of voluntariness of the confession or on the credibility and veracity of State's witnesses, it had a bearing then. The reason for objecting to it is revealed in the following colloquy taken from the record of the hearing in the instant case:

> "The Court: The State sought to put it (the tape recording) in evidence and it was not admitted in evidence?
>
> Mr. Doyon: Yes, sir.
>
> The Court: At the objection of your counsel?
>
> Mr. Doyon: Yes, sir. May I suggest why I believe the objection was taken at the time, sir? The tape recording would have been, let's say, prejudicial against me. The wording used on the tape recording, the way it was said, well, it would have been taken in a wrong light."

In his brief to the Law Court the appellant seems to argue that the tape recording should have been admitted at his original trial *in spite of his objection.* He points out that the presiding justice gave no reason for the exclusion, and he adds: "It cannot be said that it was excluded because of the objection." We appreciate the fact that appellant has no training in the elementary rules of trial practice and can only point out that under these rules one who objects to the admission of evidence cannot complain if the evidence is excluded.

Although the two allegations under consideration stand in different technical positions, they are closely related since the claim of perjured testimony is based on alleged discrepancies between the events leading to the signing of the confession and the subsequent testimony of State's witnesses describing those events. Procedurally the State moved initially for a dismissal of the first allegation in appellant's petition for the writ of error coram nobis on the

ground that the appellant had raised the issues of the coercive and involuntary aspects of his confession at his original trial as a matter of record, and that these issues had then been fully litigated and finally adjudicated. The motion to dismiss as to the first allegation was granted by the court. The court later denied a motion to amend the writ to restore the first allegation. At the close of the hearing on the second and third allegations, the justice below ascertained from the appellant that *all* the evidence which he deemed relevant to the first allegation had been in fact presented in support of his second and third allegations. At this point the justice below informed the appellant that he would "consider Claim No. 1 in the light of what you have produced here." We need not now determine whether or not the first allegation was open to such consideration at this stage since the justice below did consider it fully in his written opinion and decided it adversely to the appellant. He concluded quite properly that the evidence before him demonstrated that the admissibility of the confession had been fully tried once and could not again be tried on a writ of error coram nobis. *Dwyer* v. *State, supra*; *Smith* v. *United States* (1951), 187 F. (2nd) 192; *Hodges* v. *United States* (1960), 282 F. (2nd) 858.

As to the second allegation charging that the State had knowingly used perjured testimony in its prosecution of the appellant, appellant urges that State's witnesses perjured themselves in minimizing the degree of his intoxication at the time of his interrogation, in characterizing the confession as having been "dictated" by the appellant, in stating that appellant was informed of his rights before the confession was signed, and in relating certain oral statements attributed to appellant as having been uttered during the interrogation. All that we have said as to the availability of the tape recording to the respondent at his original trial has equal application here. All of the foregoing matters

were fully explored at the trial and the credibility of witnesses was left to the jury. We have, however, appraised all of the evidence before us and find no support for the assertions of the appellant. The State's witnesses at the trial expressed the opinion that appellant was during his interrogation under the influence of intoxicating liquor but not intoxicated, that he was angry as a result of the unfavorable decision of the court that morning but not remorseful over the homicide, and that he was nervous, tense and agitated but nevertheless cooperative rather than hostile. The tape recording supports this summation of the condition and attitude of the appellant. He gave a comprehensive and coherent account of the events of the day. The clarity of his memory and ideas was not that of an intoxicated man. His vocabulary was more than adequate and the choice of words his own. Photographs taken of the appellant do not aid us in determining the state of his sobriety. At the point of the actual preparation of the typewritten confession, the appellant did not "dictate" it in a narrow and technical sense. The bare essentials of his activities as he had related them were put in sentence form by the assistant county attorney and were submitted sentence by sentence to the appellant for his approval. Nothing appears in the signed confession which had not been first voluntarily related by the appellant. Nothing was omitted which could have benefited the appellant or which he desired to have included. The confession was a fair and truthful short summation of a much longer narration by the appellant. We note that the method of so-called "dictation" of the confession was fully explained and clarified for the jury by the examination and cross-examination of witnesses so that no doubt remained as to how it was accomplished. During the interrogation the appellant more than once displayed his awareness that he was under no obligation to answer questions. He was so assured by the assistant county attorney and on at least two occasions declined to answer

questions which he apparently felt might cause embarrassment to innocent third parties. He carefully read the confession which began with the words, "I, Vincent Doyon, make the following statement of my own free will and without threat or promise of reward, knowing that it may be used against me." The appellant with what we are satisfied was full comprehension and understanding thereafter signed the document. We can discover no important or prejudicial variations between the actual utterances of the appellant during his interrogation and those attributed to him by State's witnesses at the trial.

The appellant had the burden of proof as petitioner for the writ of error coram nobis and must support his allegations by a preponderance of the evidence. *Dwyer* v. *State*, *supra*. The justice below correctly held that appellant had failed to sustain this burden.

In the instant case the appellant professes to have the feeling that great injustice has been done him. Since he is now incarcerated for life and has no counsel to advise him, we have surveyed the entire background of his case to ascertain the nature and source of his real grievance. In the preamble of his brief he candidly admits that he was guilty of the homicide with which he was charged but asserts that he should now be serving a sentence for the crime of manslaughter rather than murder. Looking further, we discover that his reason for this belief is that prior to the date of this crime he had been a good citizen holding responsible positions in the community and that at the time of the homicide he was badly intoxicated. Moreover, he continues to lay stress on what he deems an unfair decision of the court in his domestic relations case. No one of these factors will reduce the crime of murder to manslaughter. With reference to the sobriety of the appellant, he cites and expresses familiarity with the case of *State* v. *Arsenault*, 152 Me. 121, but does not seem to apprehend the full significance of the

holding therein and its application to his own case. At page 125 the court said: "Where there are statutory degrees of murder (as formerly in Maine) intoxication may sometimes reduce from first to second degree murder. Intoxication will not reduce to manslaughter where there is malice aforethought, and where there is no provocation or sudden passion. *Voluntary intoxication is no excuse for murder.* 'Voluntary intoxication is not an excuse, or justification, or extenuation of a crime.' * * * Voluntary intoxication is not an excuse for crime, *except in those cases where knowledge or specific intent are necessary elements.* 'Intoxication does not make innocent an otherwise criminal act.'" (First emphasis ours.) Our review of the entire cause satisfies us that there has been no miscarriage of justice and that the appellant was convicted of the crime of murder on the basis of legally admissible evidence without any deprivation of constitutional rights.

Appellant informs us that he previously made an unsuccessful effort to obtain his release by way of a writ of habeas corpus. His present resort to the writ of error coram nobis leads him to argue that he is caught on the post conviction "merry-go-round." Since his complaint is one frequently made to the court, we take this opportunity to respond to it. The appellant has chosen the right method of obtaining a hearing upon his allegations by seeking the writ of error coram nobis. He fails not because of his choice of remedy but because of a failure of proof. In the instant case as in the vast majority of post conviction cases which have come to the attention of the court in recent years, the petitioner is in reality seeking not the correction of legal error in trial and sentence but a commutation of a sentence legally imposed. In such cases it makes no difference what post conviction remedy is employed or how many petitions are addressed to the court. The court is without jurisdiction to commute a sentence and the only authority to grant such

relief is vested exclusively in the Governor and Executive Council.

Appeal denied.

ROLAND H. COBB,
COMM'R. OF INLAND FISHERIES AND GAME
vs.
BOLSTERS MILLS IMPROVEMENT SOCIETY

Cumberland. Opinion, June 19, 1962.

Fishways. Administrative Orders.

If an order of an administrative commission is so vague that the court cannot tell what specifically is required therein, a complaint seeking its enforcement may be dismissed.

A commissioner's order must be sufficiently exact and specific to provide a basis for the court to act on it.

An order "to construct a fishway in your dam" is not adequate to inform the parties of the exact nature and extent of the performance expected of them.

ON REPORT.

This is a petition by the Commissioner of Inland Fisheries and Game to compel the carrying out of his order to construct a fishway in a dam. Petition dismissed.

Reid, Brown and Wathen, for plaintiff.

Linnell, Perkins, Thompson, Hinckley and Thaxter, for defendant.

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

WILLIAMSON, C. J. This is a petition by the Commissioner of Inland Fisheries and Game to compel the carrying out of his order to the defendant Bolsters Mills Improvement Society to construct a fishway in its dam, known as the Bolsters Mills Dam, on the Crooked River between Harrison and Otisfield. The defendant is a village improvement society and a charitable corporation organized and existing under R. S., c. 54.

The case is reported to us from the Superior Court by agreement of the parties upon the complaint, answer, and agreed statement of facts for "such decision as the rights of the parties require."

Acting under the provisions of R. S., c. 37, § 13, the Commissioner after notice and hearing ordered the defendant in writing "to construct a fishway in your dam. . . This fishway must be constructed by September 1, 1961 and this fishway shall be kept open to the passage of fish each year from April 1 through December 15. I trust you will advise me as to your plans in this matter, at your earliest convenience." The order did not specify the nature of the fishway and no plans or specifications with respect thereto were attached to or made a part of the order.

From the agreed statement of facts it appears that the defendant has no assets with which to comply with the order, "its only assets being its said dam and the land connected therewith." Further, there exists an obstruction in the Crooked River approximately two miles down the stream from the defendant's dam known as Scribner's Dam "of sufficient nature to prevent the passage of migratory fish," with reference to which there is a similar action now pending to enforce an order to construct a fishway therein. The pertinent parts of the statute read:

> "**Sec. 13. Construction of fishways and repairs thereto; appeals.**—If any owner or occupant neg-

> lects or refuses to join in proportion to his interest therein in erecting, maintaining, repairing or altering such fishway so ordered and required, the other owners or occupants shall do so and shall have a civil action against such delinquents for their proportion of the expense thereof. If all owners and occupants refuse or neglect to do so, the commissioner may do so and shall have a civil action against all delinquents for their proportion of the expense thereof *or the commissioner may petition the superior court, in the county where said dam or other artificial obstruction exists, to enforce any such order or to restrain any violation thereof.*"

We have emphasized above the provision first enacted in 1955, under which the present proceeding was brought.

In our opinion, the order of the Commissioner is not sufficiently exact and specific to provide a basis for action by the court. For this reason alone without consideration of the other reasons advanced by the defendant the Commissioner's petition to the Superior Court must be dismissed.

The Commissioner of Inland Fisheries and Game "shall have general supervision and enforcement of the inland fish and game laws." R. S., c. 37, § 2. In the department headed by him are gathered the expert knowledge and experience essential in carrying out the functions of the office, so important to the State and to our citizens and to our many visitors. It is not surprising that the Legislature has given broad powers over fishways to the Commissioner.

As we read the statute, it is implicit that the order of the Commissioner contain a description or plan of the proposed fishway and the conditions of its use in reasonable detail. We need not determine precisely what such an order should contain, but certainly we should find more than merely an order to build a fishway.

The defendant argues in substance that it cannot tell whether a fishway deemed sufficient to the dam owner would be so considered by the Commissioner, and that it would be entirely possible for a dam owner to incur substantial expense in constructing a fishway which would not meet standards set by the Commissioner. We recognize the force of the contentions.

Given a plan or description or both based on the expert knowledge of the Commissioner and his staff after notice and hearing, a dam owner such as the defendant would not be forced to build a fishway blindly and without guidance. Further, the dam owner on entry of an order in reasonable detail could determine more readily whether to accept the decision or to appeal therefrom.

Of decisive importance as well is the need of the Superior Court to have before it an order which speaks in reasonable detail. It is immaterial whether the court is considering the order on appeal or on a petition for enforcement. In either case, the court is entitled to know what in fact the Commissioner has ordered. The court must ask what kind of a fishway is required to meet the Commissioner's decision. The answer must be found in the order made by him.

It is the Commissioner's order alone that the court may "enforce" or "restrain any violation thereof." Unless the order is in reasonable detail the court, no less than the dam owner, will not know with certainty whether any particular kind of fishway will prove sufficient in the judgment of the Commissioner.

The Commissioner, not the court, is the expert and his administrative functions in this field have not been placed in the court.

The requirement of reasonable detail in the order will not unduly burden the Commissioner. He will be doing no more

than placing on the record and in the order for the dam owner, the courts, and other interested parties the details of the proposed fishway.

In brief, the Commissioner may not simply say that it is expedient to have a fishway in a certain dam. He must say as well what kind and nature of a fishway in his judgment is required.

We ground our decision only on the point that the order is not sufficiently exact and specific. "Fishway" alone is not a sufficient description. There is no need to consider, and we do not consider, the arguments of the defendant based on financial inability to comply with the order, or that the fishway is inexpedient, or that the statute above is unconstitutional.

If a proper order is entered by the Commissioner it may develop that the expense of constructing and maintaining the required fishway will come within the financial strength of the defendant — or of those who support or benefit from its charitable purposes. In any event, under such an order the interested parties will be able to proceed without guesswork. Darkness will give way to light.

The words of the court in *Kirby* v. *Pennsylvania R. Co.* (C. A. 3rd Cir.), 188 F. (2nd) 793, 796 note 11, involving an order and award of the National Railroad Adjustment Board, are applicable.

> "The court cannot shape a new order. Thus, if the order or award is so vague that the court is unable to tell what it requires, then we agree that a complaint seeking enforcement of it may be dismissed."

The entry will be

Petition dismissed.

ROBERT J. CAREY AND ALFRED J. CAREY, JR.,
D/B/A ALFRED J. CAREY & SONS
vs.
LEO BOULETTE AND ALDORA BOULETTE
AND WATERVILLE SAVINGS & LOAN ASSN.

Cumberland. Opinion, June 22, 1962.

Mortgage Interest Consent. Conduct. Liens. Notice.

A mortgagee, in or out of possession, is an owner of the mortgaged property to the extent of his mortgage interest.

Knowledge and Consent may be inferred from the conduct of the parties.

The claim of one who furnishes labor and materials in a building may be inferior or superior to the mortgagee's lien according to circumstances.

Lack of notice is no substitute for consent.

ON APPEAL.

This is a complaint to enforce a lien claim brought by the contractor against the mortgagor and mortgagee of the liened premises. Appeal denied provided plaintiffs remit all of the lien judgment in excess of $7,000.00 against the mortgagee. Otherwise, mortgagee's appeal is sustained.

Jerome G. Daviau, for plaintiff.

Roland J. Poulin,
Robert Marden, for defendant.

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

SIDDALL, J. On appeal. This is a complaint to enforce a lien claim brought by attachment under the provisions of R. S., 1954, Chap. 178, Sec. 45, as amended by P. L., 1959,

Chap. 317, Sec. 396. The complaint was brought by the plaintiffs, hereafter called the Contractors, against the defendants Leo Boulette and Aldora Boulette, hereafter called the Mortgagors, and also against the Waterville Savings and Loan Association, hereafter called the Association. The Contractors claim a lien on certain property located on Silver Street in Waterville, upon which property the Association held a mortgage given to it by the Mortgagors. The Contractors, between September 8, 1960, and January 25, 1961, furnished labor and materials on said property under an oral contract with the Mortgagors with the alleged knowledge and consent of the Association. The case was tried before a jury, and the jury found for the Contractors against the Mortgagors in the sum of $20,000, and a lien for that amount against said property having priority over the mortgage to the extent of said $20,000. The Mortgagors waived their right to appeal, and the Association appealed from the jury verdict.

One of the claims of the Association is that the jury erred as a matter of law in finding that the lien claim of the Contractors took priority over the mortgage of the Association to the extent of $20,000.

R. S., 1954, Chap. 178, Sec. 34 provides that "whoever performs labor or furnishes labor or materials or performs services * * * * * * in altering, moving, or repairing a house * * * * * * by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs."

R. S., 1954, Chap. 178, Sec. 35 provides that "If the labor, materials or services were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor, materials or services not then performed or furnished, by giving written notice to the person per-

forming or furnishing the same that he will not be responsible therefor."

No claim is made that the Association is not an owner of the property within the meaning of the statute. We are aware that in some jurisdictions it has been held that a mortgagee not in possession is not an owner within the provisions of an applicable lien statute. Under the particular wording of our statute we consider that a mortgagee, in or out of possession, is an owner of the mortgaged property to the extent of his mortgage interest. This is conceded by the Association in oral argument.

The question before us is whether, under the terms of the statute, the materials and labor were furnished by consent of the Association within the meaning of the statute, and if so, to what extent.

Prior to 1868, a lien would attach only when labor and materials were furnished "by virtue of a contract with the owner." P. L., 1868, Chap. 207, provided that a lien would attach if the labor and materials were furnished "by consent of the owner." This legislation also provided that such a lien would not attach unless the owner was notified, and contained a provision that the owner could prevent the attachment of the lien by giving notice. The provision requiring notice to the owner by the lienor was stricken from the lien law by the provisions of P. L., 1876, Chap. 140. Under our present law it is not incumbent upon the lienor to notify the owner of the performance of labor or the furnishing of materials, and the owner may prevent the lien by giving notice of nonresponsibility.

Our court stated in *Shaw* v. *Young*, 87 Me. 271, 276, that this change materially modified the meaning of the word "consent" in favor of the lien claimant. Our court has also held that while the lien statute is to be construed somewhat liberally to accomplish the beneficial purpose, the rights of

the owner should be fairly protected. *Hanson* v. *News Publishing Co.*, 97 Me. 99, 53 A. 990.

We do not find that our court has passed upon the question of what constitutes "consent of the owner" under a factual situation similar to that in the instant case. Many of the cases in which this question has arisen are cases in which repairs or improvements have been made by a lessee, or by a person in possession of property under a contract of purchase. It has been impossible for our court to lay down any rule applicable in all cases. It has been generally held that whether consent appears in any given case depends wholly upon the facts in that case. *Greenleaf & Sons Co. et al.* v. *Shoe Co.*, 123 Me. 352, 123 A. 36; *Shaw* v. *Young, supra; Morse* v. *Dole*, 73 Me. 351. In *Morse* v. *Dole, supra,* to be discussed later in this opinion, it was stated that the claim of one who furnished labor and materials in a building may be inferior or superior to the mortgagee's lien according to circumstance.

In many cases involving consent of an owner under the lien statute our court has been careful to state that the decision must be regarded as based upon and limited by the facts of the particular case then being decided.

It appears clear that in order to subject the interest of the owner of property to a lien claim the owner must at least have knowledge that labor and materials are being furnished. Without such knowledge he cannot protect his property by giving the statutory notice. *Corey Co.* v. *Cummings Construction Co.*, 118 Me. 34, 39, 105 A. 405; *Morse* v. *Dole, supra.* Whether more than such knowledge is necessary depends upon the circumstances of the case.

In several cases our court has approved the following quotation from 2 Jones on Liens, Sec. 1253: "Consent within the meaning of the statute means something more than mere acquiescence. It implies an agreement to that which

could not exist without such consent." *Greenleaf & Sons Co.* v. *Shoe Co., supra; Corey Co.* v. *Cummings Construction Co., supra; Hanson* v. *News Publishing Co., supra.* We believe that the definition of consent in each of these cases applies only to the facts presented in that case. An examination of these cases discloses that the contract for labor and materials was made by a lessee and that the owner had no right to object to the work being done. It is noted that the owner in none of these cases appeared to be an affirmative factor in bringing about the contract for the work done, or participated in the improvements being made.

A review of some of our cases which involve the consent of an owner may be helpful.

In *Maxim* v. *Thibault,* 124 Me. 201, 126 A. 869, the owner leased a hall for a period of five years. The lease provided that all repairs should be done by and at the expense of the lessee. The evidence established that the lessors, or one of them, knew the purpose for which the hall was leased, and that extensive alterations and reconstruction of the interior of the fourth floor and exits were in progress to fit the property for the purpose intended, and that he was consulted about the changes. On page 203 of this case the court said:

> "from general knowledge alone that repairs were contemplated and were being made, the consent of the lessor is not to be inferred, so as to charge his interest with a lien, but the evidence must go to the extent of showing knowledge of what work was actually being done and that it was more than mere preservation repairs."

It was held that the consent of the owner must be inferred from the language of the lease, their knowledge of what was contemplated and actually being done, and their *conduct.*

In *Greenleaf & Sons Co.* v. *Shoe Co., supra,* a lien was claimed against the land and buildings of the owners by virtue of a contract between the lien claimant and the lessee

who had agreed to make all repairs inside and outside during the term of the lease. The labor and materials went into somewhat extensive alterations of the building. The court found no adequate evidence tending to prove that the owner of the building had any explicit information as to the nature and extent of the repairs beyond ordinary repairs being made in his building. The lien against the owner was denied. We note that in a concurring opinion Justice Morrill stated that there was nothing in the conduct of the owner to justify the expectation and belief that he had consented to the making of the repairs and alterations on the credit of the building.

In *Corey Co.* v. *Cummings Construction Co., supra,* a lien was denied against the property of the owner for materials used in the construction of an addition to a mill made under contract with a lessee. The lease provided that the building being erected should remain personalty and not become a part of the realty and could be removed at the expiration of the lease. The court took occasion to state that although the owner knew that the building was being erected, it could not prevent its erection; that it did not participate in the improvement nor was it an affirmative factor in procuring the erection of the addition to the building. Under such circumstances the owner did not consent but only acquiesced in that which he could not prevent.

In *York* v. *Mathis,* 103 Me. 67, 68 A. 746, the owner leased a certain building by written lease "to be used as a skating rink." The plaintiff, by contract with the lessee, performed labor in re-laying a portion of the floor found to be in an unsuitable condition for skating. The new floor was laid with the intention of making it a permanent improvement to the building. It would have been valueless for removal by the lessee. The building with the floor thus repaired continued to be used as a skating rink after the expiration of the lease. The floor before being repaired was unsuitable

for a skating rink. The president of the owner corporation was present the next day after the work started, observed the workmen, inspected the work as it progressed, and, in the presence of the plaintiff, made comments on it, but expressed no dissent or dissatisfaction. The court held that a ruling by the court below that the labor and materials were furnished "by consent of the owner" was not clearly erroneous.

In *Hanson* v. *News Publishing Co., supra,* the owner leased a store. The lessee, for his own convenience, put up certain removable partitions into the leased premises. The partitions were actually removed by the lessee. The owner saw the partitions being put in but gave no express consent, nor made any objections, except that they should not be nailed to the ceiling. The court found that no consent was given by the owner and a lien claim against him for the work performed was denied.

In *Baker* v. *Waldron,* 92 Me. 17, the principal defendant was in possession of land under agreement to sell on part of owner. The agreement provided that the principal defendant should build a dam across a stream running through the land and erect a mill at one end of the dam. The plaintiff furnished labor and materials for the foundation and asks a lien on the foundation and land. The court held that the owner of the land must be considered as assenting to the purchasing of materials and the hiring of labor for the purpose of erecting the contemplated mill, inasmuch as the contract of sale of the land between him and the principal defendant, who hired the plaintiff's services, made it a condition of the sale that the principal defendant should erect the mill.

In *Shaw* v. *Young, supra,* several persons were the owners of property constructed as a hotel and used for that purpose for a number of years. One of the owners appeared

to have been the managing owner. The property was leased for a term of years by an instrument under which the lessor was obligated to make the necessary outside repairs and the lessee the necessary inside repairs. The lease was assigned by consent of the managing owner. At that time the building needed repairs inside and out, repairs necessary for the preservation of the building and to keep up its earning power. The managing owner and the assignee of the lease talked over the matter of the repairs at the time of the assignment, and it was understood that the assignee was to have the necessary repairs made inside and out. The assignee employed the plaintiff to make the repairs. The managing owner and another owner lived at the hotel during a portion of the time the repairs were being made, saw the repairs going on, and more or less directed and approved them. The proper preservation of the hotel required that it be kept in good repair. The court held that the statutory consent sufficiently appeared. The court said: "This decision, however, should not be extended beyond the facts in this particular case. Consent may be inferred for ordinary preservative repairs, when it would not be inferred for alterations, remodeling, additions, or even more extensive repairs. The consent must be shown, and whether it appears in any given case will depend wholly upon the facts in that case."

In *Morse* v. *Dole, supra,* a lien was claimed against the interest of the mortgagee of property upon which labor was performed and materials furnished under contract with the mortgagor. The court found there was no evidence that the mortgagee had any knowledge whatever, at the time of the rendering of the services or of the delivery of the materials for which the lien was claimed, and the lien claim against the interest of the mortgagee was denied. While this decision was based upon a lack of knowledge of the work being done on the mortgaged property, the court took

occasion to discuss the lien statute in its relation to mortgaged property. Beginning on page 353 of the case the court said:

> "The lien can hold against such a mortgagee, only in cases where he has become a party to the delivery of the materials, or to the work done, by consent tacitly or expressly given. The law was so declared in *Cocheco Bank v. Berry,* 52 Maine, 293, 304, cited for the respondents, and no change in this respect was intended by the later acts, nor by the revision of 1871. The contract or consent of the owner must go along with the delivery of the materials to give the lien, and when these are made part of a mortgaged estate, at least the knowledge of the mortgagee must in some way appear, before the written notice mentioned in R. S., c. 91, sec. 28, (amended 1876, c. 140,) can be required from him in order to prevent a later claim from taking precedence of the mortgage. It is only to the extent that the mortgagor is the owner, within the meaning of R. S., c. 91, Sec. 27, that his consent can give the lien; that is to say, only within the limits of a mortgagor's interest."

Although this decision was based upon a lack of knowledge on the part of the mortgagee of the work being done on the mortgaged premises, the case carries an inference that more than mere knowledge may be necessary under some circumstances to charge the mortgaged property with a lien. The case does not describe the conditions under which, by tacit consent, a mortgagee may become a party to the delivery of materials or the work done.

> "But after the analogy of implied contracts or agreements inferred from the conduct of parties and the circumstances of the case, if one furnished labor and materials for making permanent repairs on a building, in the belief that the owner has given his consent thereto and in the expectation that he will have a lien therefor on the building and the conduct of the owner, viewed in the light

> of all the circumstances, justified such expectation and belief, the basis of a lien is thereby established as effectually as by a mutual understanding between the parties to that effect." *York* v. *Mathis, supra,* 76, 77.

Having these decisions in mind the Contractors, in the instant case, in order to show consent on the part of the Association and thus establish the priority of their lien over that of the mortgage, had the burden below of proving (1) knowledge on the part of the Association of the nature and extent of the work being performed on the mortgaged premises, (2) conduct on the part of the Association justifying the expectation and belief that it had consented to the making of the alterations on the credit of the building.

A mechanic's lien cannot have priority over the mortgage without knowledge on the part of the Association of the nature and extent of the work being performed on the mortgaged premises. With such knowledge the conduct of the Association will be examined to ascertain whether in the light of all the circumstances there is any basis for subordinating the mortgage to the lien claim, and if so, to what extent.

Viewed in the light most favorable to the Contractor, the Association had knowledge that certain alterations, to cost between $5,000 and $7,000 according to an estimate given by the Contractors, were to be made by the Contractors upon the Silver Street property under Mortgage to the Association. Robert J. Carey, one of the Contractors, testified that his estimate was based upon the cost of remodeling the downstairs apartment into a home and living quarters for the Mortgagors. On direct examination Mr. Carey testified as follows:

> "Q. Now, did Mr. Boulette and Mrs. Boulette, as you went along, indicate that they wanted work done differently than you had first discussed?

A. The entire job was different than what we first discussed."

He also testified that although his estimate was strictly for alterations on the downstairs apartment, that during the progress of the work the Mortgagors made certain changes, and ordered alterations on the second and third floors. The alterations on the second and third floors appear to have been extensive. A careful examination of the record fails to indicate that the Contractors or the Mortgagors brought to the attention of any officer of the Association that changes had been made in the work originally contemplated. The testimony also discloses that no officer of the Association visited the premises during the progress of the work. The changes made after the first estimate were considerable. The first estimate was between $5,000 and $7,000 and the final bill was over $21,000. It also appeared at one stage of the work, the exact date of which is not clear, there was an estimate that the cost of the work performed at that time was between $10,000 and $12,000. No information was given to the Association at the time of this estimate that changes had been made in the work originally contemplated.

We reach the conclusion that a jury would be justified in charging the Association with knowledge of the alterations contemplated in the first estimate, and that there is no justification for charging the Association with knowledge of work not contemplated therein.

Did the conduct of the Association taken in the light most favorable to the Contractors, under all the circumstances of the case, justify the expectation and belief on the part of the Contractors that the Association had consented to the making of the alterations on the credit of the building? If so, to what extent was the consent given?

The Association is a Loan and Building Association and the authority of its officers is governed by R. S., 1954, Chap. 59, Secs. 158 to 188 inc.

> "Loan and building associations are creatures of statute, and it follows that the statutes which give them being must be followed so far as provisions for their existence, powers, rights and liabilities, as well as the rights and liabilities of their members are concerned. In respect to those matters where no provisions are made, the general principles of law and equity will prevail." *Bank Commissioner* v. *Loan Association,* 126 Me. 59, 62.

> "A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act If the board of directors or trustees makes a director or any person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, that the board itself has." *Fairfield Savings Bank* v. *Chase,* 72 Me. 226, 227, 228.

The evidence in the case discloses that Napoleon J. Marshall was an officer of the Association. No evidence was produced tending to show that any specific authority had been delegated to him by the Board of Directors, or that he had been held out as having authority to make loans, or that any act on his part had been ratified by the Board of Directors. The Contractors claim that there was an understanding that the Association would release the Carver Street property from the terms of the mortgage, when sold, and that the proceeds of the sale if sufficient to cover the cost of the alterations would be paid to the Contractors. The evidence that any such understanding existed on the part of the Association is extremely vague and indefinite. In any event such an agreement was clearly beyond the authority of any single officer, and cannot be considered as being binding on the Association.

There was considerable evidence of conversations between Leo Boulette, one of the Mortgagors, and Robert J. Carey, one of the Contractors. Any agreement between

these parties, or any impression gained by the Contractors from these conversations, was not binding upon the Association. Likewise, impressions or understandings on the part of the Contractors of the position of the Association have no evidential weight unless substantiated by evidence of the facts upon which they were based. The Association was bound only by its own agreements, or, in the instant case, by its conduct viewed in the light of the surrounding circumstances.

In analyzing the conduct of the Association it must be borne in mind that it was not a party to the contract between the Mortgagors and the Contractors. It did not attempt to direct any part of the work being done or to inspect the premises during the progress of the alterations. Its position was that of a mortgagee to whom a request had been made by the Mortgagors for an additional loan. It becomes important to determine whether the Contractors were justified in believing that the Association, by express agreement or by conduct, undertook, on the strength of the mortgage, to make an additional loan for the full cost of the improvements, or whether it undertook to make a loan limited in amount.

The Contractors took no part in the discussion between Leo Boulette and Mr. Marshall. We do not have much insight into those discussions because the Contractors' counsel objected to any testimony in relation thereto.

We quote from the testimony of Robert Carey on cross-examination:

"Q Mr. Carey, I believe your testimony was that you would not have proceeded on this job if it were not for the conversations with Mr. Marshall of the Bank?

A Yes, sir.

Q I must have missed something in your direct testimony because I don't recall that you told us exactly what those conversations were.

A My first, when I sent Mr. Boulette to see Mr. Marshall about getting an addition to the mortgage that he had, I asked Mr. Marshall if Mr. Boulette could have an appointment with him; he said he could. I saw Mr. Marshall the next day about the same thing and he made an appointment for, I think, four o'clock one afternoon for an addition from five to seven thousand dollar mortgage for the repairs, he told me, of remodeling at that time.

This testimony indicates that the Association was to be asked to make an additional loan of from $5,000 to $7,000. The jury would have been justified in finding that Mr. Marshall, after talking with Mr. Boulette, discussed the situation with the proper Board of the Association, and in finding that they were willing to make an additional loan to the Mortgagors of from $5,000 to $7,000 to pay for the alterations. We have gone over the entire record with care. Viewing the conduct of the Association most favorably to the Contractor, it appears that a jury would be justified in finding that the Association was willing to make a loan in the amount of the *estimated cost* of the alterations, and that the Contractors, before starting work, were justified in believing this loan would be made. There is in the case, however, no credible evidence from which a reasonable inference can be drawn that the Association would make a loan for the *actual cost* of the alterations if it exceeded the maximum amount of the first estimated cost.

The Contractors never kept the Association informed of the cost of the work being done. Sometime in November or December, the exact date of which is not clear, the Contractors found that the estimated cost of the work then done was between $10,000 and $12,000. It is fair to assume that changes, unknown to the Association, had been made at

that time. That estimate exceeded the previous estimate, and the parties were faced with an entirely new problem. There is no credible evidence in the case from which can be drawn any reasonable inference that the Association gave any assurance that it would make a loan to the Mortgagors in a sufficient amount to meet the new situation. Without such assurance, the Contractors thereafter proceeded with the work at their peril. The Mortgagors did make an application for a loan of $12,000, apparently after the alterations were completed. The application was denied. Even at that time the Association was not informed that the cost of the improvements exceeded the maximum amount of the second estimate by almost $10,000.

The case presents an unfortunate situation because the Contractors furnished substantial services and materials which added considerable value to the building. The cost of the improvements was far in excess of the anticipated cost. The Contractors themselves were surprised when they ascertained the actual cost of the alterations. The responsibility for the situation that arose is clearly that of the Contractors. The cost of the alterations was either grossly underestimated, or the subsequent changes in the work materially increased the contract cost. In either event the Association is without fault. If the Contractors had intended to hold the property for a lien having priority over the mortgage to the extent of the cost of the improvements, they should have had a clearer understanding with the Association as to its position. The situation that now confronts the Contractors might have been avoided had they kept the Association informed as the work progressed of the cost of the improvements, and of additions and changes made after the first estimate.

The presiding justice left for jury determination the question of whether consent was given by the Association for the full amount of the work done or only for a part thereof.

He was not requested by counsel to place a limitation on such a consent. The jury, however, was clearly wrong in finding consent for improvements to the extent of $20,000 and in finding a lien priority of that amount in favor of the Contractors. The maximum amount of a priority under the evidence given in this case was $7,000.

Under the circumstances of this case it was not necessary for the Association to give the notice provided for by R. S., 1954, Chap. 178, Sec. 35. Lack of notice is no substitute for consent, and the consent of the Association upon the evidence presented in this case is limited to the amount specified herein.

If the plaintiffs remit all of the lien judgment against the defendant, Waterville Savings and Loan Association, in excess of $7,000.00, within thirty days after the rescript in this case is filed, the appeal is denied; otherwise the appeal of Waterville Savings and Loan Association is sustained.

IRWIN SWED, IRVING ASHKENAZIE
SAM ROMANO, ALBERT BEYDE AND
JAIME DEBBAH
vs.
INHABITANTS OF TOWN OF BAR HARBOR

Hancock. Opinion, June 29, 1962.

Constitutionality. Penal Law. Due Process.
Business License.

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meanings and differ as to its application violates the first essential of due process.

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

A business license ordinance which is vague and violative of due process is unconstitutional.

ON REPORT.

This is a complaint by the plaintiffs, shopkeepers at the town of Bar Harbor, testing the constitutionality or validity of P. & S., 1961, Chapter 176, Sec. 3 as that law applies to *bric-a-brac,* linen stores and the constitutionality or validity of the derivative Town ordinance as the latter applies to the business conducted by these plaintiffs. Ordinance unconstitutional, case remanded to the Superior Court for entry of judgment in accordance with opinion.

Harvard W. Blaisdell,
Herbert T. Silsby, for plaintiffs.

Ralph C. Masterman,
Thomas Tavenner,
Wayne B. Hollingsworth, for defendants.

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

SULLIVAN, J. This case comes upon report. R. S., c. 103, § 15, as amended; Rule 72, M. R. C. P., 155 Me. 573.

Plaintiffs, shopkeepers at Bar Harbor, Maine, instituted their complaint for a declaratory judgment against that Town. R. S., c. 107, §§ 38 through 50; Rule 57, M. R. C. P., 155 Me. 560.

The Legislature had enacted P. & S., 1961, Chapter 176 authorizing the municipal officers of the Town of Bar Harbor to grant licenses for regulating, *inter alia*, the business of *bric-a-brac, linen stores*. Purportedly invoking such authority the municipal officers had thereupon promulgated an ordinance regulating in the Town the operation and maintenance of *bric-a-brac, linen stores* and certain listed, personal services of no moment in the instant case.

By stipulation the issues here presented are the constitutionality or validity of P. & S., 1961, Chapter 176, § 3 as that law applies to *bric-a-brac, linen stores* and the constitutionality or validity of the derivative Town ordinance as the latter applies to the business conducted by these plaintiffs.

The Towns of Old Orchard Beach and Bar Harbor are summer resorts of surpassing natural endowment and annually attract vacationers in numbers aggregating 7 digits. Many tradesmen and most patrons are transients. These facts afford facile occasion for accruing social and police problems. The Legislature very understandably concluded that no adequate provision existed in those Towns for the granting of licenses for the regulation and control of certain businesses and purposes whereas such authority was necessary to the preservation of the public peace, health, safety and welfare. In the legislative judgment such a shortcoming created an emergency and P. & S., 1961, Chapter 176

was enacted as immediately effective and necessary for the public peace, health and safety. The statute commissioned the municipal officers of Bar Harbor to grant licenses in accordance with such rules and regulations as they might establish by ordinance consistent with law and for the surveillance of some 56 business categories. A maximum annual license fee of $75 was sanctioned for each and any such business pursued and a limit of $100 as a fine for violation of any ordinance. The municipal officers were accorded suspension and revocation faculties for cause.

Amongst the 56 varieties of business permissively to be monitored the legislative act listed *Bric-a-brac, linen stores.*

The municipal officers of Bar Harbor by their ordinance endeavored to police the operation or maintenance of *bric-a-brac, linen stores.* A license at an annual fee of $50 is exacted. Such license may not be issued to one who refuses to be finger-printed, to file a bond in the amount of $1,000, to insure payment of taxes and fines or to carry liability insurance, who has not paid all real and personal property taxes due the Town, who purposes to carry on business in a building not approved as safe by the building inspector, plumbing inspector or who refuses to state his place of business for the 3 years last past. A license may be suspended or revoked for cause after notice and hearing. Grounds recited for revocation are misstatement of a material fact in a license application, undesirable practice such as misrepresentation of goods, misleading advertising, improper conduct toward patrons and violation of any local, state or federal law when such violation is deemed by the municipal officers to deserve disciplinary action. A fine of $100 for each day of operation without license is specified.

The municipal officers notified the plaintiffs who were operators of retail stores in Bar Harbor to conform to the ordinance or suffer its penalties. Plaintiffs responded by

filing their complaint in the Superior Court praying a declaratory judgment upon those constitutional issues stipulated and stated earlier in this opinion.

Testimony was presented by the parties and to the extent that such evidence is legally admissible is before this court for estimation. All plaintiffs stated that they were shopkeepers and sold miscellaneous merchandise including linen goods in varying percentages of total sales. It is impossible to judge whether the plaintiffs dealt in *bric-a-brac* because of their terminology and nomenclature in classifying their inventories. The Town's building inspector approved the buildings in which 2 plaintiffs conducted business but for expressed reasons refused to approve the 3 buildings in which the other plaintiffs respectively operated. So much for the testimony which is unobjectionable and pertinent.

Plaintiffs contend in part that neither the legislative enabling act nor the ordinance supplies any definition of a *bric-a-brac, linen store* and because of such vagueness and indefiniteness each law violates the due process requirements of the United States Constitution, Amendment XIV, Section 1 and of the Maine Constitution, Article I, Section 1.

The Legislature is endowed with plenary police powers. Constitution of Maine, Article IV, Part Third, Section 1.

> "- - - The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality - - -"
>
> *Baxter* v. *Sewerage District* (1951), 146 Me. 211, 214.

> "As a general rule, there is a presumption in favor of the reasonableness of a municipal by-law, and the burden is on the objecting party to overcome this presumption. If it does not appear on its face, the objecting party must produce evidence to show that it is in fact unreasonable in its operation - - - -"
>
> *State* v. *Small,* 126 Me. 235, 237.

The statute and the ordinance implemental thereunder apply controls to *bric-a-brac, linen stores* and plaintiffs protest that such a classification is nondescript, indeterminate and constitutes a violation of due process.

The characterization, *bric-a-brac, linen stores,* is composite. *Bric-a-brac* and *linen* are obviously nominal adjectives modifying *stores.* The statute and ordinance manifestly contemplate stores in which both *bric-a-brac* and *linen* are sold and purchased although those stores may also vend other types of merchandise. The term, *linen,* is unequivocal. Plaintiffs charge that the appellation, *bric-a-brac,* is undefined, indefinite and unknowable.

Bric-a-brac must be conceded to be a word in good usage for it appears in accredited dictionaries.

> "bric-a-brac - - Curious or antique articles of virtu; odd knick knacks"
> Webster's Collegiate Dictionary, 5th ed., 1946.

> "bric-a-brac - - Small, rare, or artistic objects of miscellaneous pattern and assortment, used for decorating and as shelf ornaments."
> Webster's New Twentieth Century Dictionary, unabridged second edition, 1960.

> "bric-a-brac - - a miscellaneous collection of often antique articles of virtu: miscellaneous objects regarded as decorative or of a sentimental value and usu. collected in one place: curios (small china figurines, seashells, ornamental ashtrays, and other such *bric-a-brac* around the parlor) - - -"
> Webster's Third International Dictionary (Merriam-Webster), 1961.

> "bric-a-brac - - Curious or antique articles of virtu; miscellaneous objects of an artistic kind, as antiques or metalwork; odd knickknacks."
> Webster's New International Dictionary, 2nd ed., 1961.

We are forced to conclude that to capture comprehensively all concepts of the illusory term, *bric-a-brac*, is morally impossible. While we could never correctly assert that all things are bric-a-brac, a multitude surely must or could be and as to further multitudes there can be no confident judgment. Some contained elements in the authoritative definitions are sufficiently definite but, as to most of the synthetic and conglomerate topic, where inclusion and exclusion objectively meet must all too often defy responsible detection. *Bric-a-brac* although named is incalculably anomalous and is not satisfactorily amenable to classification or explanation. *Bric-a-brac* as a category is too conducive to arbitrary abuse and unlimited cannot be utilized as a norm in a penal law. A person of ordinary intelligence would be habitually nonplused as to whether a store inventory included or was innocent of *bric-a-brac*.

In 62 Harvard Law Review, 76, 77 (1948), concerning due process requirements of definiteness in statutes, it is said:

> "- - - The starting point for such an inquiry should be an examination of the two major statutory functions which may be fundamentally affected by definiteness. *One of these functions is to guide the adjudication of rights and duties; the other is to guide the individual in planning his own future conduct.*" (Emphasis added.)

In *Connally* v. *General Const. Co.* (1926), 269 U. S. 385, 391, the United States Supreme Court held:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that

men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

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

"- - - But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, - - - or as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U. S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

The highest court ruled in *United States* v. *Harris* (1954), 347 U. S. 612, 617, as follows:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

"On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statutes will not be struck down as vague, even though marginal cases could be put where doubts might arise - - - And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute this Court is under a duty to give the statute that construction - - -"

Bric-a-brac is not in our estimation a general class productive of only marginal cases where doubts might arise but is essentially prolific of omnipresent cases with doubts, all in the pale of the very definition. We despair of render-

ing the puzzlement constitutionally definite by any reasonable construction when we are mindful of the connotations of *"curious articles; virtu; odd knickknacks; small, rare, or artistic objects of miscellaneous pattern and assortment, used for decorating and shelf ornaments,"* etc. We become bewildered as we recall and attempt to characterize much of the stock in trade of the contemporary 25c - $1.00 stores, drug stores, department stores, gift shops, supermarkets, etc.

The perplexity of the instant case will be seen as plainly distinguishable from the predicament accorded such a tolerant construction in *McGowan* v. *Maryland* (1961), 366 U. S. 420, 428, where the court commented:

> "Another question presented by appellants is whether Art. 27, § 509, which exempts the Sunday retail sale of 'merchandise essential to, or customarily sold at, or incidental to, the operation of' bathing beaches, amusement parks, et cetera in Anne Arundel County, is unnecessarily vague. We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. - - - Under these circumstances, there is no necessity to guess at the statute's meaning in order to determine what conduct it makes criminal. - - -"

That category listed in P. & S., 1961, Chapter 176, Section 3 and also in Sections 1(a) and 3 of the Business License Ordinance of the Town of Bar Harbor as *"Bric-a-brac, linen store(s)"* is vague, violative of due process of law and therefore unconstitutional. Such invalid provision in both statute and ordinance is separable. *State* v. *Webber*, 125 Me. 319, 323; P. & S., 1961, Chapter 176, Section 5.

Our conclusion is decisive of the instant case and we express no opinion as to the other issues.

The mandate will be:

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

MARJORIE C. TANTISH
vs.
DR. ANDREW SZENDEY

Somerset. Opinion, June 30, 1962.

Statute of Limitations. Malpractice.

Cause of action for malpractice accrues when the wrongful act is committed and not when the damage is discovered or reasonably should have been discovered.

ON REPORT.

This is a malpractice action in which the defendant contends that the action was not commenced within the 2-year statutory period as provided under R. S., c. 112, Sec. 93. Judgment for defendant.

Carl R. Wright, for plaintiff.

Locke, Campbell, O'Connor, and Lund, for defendant.

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

WILLIAMSON, C. J. This malpractice action is before us on report and an agreed statement of facts. The defendant

surgeon contends that the action is barred by the statute of limitations. For our purposes in testing the applicability of the statute it appears: that the alleged negligence lies in the failure of the defendant to remove a tubing inserted by him in the plaintiff's back in the course of an operation on September 5, 1956; that the defendant treated the plaintiff through October 27, 1956; that the plaintiff was not aware until July 21, 1958 of a foreign substance, that is to say, of the tubing, in her back, or of consequential damage and injury therefrom; that the defendant had no knowledge of the tubing in the plaintiff's back until after the discovery thereof by the plaintiff; and that the present action was commenced on July 20, 1960 by service of a complaint and summons on the defendant. Maine Rules of Civil Procedure, Rule 3.

The plaintiff makes no charge of negligence on the part of the surgeon during the postoperative period ending October 27, 1956. The negligence of which she complains consists only of the failure to remove the tubing on the completion of the operation. There is no assertion of negligence in failing to find and remove the tubing at a later time. We also note there is no suggestion of fraudulent concealment of the situation by the defendant which might under certain circumstances toll the statute. Further, there is no charge that the plaintiff failed reasonably to discover the tubing prior to July 21, 1958. In brief, we have before us the application of the statute of limitations to the case wherein a foreign substance was negligently left in the patient's body by the surgeon in the course of an operation in September 1956 and not reasonably discovered until July 1958, with no fraudulent concealment or other negligence on the part of the surgeon.

The statute of limitations reads:

> "Actions for assault and battery, and for false imprisonment, slander, libel and malpractice of phy-

> sicians and all others engaged in the healing art shall be commenced within 2 years after the cause of action accrues." R. S., c. 112, § 93.

The decisive question is this: When did the action accrue? If the action accrued at the time of the operation in September 1956, the statute is a bar. If the action accrued when the tubing was discovered in July 1958, the action was seasonably brought.

In our opinion the action accrued at the time of the operation and specifically when the surgeon failed to remove the tubing on completion of the operation. The nature and time of the negligent act charged is tied plainly and with certainty to the fact of the operation.

On the one hand there is what appears to be justice for the patient in commencing the accrual of the right of action when the negligence of the defendant is discovered, or reasonably should have been discovered and not before. How, says the patient, may I as a practical matter bring an action until the wrong, that is to say, the failure to remove the foreign substance, is known to me?

On the other hand, the surgeon may with justice urge that the statute of limitations is a statute of repose designed by the Legislature to cut off claims which grow increasingly stale with greater age. The production of evidence and records necessary to meet malpractice claims becomes progressively more difficult with time.

Meritorious claims may, it is true, be barred by commencing the running of the statute from the time of the negligent act when discovery is later made. Statutes of limitations in general, however, in their operation cut off both meritorious and unmeritorious claims. It is well understood that the purpose of such statutes is to bring repose and security to persons who might otherwise be faced for long periods with the possibility of meeting claims under more difficult con-

ditions. The decision here rests upon the choice to be made between competing policies.

In the event the discovery of the legal wrong comes after the expiration of the statutory period of limitations, there is obviously a hardship to the plaintiff. The possibility of hardship, however, does not, in our opinion, outweigh the need of certainty in establishing the time when an action accrues under the circumstances here disclosed. In retrospect the time of the particular wrongful act is here readily fixed. We do not have the case of negligence arising in the course of continuous treatment. In such a case it would be difficult and perhaps impossible to determine the precise moment in which a particular negligent act or acts occurred.

In the instant case the tubing was discovered in July 1958 about six weeks less than two years after the operation. Within this period the plaintiff could have commenced her action with no question of the applicability of the statute. The relative lack of hardship to the plaintiff arising from the discovery before and not after the two-year period, however, is given no weight by us in determining the applicable rule. It is more properly material for the Legislature to consider in fixing the statutory period.

In placing the accrual of the action at the time of the operation, we follow the weight of authority, namely, that the cause of action accrues from the date of the wrongful act or omission. Annot., 80 A. L. R. (2nd) 368, 387, 388, 397.

In *Cappuci* v. *Barone*, 266 Mass. 578, 165 N. E. 653, 654, in which a surgeon had failed to remove a piece of gauze and a gauze sponge in the course of an operation, the principle is stated as follows:

> "Upon this branch of the defense the single question is, When did the cause of action accrue? The defendant as a surgeon, on May 11, 1924, impliedly

> undertook to use care in the operation which he was about to perform. Any act of misconduct or negligence on his part in the service undertaken was a breach of his contract, which gave rise to a right of action in contract or tort, and the statutory period began to run at that time, and not when the actual damage results or is ascertained, as the plaintiff contends. The damage sustained by the wrong done is not the cause of action; and the statute is a bar to the original cause of action although the damages may be nominal, and to all the consequential damages resulting from it though such damages may be substantial and not foreseen."

See also *Maloney* v. *Brackett*, 275 Mass. 479, 176 N. E. 604.

In New York it has been held that a malpractice action accrues when a wrongful act is committed and not as of the date damage was discovered or reasonably should have been discovered. *Budoff* v. *Kessler*, 135 N. Y. S. (2nd) 717; *Golia* v. *Health Insurance Plan of Greater New York*, 177 N. Y. S. (2nd) 550; Affirmed 197 N. Y. S. (2nd) 735; *Dorfman* v. *Schoenfeld*, 203 N. Y. S. (2nd) 955. Other illustrative cases are: *Murray* v. *Allen* (Vt.), 154 A. 678; *Giambozi* v. *Peters* (Conn.), 16 A. (2nd) 833. (See comment 144 A. L. R. 211); *Shearin* v. *Lloyd* (N. C.), 98 S. E. (2nd) 508.

The contrary view is taken by the New Jersey Court in *Fernandi* v. *Strully*, 173 A. (2nd) 277 (1961), in which it was held that "the period of limitations on a cause of action for malpractice based on negligent failure to remove a foreign object from patient's body during course of an operation began to run when the patient knew or had reason to know about the foreign object and existence of a cause of action based upon its presence; . . ." An earlier decision *Weinstein* v. *Blanchard*, 162 A. 601, was disapproved by the court insofar as it embodied a contrary view. The arguments for and against the rule and the competing policies

are ably set forth in opinions of Justice Jacobs for the court and of Justice Hall in dissent.

The precise question of when an action for malpractice accrues in the undiscovered foreign substance situation has not arisen in our Maine cases. It is of interest, however, that in the Federal Courts it became necessary to find and apply Maine law. Metallic needle fragments left in the plaintiff's body in the course of an operation at the Veterans' Administration Hospital in Togus in 1947 were not discovered until 1954. The Court of Appeals, First Circuit, held that under the Federal Tort Claims Act a "claim accrues" when a private person similarly situated would become suable under the law of the state. In *Tessier* v. *United States*, 269 F. (2nd) 305, 309, Judge Magruder, writing for the court, said:

> "The tort alleged by appellant Tessier took place in Maine. It seems clear that the law of that state gave him a right of action as soon as the metal fragments were abandoned in him. There was a legal wrong on June 7, 1947, and suit thereon was not suspended because of any duty imposed on the United States to remove the fragments. See Jones v. Grand Trunk Railway Co., 1882, 74 Me. 356; Perkins v. Maine Central R.R. Co., 1881, 72 Me. 95. See also Wilcox v. Plummer, 1830, 4 Pet. 172, 29 U.S. 172, 7 L. Ed. 821. Hence his claim accrued within the meaning of 28 U.S.C. § 2401 (b) in 1947."

Continuing wrongs in distinction from the situation in *Tessier* and here are illustrated in the Maine cases cited above. *Jones* involved damages for inexcusable delay in delivery of flour, and *Perkins* was an action of trespass. In *Wilcox* v. *Plummer*, *supra*, the Supreme Court held, in the words of the headnote:

> "The cause of action against an attorney, for negligence in not bringing an action on a note left with him for collection, or for bringing the action in a

> wrong name, accrues to the creditor by and at the date of such negligence, and the statute of limitations then begins to run, though the actual damage from the negligence is not suffered till afterwards."

There is language in an earlier Maine case which requires a brief explanation. In *Harriman* v. *Wilkins*, 20 Me. 93, involving application of statute of limitations against a sheriff for taking insufficient sureties, we said at p. 97:

> "The defendant's counsel contended, that the action barred by the Statute, c. 62, § 16, which provides 'that all actions against sheriffs for the misconduct or negligence of their deputies shall be commenced and sued within four years next after the cause of action.' An action upon the case to recover damages for such misconduct or neglect cannot be maintained without proof of actual injury. Whether the plaintiff in this case would be injured by the misconduct of the officer could not be known, until he had recovered judgment for a return of the property, and the defendant in replevin had failed to restore it. The general rule in actions of tort is that the statute commences to run from the time when the consequences of the act arise or happen, and not from the time when the act was done. *Roberts v. Read*, 16 East, 215; *Gillon v. Boddington*, 1 C. & P. 541. The cases relating to the negligence of attorneys, cited for the defendant, were actions of assumpsit, in which a different rule prevails."

The statement of the general rule in actions of tort was unnecessary to the decision of the case and is not, in our view, applicable to the circumstances of the case before us. *Roberts* v. *Read, supra,* and *Gillon* v. *Boddington, supra,* the English cases cited in support of the statement, each involved an excavation rightfully made by the defendant which later caused the wall of the plaintiff to fall. The action in each instance was held to accrue not with the innocent act, but when the consequential damage occurred.

See comment in *Betts* v. *Norris*, 21 Me. 314, 318, and on the *Gillon* case in *Wilcox* v. *Plummer, supra,* at p. 44.

In *Betts v. Norris, supra,* our court, in holding that the statute in an action against an officer for negligence in attaching real estate ran from the time of his return on the writ or its return in the court and not when the damage was sustained, in commenting with approval on *Wilcox* v. *Plummer, supra,* said at p. 324:

> "From a careful examination of that case, it will seem to be difficult to infer, that the statute of limitations, in any case of nonfeasance or misfeasance, unaccompanied by fraudulent concealment, should be considered as beginning to run from any time, other than that at which the act of nonfeasance or malfeasance actually took place. The substantive cause of action then takes place; and whatever may follow, or flow from it, is but incident thereto, and must follow the fate of the primary cause."

See also *Garlin* v. *Strickland*, 27 Me. 443, 449.

The Legislature over the years has established different periods of limitations for different types of cases. For example, under the general statute of limitations the period is six years "after the cause of action accrues," R. S., c. 112, § 90; and in suits against a sheriff for escape, one year, and for his misconduct, four years, R. S., c. 112, § 92. In 1931 the Legislature reduced the period in malpractice cases from six to two years. R. S., c. 112, § 93, *supra.* See *Miller* v. *Fallon*, 134 Me. 145, 183 A. 416. In actions by a married woman for alienation of affections, the bar operates three years "after the discovery of such offense." R. S., c. 166, § 41.

The statutes noted illustrate the concern of the Legislature for appropriate limitations upon access to the courts.

In Connecticut we find that the Statute of Limitations in malpractice cases carries the interesting combination of a short period from discovery coupled with a longer period from the time of the act.

> "No action. . . malpractice. . . shall be brought but within one year from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of." Connecticut Gen. Stat. Anno. § 52-584.

Missouri provides that the cause of action "shall not be deemed to accrue (until) the damage resulting therefrom is sustained and is capable of ascertainment." Missouri Rev. Stat. § 516. 100 (1959).

In Arkansas a two year limitation in malpractice after the cause of action accrues, provides that "the date of the accrual of the cause of action shall be date of the wrongful act complained of and no other time." Arkansas Statutes § 37-205 (1947). See *Crossett Health Center* v. *Croswell* (Ark.), 256 S. W. (2nd) 548, in which even under this statute a malpractice action arising from an undiscovered foreign substance was held not barred after seven years on the theory of fraudulent concealment (which is not here suggested) and continuing negligence until discovered (which we do not accept).

Additional material of interest on the statute of limitations in malpractice actions includes: Annot. in 74 A. L. R. 1317; 144 A. L. R. 209; 63 Harv. L. Rev. 1177, 1200, 1222, Developments — Statutes of Limitations; 41 Am. Jur., *Physicians and Surgeons* pp 233, 234; 70 C. J. S., *Physicians and Surgeons* pp 983; 25 Insurance Counsel Journal 237, The application of statutes of limitations to actions against

physicians and surgeons; 30 N. Y. U. L. Rev. 1563, 1630; 32 Ind. L. J., 528; 64 Dick. L. Rev. 173.

To summarize, we are of the view that the action for malpractice in the circumstances of the instant case accrued at the time of the operation and not upon discovery of the foreign substance. Change in the statutory period of limitations must come from the Legislature and not from the court. The plaintiff's action is barred by the statute.

The entry will be

Judgment for defendant.

BURT COMPANY

vs.

THE BURROWES CORPORATION

Cumberland. Opinion, July 2, 1962.

Premature Appeals. Final Judgments. Opinions. Receivership.

Only final judgments are ripe for appellate review.

A decree or order definitely determining the priority of claims and liens and directing distribution is final for the purpose of appeal.

One whose equities have been cut off may appeal even though there has been no order of distribution.

A judgment is distinguishable from the findings of fact and conclusions of law or the opinion rendered by a single justice, even though such findings or opinions may contain an order for judgment.

An appeal is from judgment, not from findings or "opinion."

ON APPEAL.

This is an appeal by the receiver to determine validity and amounts due under claimed security of particular creditor of corporation which was in receivership. The court held that the receivers had no standing to appeal, because it was impossible to determine whether or not the appeal was premature. Appeal of co-receivers dismissed and case remanded with directions.

Raymond E. Jenson, for plaintiff.

Simon Spill,
John J. Flaherty,
William S. Linnell,
Joseph B. Campbell,
Harry Marcus, for defendant.

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

WEBBER, J. On appeal. The Burrowes Corporation is in receivership. The receivers filed a petition addressed to the justice below by whom they were appointed seeking his determination as to "the validity and the amounts due thereunder of the claimed security of Depositors Trust Company." The petition further prayed that the court would order the receivers to pay over to the creditor "monies on account of said respective secured accounts" as so determined. On this petition the court fixed a time for hearing and ordered notice thereof to be given to the Depositors Trust Company. After hearing, the justice filed his findings of fact and conclusions of law which concluded with the following:

> "I find that the lien created by the factor's agreement attaches to the balance of proceeds of sale of the inventory now held by the Receivers and af-

> fords security for payment of the deficiency due or to become due on those notes which were properly proven in the receivership procedure.
>
> It is to be noted that some portion of the proceeds of sale of the inventory may be required to satisfy costs of administration including fees and disbursements."

These findings were filed December 1, 1961 and the docket entries of the same date show "Judgment in accordance with findings." The record is silent as to the form of the "judgment" and we are not informed as to whether it included any order for the payment of money to Depositors Trust Company as prayed for in the petition. Notice of appeal was seasonably filed by the receivers. On December 29, 1961 the court granted leave to Burton C. Decker, a creditor, to intervene, apparently for the purpose of prosecuting an appeal from the "judgment" fixing the security interest of Depositors Trust Company. Such an appeal was seasonably taken by Decker.

In the Law Court the receivers have not pressed their appeal and we assume that they have properly concluded that they have no standing here to prosecute an appeal from a decision which at most determines the distribution of the assets in their hands. Their appeal must be dismissed as improvidently taken. *Hatten* v. *Vose* (1946), 156 F. (2nd) 464, 467. The remaining controversy lies between the Depositors Trust Company and Decker and has been so treated by opposing counsel.

Depositors Trust Company contends that the appeal is premature and should await a final disposition of the entire cause. We find ourselves unable to determine upon the present record whether or not the "judgment" below has such finality as to make it the proper subject of immediate review. It should be noted that review is not here sought under the special provisions of M. R. C. P. Rule 54 (b).

M. R. C. P. Rule 73 provides for appeal from a "judgment" which is "by law reviewable by the Law Court." Field & McKusick, Sec. 73.1 correctly states: "There is a strong policy running through the Maine cases, just as through the federal cases, insisting that only 'final' judgments are ripe for appellate review." The reasons which prompt judicial resistance to "piecemeal review" are fully set forth in the quoted section. As noted in Sec. 73.2 of the text, exceptions to the final judgment rule have been carefully limited to those instances in which "the peculiar character of questions * * * presented hardly permits of postponement if any benefit is to be derived from it by the moving party." *Stevens* v. *Shaw*, 77 Me. 566; *Munsey* v. *Groves*, 151 Me. 200; *Socec* v. *Maine Turnpike Authority*, 152 Me. 326, 328.

It is apparent that the Law Court cannot determine whether or not an appeal is premature until it has been fully informed as to the nature and scope of the order or judgment from which appeal is sought. A judgment is distinguishable from the findings of fact and conclusions of law or the "opinion" rendered by a single justice, and even though such findings or "opinion" may contain an order for judgment, appeal is from the judgment and not from the findings or "opinion." Field & McKusick, Sec. 54.2.

We would be surprised to learn that any "judgment" ordered by the court below, if such there be in this case, includes an order for the payment of money to Depositors Trust Company. We note that there was no notice to creditors generally on the petition of the receivers but only to the secured claimant. Sound practice requires notice to competing creditors and an opportunity for hearing before the entry of an order for the payment of claims to creditors. *National Surety Corporation* v. *Sharpe* (1950), 232 N. C. 98, 59 S. E. (2nd) 593; 75 C. J. S. 993, Sec. 317. If on the

other hand the "judgment" does no more than to declare the rights of the Depositors Trust Company and contains no order for the payment of its claims, it may be doubted as to whether such a "judgment" is appealable at this stage of the proceedings. *Caudill Coal Co.* v. *Rosenheim* (1924), 258 S. W. (Ky.) 315; *Rossi* v. *Caire* (1916), 161 P. (Cal.) 1161; cf. *Denver* v. *Stenger* (1924), 295 F. 809. The following rule as stated in 4 C. J. S. 398, Sec. 128 finds support in the authorities: "A decree or order definitely determining the priority of claims and liens *and directing distribution* is final for the purpose of appeal, even, as a rule, in case of a partial order of distribution; *This is not so, however, if the decree or order fails to adjudge the fund to the respective claimants.* One whose equities have been cut off may appeal even though there has been no order of distribution." (Emphasis ours.)

As already noted, it is impossible for us to determine on the record presented here whether or not this appeal is premature. It is also possible that a review of the actions taken below may reveal the necessity of further proceedings in order to satisfy notice requirements and produce a judgment or collateral order which may properly be subjected to immediate review. Accordingly this case will be remanded to the court below for amplification of the record on the appeal of Decker or for further proceedings in accordance with this opinion. In event that on this or a subsequent appeal the issue as to the validity of the claims of Depositors Trust Company is properly tendered, we see no reason why leave of court would not be given to submit that issue on the briefs and record now on file in the Law Court in order to avoid unnecessary expense to the parties.

So ordered.
Appeal of co-receivers dismissed.

STATE OF MAINE
vs.
EDWIN L. CHILD

Oxford. Opinion, July 5, 1962.

Reckless Driving. Amendments. Indictments.

An indictment alleging a felony may be amended as to matters of form only.

An indictment charging a misdemeanor may be amended as to matters of form and substance, provided the nature of the charge is not changed thereby.

There is no statutory power authorizing a court to amend an indictment charging a felony in so far as substance is concerned.

If a statute does not sufficiently set out the facts constituting the crime so that a person of common understanding may have sufficient notice of the nature of the charge, a more definite statement of facts is necessary.

It is sufficient to charge a crime in the language of the statute if the language used is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation.

ON EXCEPTIONS.

The respondent is before the court on exceptions to: the allowance of the amendment, denial of motion to quash, and denial of motion for a directed verdict of not guilty. Exceptions overruled. Judgment for the State.

David R. Hastings II, County Attorney, for the State.

William E. McCarthy, for the defendant.

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

TAPLEY, J. On exceptions. The respondent was indicted for the crime of operating a motor vehicle on a public highway in the Town of Rumford, Maine, at a careless and imprudent rate of speed greater than was reasonable and proper, not having due regard to the traffic on said way and other conditions then and there existing. The indictment charges a crime within the degree of a misdemeanor. Before commencement of trial the State moved to amend the indictment, said motion and amendment being in the following language:

> "Now comes David R. Hastings, County Attorney for the County of Oxford and moves that the indictment against Edwin L. Child, Docket #299, be amended by inserting the following words and punctuation in the eleventh line of the body of said indictment, after the words "a grossly excessive rate of speed", to wit: ", (sic) to wit, forty miles per hour,".

The presiding justice granted the motion to amend over the objection of the respondent. At the conclusion of all the evidence, respondent moved that the indictment be quashed. This motion was denied by the court. The respondent also filed a motion for a directed verdict of not guilty. This motion was denied. The respondent is before this court on exceptions (1) to the allowance of the amendment; (2) denial of motion to quash; and (3) denial of motion for a directed verdict of not guilty.

EXCEPTIONS TO THE ALLOWANCE OF MOTION TO AMEND THE INDICTMENT

The respondent was indicted under the provisions of Chap. 22, Sec. 113 (I) of R. S., 1954, as amended. This section reads as follows:

"1. Any person driving a vehicle on a way shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and of any other conditions then existing."

The indictment is couched in the following language:

"OXFORD, ss

At the Superior Court, begun and holden at Paris, within and for the County of Oxford, on the second Tuesday of May in the year of our Lord one thousand nine hundred and sixty-one

"THE GRAND JURORS FOR SAID STATE upon their oath present that Edwin L. Child of Peru, in the County of Oxford and State of Maine, on the fifteenth day of April in the year of our Lord one thousand nine hundred and sixty-one, at Rumford, in said County of Oxford, did then and there operate a certain motor vehicle, to wit, an automobile, on a certain public way in said Rumford, to wit, Congress Street, so-called, at a careless and imprudent rate of speed greater than was reasonable and proper having due regard to the traffic then on said way and other conditions then existing, in that said Edwin L. Child then and there did operate said motor vehicle at a grossly excessive rate of speed and did race with another automobile travelling along on said Congress Street at a time in said day when pedestrian and vehicular traffic were very heavy and congested.

"against the peace of said State, and contrary to the form of the statute in such case made and provided.

A True Bill

George L. Sanborn, Foreman

"*David R. Hastings* Attorney for the State for said County."

The amendment added the words to the indictment, "to wit, forty (40) miles per hour" so that the amended portion of the indictment reads:

> "in that said Edwin L. Child then and there did operate said motor vehicle at a grossly excessive rate of speed, *to wit, forty (40) miles per hour.*" (Emphasis supplied.)

Counsel for the respondent contends that the justice below was in error in allowing the amendment to the indictment as it is only for the Grand Jury to amend, and the court was without right or authority to amend upon motion of the County Attorney. The State, on the other hand, argues that the amendment of the indictment was proper as the presiding justice was authorized to allow the amendment under the provisions of Sec. 14 of Chap. 145, R. S., 1954. The pertinent portion of this section reads:

> "--- any criminal process may be amended, in matters of form, at any time before final judgment. Any complaint, indictment or other criminal process for any offense, except for a felony, may be amended in matters of substance, provided the nature of the charge is not thereby changed."

Under common law, indictments could not be amended. Where it appeared that an indictment was insufficient, it was the practice to reconvene the Grand Jury that found the indictment for the purpose of amending it. It could be done in no other way. In the case of *Ex parte Bain*, 121 U. S. 1 (1887) the Supreme Court held to the common law procedure in determining that the trial court had no right or authority to amend an indictment. The indictment in the *Bain* case, charging a felony, was amended, not by adding but by striking some words from it, the words being descriptive of a person alleged to have been deceived. The court said, at page 13:

> "It only remains to consider whether this change in the indictment deprived the court of the power

> of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

This court in 1866, in the case of *State* v. *Smith*, 54 Me. 33, at 38, said:

> "If an indictment should be changed by amendment after it is returned to and filed in Court, it is no longer the presentment of the grand jury duly sworn; hence the rule applicable to criminal cases. This rule applies only to such matters as are required to be stated under the oath of the party making the complaint or presentment; — as to all other matters, they are subject to such rules of practice as long experience has shown are calculated to promote justice."

Legislation has been passed in this State abrogating the common law rule to the extent that an indictment alleging a felony can be amended as to matters of form only, but if the offense charged is not a felony the indictment is subject to amendment as to matters of substance, as well as form, provided the nature of the charge is not changed

thereby (Chap. 145, Sec. 14, R. S., 1954). Many jurisdictions have similar statutes. It is to be noted that there is no statutory power authorizing the court to amend an indictment charging a felony insofar as the substance of the charge is concerned.

> "It is the general rule under statutes authorizing the amendments of indictments that the defense of the accused must not be prejudiced by the amendment, and that the constitutional provisions concerning the Grand Jury must be considered in determining the propriety of any given amendment." 27 Am. Jur. — Indictments and Information, Sec. 116.

In the case of *State* v. *Mottram*, 155 Me. 394, cited by the State in support of the allowance of the amendment, the presiding justice properly allowed an amendment of a count in the indictment alleging a previous conviction. The indictment consisted of two counts. The first count charged the offense and the second alleged a former conviction. The amendment affected the count alleging a former conviction by changing the date of a prior conviction from the 15th day of June, 1952 to the 17th day of June, 1952. The offense charged was a felony. The count averring the offense was not amended. The count amended had nothing to do with the allegation of the crime but only to the imposition of penalty. The amendment was to form and not substance. The *Mottram* case is distinguishable from the case at bar as the *Mottram* case treats of an amendment to a count not charging an offense, and the amendment was made before trial and with the consent of the respondent.

Chap. 145, Sec. 14 allows amendments of indictments charging felonies as to form only. This procedure does not change or alter the offense as found and returned by the Grand Jury. The respondent suffers no prejudice by such an amendment. The statute authorizes amendments, both as to form and substance, to indictments charging a mis-

demeanor when the nature of the charge is not changed thereby. In the instant case the Grand Jury returned an indictment purporting to charge the respondent with a misdemeanor as defined by Chap. 22, Sec. 113 (I) of R. S., 1954, as amended. The amendment was presented by the County Attorney and allowed by the presiding justice.

In the instant case the statute alleged to have been violated is one regulating the speed of motor vehicles. The operator, in this instance, was required to drive his motor vehicle "at a careful and prudent speed not greater than is reasonable and proper." In determining the reasonableness of the speed it must be considered in light of "the traffic, surface and width of the highway, and of any other conditions then existing." A person indicted under this section is charged with violating a speed regulation, not the violation of a speed determined by an arbitrary figure of miles per hour but rather by the circumstances and conditions obtaining at the time of operation. Under some traffic conditions 20 miles per hour would be an imprudent rate of speed and greater than reasonable and proper, while under other circumstances 70 miles per hour would not be unreasonable or improper.

The respondent is clothed with the constitutional right to be informed of the nature and cause of the accusation and to have the commission of the offense fully, plainly and substantially set forth. The indictment charged the respondent with operating a motor vehicle (1) "on a certain public way in said Rumford, to wit, Congress Street, so-called." (2) "at a careless and imprudent rate of speed greater than was reasonable and proper having due regard to the traffic then on said way and other conditions then existing." The indictment describes the manner in which the respondent was driving the automobile by informing him that he was then and there operating the motor vehicle "at a grossly excessive rate of speed and did race with another automo-

bile traveling along said Congress Street at a time in said day when pedestrian and vehicular traffic were very heavy and congested." The prosecutor obviously felt that there was need to amend the indictment by defining the allegation of "at a grossly excessive rate of speed" by the addition of "to wit, 40 miles per hour." It is important to note that the indictment did explain why the State contended the respondent was careless and imprudent in the operation of the motor vehicle when it set out that he "did race with another automobile traveling along on said Congress Street at a time in said day when pedestrian and vehicular traffic were very heavy and congested." This allegation connotes speed. To a reasonable mind speed is associated with an automobile race. Without the amendment of 40 miles per hour, the respondent was adequately informed with what he had to meet in defense.

If a crime is charged in the words of the statute, the indictment is good unless the statutory language is not sufficient to apprise the respondent fully, plainly and substantially with the commission of the offense. The respondent has the right to know, not only of the crime with which he is charged, but also the manner in which he is alleged to have committed the offense. It is not that the prosecutor has to plead to a mathematical certainty but only to that degree of particularity whereby a respondent can determine what he is charged with in order to prepare his defense and use a conviction as a plea of former jeopardy should the occasion arise. The offense of reckless driving does not lie in the act of operating a motor vehicle but in the manner and circumstances of the operation. *State* v. *Houde,* 150 Me. 469. If a statute does not sufficiently set out the facts constituting the crime so that a person of common understanding may have sufficient notice of the nature of the charge, then a more definite statement of the facts than is contained in the statute is necessary. *State* v. *Strout,* 132 Me. 134.

> "A crime is charged. The words of the statute are used in charging the crime, but the plaintiff in error says the words in the statute do not describe the crime with certainty. At the most, the charge is not made with the certainty to which the plaintiff in error is entitled. He could have taken advantage of this by demurring, or he could have waived it by going to trial. He chose the latter course, so we are not called upon to decide this as if we were doing so upon a demurrer." *Briggs, Plaintiff in Error* v. *State of Maine*, 152, Me. 180, at 182.

The pleading in the instant case is much like that in *Carlson* v. *State of Maine*, 158 Me. 15. In the *Carlson* case the respondent was charged with reckless driving. The complaint said, in part: "did operate a motor vehicle - - - recklessly, to wit, *at great excessive speed* on said streets; failure to stop at stop signs at No. Main and Birch Streets, also No. Main and Maverick Streets." (Emphasis supplied.) This court said, on page 16:

> "The complaint informed the respondent that he must be prepared to defend against an accusation that he drove on certain designated streets at a 'great excessive speed' recklessly and that he drove through two stop signs at identified locations recklessly. The complaint therefore, as required by Houde, charges one single episode of reckless driving, an offense prohibited by law, and at the same time adequately informs the respondent of the factual nature of the charge and gives sufficient detail to insure to the respondent future protection against double jeopardy."

The pleadings in the *Carlson* case bear similarity to those in the case at bar wherein the *Carlson* case describes the operation of the car recklessly when it charges the car was driven at *great excessive speed* on various streets and alleges failure to stop at stop signs. Respondent Child is charged with driving an automobile at a careless and im-

prudent rate of speed greater than was reasonable and proper in that he did operate the car at a *grossly excessive rate of speed* and did race with another automobile traveling along on said Congress Street at a time of said day when pedestrian and vehicular traffic were very heavy and congested.

State v. *Randall,* 182 P. 575 (Wash.) treats of a statute similar to the one under consideration. It reads:

> " 'No person driving or operating any motor vehicle shall drive or operate the same in any other than a careful and prudent manner, nor at any greater speed than is reasonable or proper, having due regard to the traffic and use of the way by others, or so as to endanger the life and limb of any person.' "

A demurrer was filed upon the sole ground that the complaint did not state facts sufficient to charge a crime. The complaint substantially follows the language of the statute. The decision in this case holds to the well established rule that it is sufficient to charge a crime in the language of the statute if the language used is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation. The court said, at page 576:

> "But to charge the accused with driving an automobile at a greater rate of speed than is reasonable and proper, having due regard to the traffic and use of the way by others, falls within the rule of those cases which hold that a complaint or information in the language of the statute is sufficient."

The amendment of which the respondent complains was descriptive of the phrase "grossly excessive rate of speed." The amendment added nothing to the sufficiency of the indictment as the words it sought to clarify, namely, "grossly excessive rate of speed" are plain, understandable and are sufficient in and of themselves to describe the manner of

operation and to adequately inform the respondent as to what the State charged as to operation. This is particularly true when read in light of the further allegation that he "did race with another automobile traveling along on said Congress Street at a time in said day when pedestrian and vehicular traffic were very heavy and congested."

In our view of the case the amendment neither added to nor detracted from the sufficiency of the indictment. It was merely surplusage. The respondent suffered no prejudice by its inclusion in the indictment.

The exception is overruled.

The respondent took exception to the refusal of the presiding justice to grant a motion to quash. The motion was presented after plea at the conclusion of the evidence. The motion was made too late. This fact alone is sufficient to cause the respondent's exception to be overruled. *State* v. *Haapanen*, 129 Me. 28. *State* v. *Burlingham*, 15 Me. 104.

A motion for a directed verdict of not guilty was made by the respondent after the completion of all the evidence. This motion was denied. A review of the record satisfies us that there was sufficient evidence to justify the jury in its verdict of guilty. There was no error in the refusal to direct a verdict of not guilty. *State* v. *Gustin*, 123 Me. 307. *State* v. *Harvey*, 124 Me. 226.

Exceptions overruled.
Judgment for the State.

JAMES B. PATTERSON
vs.
NORA F. PATTERSON, EX'X.
UNDER WILL OF RALPH H. PATTERSON

Cumberland. Opinion, July 5, 1962.

Wills. Equity. Pleading. Discretion.
R. S., c. 153, Sec. 34. Appeal.

It is essential that Supreme Judicial Court know evidence or conceded factors as decided by presiding judge in his ruling.

All well pleaded material allegations are to be regarded as admittedly true; but not conclusions of law from the facts alleged.

Technical rules of pleadings are not to be stringently applied.

Findings of fact by a justice presiding in the Supreme Court of Probate are conclusive and are not to be reviewed by the Law Court if the record shows any evidence to support them.

ON APPEAL.

This case arises on appeal from the dismissal by the presiding Justice of the Supreme Court of Probate, of plaintiff's complaint to enter belated appeal from the allowance of his father's will. Appeal denied.

Udell Bramson, for the plaintiff.

Jacob Agger,
Philip G. Willard, for the defendant.

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

SULLIVAN, J. This case arises on appeal from the dismissal by the presiding Justice of the Supreme Court of Probate, of plaintiff's complaint.

The record consists of the complaint, of the defendant's answer thereto and counterclaim, of the defendant's motion to dismiss the complaint and of the court's decision upon that motion. These papers supply some data. Ralph H. Patterson died on December 15, A. D. 1959 survived by the plaintiff, James B. Patterson, as his only son and heir and by the defendant as his widow. The will of Ralph H. Patterson without adversative appearance or opposition was admitted to probate by the Judge of the Probate Court on January 7, A. D. 1960 while James B. Patterson was yet a minor. October 4, A. D. 1960 plaintiff asserted by complaint to the Superior Court that the instrument probated had not been duly executed and that at the time of its purported execution Ralph H. Patterson was of unsound mind and was a victim of undue influence. Plaintiff averred that because of his infancy and without fault he had not appeared in the probate proceeding and had not taken or prosecuted an appeal. Justice, the plaintiff contended, requires a revision of the decree which probated the will and plaintiff petitioned the Superior Court for belated leave to enter and prosecute an appeal from such decree of the Probate Court.

By answer the defendant, the executrix of the will, admitted certain of the plaintiff's allegations and denied others. The defendant in her answer and in a motion to dismiss the complaint protested that the plaintiff had failed to state in his complaint any cause of action entitling him to relief and that the plaintiff should have resorted for any redress to the Supreme Court of Probate and not to the Superior Court.

The defendant in a counterclaim affirmed that the plaintiff had already received $550 in settlement of any and all of his claims against the estate of Ralph H. Patterson or against the defendant.

The presiding justice granted defendant's motion to dismiss in the following language:

> "This matter came on to be heard upon a motion to dismiss filed by the defendant.
>
> "Upon consideration thereof and upon the pleadings, the motion is granted.
>
> "*It appearing, among other matters considered,* that the plaintiff failed to conform to the statutory requirements through which this Court may, under proper circumstances, allow a probate appeal to be entered.
>
> " R. S. 1954, Chap. 134, Sec. 34.
>
> "The entry shall be motion to dismiss granted." (Italics supplied.)

The record contains no transcription of the proceedings at the hearing upon or argument of the motion for dismissal of the complaint or of the topics or elements there developed. This court cannot know whether the hearing was formal or informal and cannot speculate as to what the record might show if amplified or fully presented. It is essential that this court know such evidence or conceded factors as decided the presiding justice in his ruling and decision. *Edwards* v. *Estate of Williams,* 139 Me. 210, 213.

A conventional appeal to the Supreme Court of Probate from the decree of the Judge of Probate, allowing the will could have been instituted as of course on or before January 27, A. D. 1960, *R. S., c. 153,* § *32,* as amended; *Carter et al., Appellants,* 113 Me. 232, 234. There was no such appeal. Although the plaintiff was a minor at the time of the probate of the will nevertheless the decree was one in rem and effective against him despite his infancy. *R. S., c. 154,* § *5; c. 153,* § *52; Bonnemort* v. *Gill,* 167 Mass. 338, 340; *Fuller* v. *Sylvia,* 243 Mass. 156, 159; *Donnell* v. *Goss,* 269 Mass. 214, 217; *Ryan* v. *Cashman,* 327 Mass. 677, 679; *McEndy* v. *McEndy,* 318 Mass. 775, 776.

Within one year from January 27, A. D. 1960 and presumably after attaining his majority the plaintiff for alleged cause invoked R. S., c. 153, § 34 as amended by P. L., 1959, c. 317, § 287, a statute providing in pertinent part:

> "If any such person from accident, mistake, defect of notice or otherwise without fault on his part omits to claim or prosecute his appeal, the supreme court of probate, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered as if it had been seasonably done; - - -"
>
> "The superior court is the supreme court of probate and has appellate jurisdiction in all matters determinable by the several judges of probate;- - -" R. S., c. 153, § 32, as amended.

Plaintiff in his complaint represented that the instrument probated as his father's will is null and void and further pleaded verbatim, as follows:

> "3. Plaintiff avers that at the time the said will was allowed the plaintiff was a minor, and an infant, and no one appeared to oppose the granting of the allowance of said will.
>
> "4. Plaintiff avers that as a result of the above fact, and without fault on his part, he omitted to claim or prosecute his appeal or to appear in any said proceedings, and he avers that justice requires a revision of the ruling of the judge of probate granting the will.
>
> "5. Wherefore your plaintiff prays that he may be allowed to enter an appeal from the decree of said - - - - Court of probate to this Superior Court, and to be allowed to prosecute his appeal as if it had been seasonably done, - - - -"

The motion to dismiss plaintiff's complaint tests the legal sufficiency of the complaint. All well pleaded material allegations are to be regarded as admittedly true, *Carter et al., Petitioners*, 110 Me. 1, 4, but not conclusions of law

from the facts alleged. *Hopkins* v. *Erskine*, 118 Me. 276, 277. The technical rules of pleading are not to be stringently applied. *Danby* v. *Dawes*, 81 Me. 30, 32; *M. R. C. P., Rule 8 (f)*, 155 Me. 496.

> "- - - It was not necessary, we think, that the petition should aver wherein it would appear that the petitioner's omission to enter or prosecute his appeal was from accident, mistake, defect of notice, or otherwise without fault on his part. That is a matter of proof and it need not be specifically alleged. - - -"
> *Ellis* v. *Petitioner*, 116 Me. 462, 466.

Confrontation of plaintiff's complaint, paragraphs 3, 4 and 5, *supra*, with the jurisdictional requirements in R. S., c. 153, § 34, as amended, *supra*, confirms satisfactorily that the complaint contains a statement entitling the plaintiff to have his petition entertained and to be heard upon its equitable issues by the Supreme Court of Probate.

It therefore devolved upon the plaintiff to demonstrate to the Supreme Court of Probate that justice required a revision.

> "- - - As prerequisite to the maintenance of the petition the petitioner is required to prove that, from accident, mistake, defect of notice or otherwise without fault on its part, it omitted to claim or prosecute its appeal. This is a distinct element, essential of proof.
>
> "If shown, then the presiding Justice must proceed to the second necessary element, that 'justice requires a revision.'
>
> "The first element rests upon a finding of fact. The second calls for the exercise of judicial discretion, based upon facts.
>
> -
>
> "Findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not to

> be reviewed by the Law Court if the record shows any evidence to support them. This rule is firmly established in this state and has been reiterated and reaffirmed in many of our decisions." (Authorities cited) *Trust Co.* v. *Baker*, 134 Me. 231, 233.

Plaintiff, appellant here, had the burden of sustaining the cogency of this appeal. He has afforded this court in the record no enlightenment as to what the presiding justice alluded to when he ruled in his decree:

> "- - - It appearing, *among other matters considered*, that the plaintiff failed to conform to the statutory requirements through which this Court may, under proper circumstances, allow a probate appeal to be entered - - -" (italics supplied.)

We indulge in no speculation but, by way of example only, such a transaction of payment and release as defendant represents in her counterclaim could, upon hearing, conceivably supply elements to activate the equitable discretion of a presiding justice.

In our ignorance of the determinants of the exercise by the presiding justice of his judicial discretion we can benefit from no premises from which would follow a conclusion as to abuse or soundness of discretion.

> "- - - There was no issue formed for trial upon that question. The petitioner was only asking for an opportunity to be heard upon that issue in the Supreme Court of Probate. The only order that could be made by the court was that she should or should not have that opportunity.
>
> "The petition therefore was addressed to the judicial discretion of the justice of the Supreme Court of Probate who should happen to hear it. When the determination of any question rests in the judicial discretion of a court, no other court can dictate how that discretion shall be exercised, nor what decree shall be made under it. There are

> in such cases no established legal principles or rules by which the law court can measure the action of the sitting justice unless indeed he has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument. - - - - 'Discretion implies that in the absence of positive law or fixed rule the judge is to decide by his view of expediency or of the demands of equity and justice.' *State v. Wood*, 23 N. J. L. 560."

Goodwin v. *Prime*, 92 Me. 355, 362.

Cf. Sawyer v. *Chase*, 92 Me. 252, 253.

Graffam v. Cobb, 98 Me. 200, 206.

The mandate must be:

Appeal denied.

EVELYN L. SAVAGE
vs.
AMERICAN MUTUAL LIABILITY INS. CO.

Cumberland. Opinion, July 16, 1962.

Initial Permission. Automobile Liability. Insurance. Coverage.

Coverage extends to the operator only if his use at the time and place of the accident is within the scope of the permission granted by the assured.

Coverage is not to be denied where the general use is primarily for the purpose for which permission was given and there are no more than minor deviations as to time and place of operation.

The insurer entrusts to the insured the extension of policy coverage but full effect is given to the restrictions imposed by the insured when he permits the use of the insured vehicle by another.

ON APPEAL.

The issue in this case is whether or not the operation of the automobile was with the permission of the named assured within the meaning of the policy contract. Appeal denied.

Basil A. Latty, for the plaintiff.

Mahoney, Thomes, Desmond and Mahoney, for the defendant.

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

WEBBER, J. The plaintiff, holder of a judgment against one Margaret MacKenzie, now seeks to compel the payment of this judgment by the defendant insurance company. The defendant provided liability insurance on the automobile of one Jensen which was being operated by Miss MacKenzie at the time the plaintiff was injured. The issue is whether or not the operation was with the permission of the named assured within the meaning of the policy contract.

The pertinent provision of the policy states:

> "With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured * * * and also includes any person *while using* the automobile and any person or organization legally responsible for the use thereof, provided the *actual use* of the automobile is by the named insured or such spouse or *with the permission of either*." (Emphasis ours.)

The justice below found on the basis of supporting evidence that Miss MacKenzie was given permission by the insured to borrow the latter's automobile; that the stated purpose was the transaction of some personal business by

Miss MacKenzie in Westbrook; that the car was borrowed not later than 9:30 A.M. at the owner's home in Westbrook upon the understanding that it would be returned in not over an hour and a half; and that the plaintiff was injured while riding as a passenger in the car being then driven by Miss MacKenzie at about 7 P.M. on a highway several miles from the owner's home. No effort was made by the plaintiff to explain why the car should have been used for the entire day or why it should have been at the place where the accident occurred. The personal business to be transacted by the operator was such that it could have been transacted in a relatively brief period.

Relying on the authority of *Johnson* v. *Insurance Company,* 131 Me. 288, the justice below denied recovery. In that case we held that coverage extends to the operator only if his use at the time and place of the accident is within the scope of the permission granted by the assured. In effect the plaintiff urges that we reconsider the rule announced in *Johnson* and adopt the rule of "initial permission" which obtains in a few jurisdictions. The plaintiff contends that since Miss MacKenzie had permission to take and use the car in the first instance, she should be deemed to be covered by insurance even though at the time of the accident her use was for a purpose and at a time and place which represented a drastic deviation from that for which permission was originally granted.

In *Johnson* we reviewed some of the leading cases which support the "initial permission" rule and indicated that they were "not persuasive." It is interesting to note that since *Johnson* was decided in 1932, two of these cases have been virtually repudiated. In 1924 a divided court held in *Dickinson* v. *Maryland Casualty Co.,* 101 Conn. 369, 125 A. 866, that the original permission to "go home and change his clothes" and "to hurry back" extended coverage to the operator even though he used the automobile to travel a dif-

ferent route for the purpose of visiting a number of saloons with friends. In 1941 the Connecticut court, presented with a rather similar factual situation, repudiated the "initial permission" rule and cited *Johnson* v. *Insurance Co., supra,* with apparent approval. *Mycek* v. *Hartford Acc. & Indem. Co.,* 128 Conn. 140, 20 A. (2nd) 735. The court attempted to distinguish *Dickinson* as a case involving only "slight deviations" from the permitted use. Moreover the court expressly declined to follow the leading case of *Stovall* v. *N. Y. Indem. Co.* (1928), 157 Tenn. 301, 8 S. W. (2nd) 473, although the court in *Stovall* had relied upon *Dickinson* as the primary authority for its position. In any event it is now apparent that Connecticut no longer follows the rule of "initial permission."

In Tennessee the court has carefully limited the application of the rule of "initial permission" to those cases in which the operator is given "general custody" of the vehicle. In *Moore* v. *Liberty Mut. Ins. Co.* (1952), 193 Tenn. 519, 246 S. W. (2nd) 960, the court refused to apply the rule previously announced in *Stovall* to a case in which the permission to use the automobile was limited to a particular purpose. Distinguishing *Stovall,* the court said at page 961 of 246 S. W. (2nd): "The only distinction between the cases is the difference between general custody and a limited permission." The court apparently attached no significance to the fact that in *Stovall* permission was limited to use in the business of the employer-owner whereas the vehicle at the time of the accident was actually being used for the personal business and pleasure of the operator. The present state of the law in Tennessee was carefully analyzed in *Branch* v. *U. S. Fid. & Guar. Co.* (1952), 198 F. (2nd) 1007 and *Young* v. *State Farm Mut. Auto. Ins. Co.* (1957), 244 F (2nd) 333. The court concluded in these cases, as do we, that the earlier rule of "initial permission" announced in *Stovall* has been rejected.

We have given particular attention to *Dickinson* and to *Stovall* because they were long considered to be the two leading cases supporting the rule of "initial permission." In our view they can no longer be so regarded. See Anno. 5 A. L. R. (2nd) 632.

In states which provide for compulsory liability insurance by statute, the rule of "initial permission" finds favor because it implements an underlying legislative policy that, for the protection of the public, liability insurance should follow the automobile under nearly all circumstances. Nevertheless in Massachusetts, a compulsory liability state, the court saw no reason to apply the rule of "initial permission" to insurance coverage over and above the limits required by law. In *Blair* v. *Travelers Ins. Co.* (1935), 291 Mass. 432, 197 N. E. 60, the court declined to apply the rule of "initial permission" to a case in which the operator had permission to use the vehicle on a matter of business of mutual interest to the owner and himself but at the time of the accident was using it for his own pleasure. The court cited our opinion in *Johnson* with evident approval.

We doubt if among the courts which require that the use at the time of the accident be within the scope of the permission there are many which would not tolerate slight and inconsequential deviations from the permitted use. Some authorities have construed *Johnson* as applying a stricter rule. Anno. 5 A. L. R. (2nd) 600, 626. We do not so regard it. In *Johnson* there was a substantial deviation from the permitted use both as to purpose and place of operation. We find nothing in *Johnson* which would deny coverage where the actual use is primarily for the purpose for which permission was given and there are no more than minor deviations as to time and place of operation. Under such circumstances the risk of accident is not appreciably increased and permission would undoubtedly have been given for such use if it had been sought. Under such a rule the

insurer entrusts to the insured the extension of policy coverage but full effect is given to the restrictions imposed by the insured when he permits the use of the insured vehicle by another. In these days when reduced premiums are being offered to those who maintain a low level of accident liability, the ability of an insured owner to impose effective restrictions on permitted use by another becomes important to the insured as well as to the insurer. In the case at bar the justice below correctly construed *Johnson* as permitting minor deviations but found on the evidence that the deviations here constituted "a radical departure from that for which permission was given."

We note that *Johnson* has been cited and followed in the following cases in addition to those already noted above: *Standard Acc. Ins. Co.* v. *Rivet* (1937), 89 F. (2nd) 74, 77; *Powers v. Wells* (1935), 115 Pa. Super. 549, 176 A. 62, 63; *Hodges* v. *Ocean Acc. & Guar. Corp.* (1941), 18 S. E. (2nd) (Ga.) 28, 35. A like result was reached in *Travelers Ins. Co.* v. *Marcoux* (1941), 91 N. H. 450, 21 A (2nd) 161. We conclude that there is no occasion to depart from the rule announced in *Johnson.*

Appeal denied.

JOHN D. DUNCAN, PETR. FOR WRIT OF ERROR
vs.
STATE OF MAINE

Knox. Opinion, July 19, 1962.

Penal Law. Statutory Construction. Legislative Intent. Indictments. Convict. Sentence. Conviction.

Penal statutes are to be construed strictly, yet the intention of the legislature is to govern and they are not to be construed so strictly as to defeat the intention of the legislature.

It is sufficient if the words used in this indictment are more than the equivalent of the words of the statute, provided they include the full significations of the statutory words.

The validity of an indictment rests not on whether the words of the statute appear, but on whether the statutory elements are set forth with sufficient particularity and clarity.

One who has been sentenced and is serving the sentence in the state prison or one who has been transferred from the reformatory for men or committed under certain circumstances for safe-keeping is a convict.

"Conviction" is the verdict of guilty; "sentence" is the judgment following conviction.

ON EXCEPTIONS.

This case comes before the court on exceptions to the denial of a writ of error. Exceptions overruled.

Louis Scolnik, for the plaintiff.

Richard A. Foley, Asst. Atty. Gen., for the State.

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

WILLIAMSON, C. J. This case is before us on exceptions to the denial of a writ of error. At the October 1956 Term

of the Superior Court, Knox County, the petitioner was sentenced to not less than eight nor more than sixteen years in the Maine State Prison for forcibly attempting to escape from the state prison under R. S., c. 27, § 42. The errors asserted by the petitioner appear below.

The charging portion of the indictment on which the petitioner, or plaintiff in error, was tried and found guilty is as follows:

> ". . . that John Douglas Duncan of Portland, Maine, commorant of Thomaston in the County of Knox and State of Maine, on the 29th day of July, A. D. 1956, at Thomaston, feloniously did attempt to commit a criminal offense, to wit, while undergoing lawful imprisonment in the Maine State Prison, in pursuance of the sentence of Francis W. Sullivan, Justice of the Cumberland County Superior Court at its September Term A. D. 1955, for the offense of breaking, entry and larceny in the night time, for a term of not less than two years nor more than four years; whereupon he, the said John Douglas Duncan, did then and there wilfully, unlawfully and feloniously from and out of said Maine State Prison attempt to escape and go at large, and did then and there do a certain act toward the commission of said offense by then and there throwing at the old vehicle entrance guard post sundry rocks and glass jars which had cloth rags inserted through the covers and were filled with inflammable material and ignited, with intent to set fire to said guard post and to escape over the wall with the use of a ladder, but failed in the execution of said offense."

The pertinent statutes are:

> "**Sec. 42. Convict assaulting officers; escape; prosecution.** — If a convict, sentenced to the state prison for a limited term of years, assaults any officer or other person employed in the government thereof, or breaks or escapes therefrom, or forcibly attempts to do so, he may, at the discretion of the

court, be punished by confinement to hard labor for any term of years, to commence after the completion of his former sentence. The warden shall certify the fact of a violation of the foregoing provisions to the county attorney for the county of Knox, who shall prosecute such convict therefor." (R. S., c. 27, § 42, as amended by Laws 1955, c. 309. An amendment in Laws 1959, c. 242, § 6, is not here material.)

"**Sec. 4. Attempt with overt act to commit offense.** — Whoever attempts to commit an offense and does anything towards it, but fails or is interrupted or is prevented in its execution, where no punishment is expressly provided for such attempt, shall, if the offense thus attempted is punishable with imprisonment for life, be imprisoned for not less than 1 nor more than 10 years; and in all other cases he shall receive the same kind of punishment that might have been inflicted if the offense attempted had been committed, but not exceeding ½ thereof." (R. S., c. 145, § 4.)

"**Sec. 2. General penalty.** — When no punishment is provided by statute, a person convicted of an offense shall be punished by a fine of not more than $500 or by imprisonment for less than 1 year." (R. S., c. 149, § 2.)

FIRST — The petitioner contends that the escape statute R. S., c. 27, § 42, *supra*, is void on the ground that the penalty stated is indefinite. The point is not expressly stated in the bill of exceptions. The attack, however, goes to the jurisdiction of the court, and thus is proper matter for consideration at any stage of the case.

It is argued that the court is left, under the statute, with discretion to punish within limits or not at all. In other words, the petitioner says that the statute provides a penalty only at the will of the court.

With this view we do not agree.

> "It is a well recognized principle of statutory construction that penal statutes are to be construed strictly, yet the intention of the legislature is to govern and they are not to be construed so strictly as to defeat the intention of the legislature. *State v. J. P. Bass Co.*, 104 Me. 288, *State v. Cavalluzzi*, 113 Me. 41." *Smith, Petr.* v. *State of Maine*, 145 Me. 313, 326, 75 A. (2nd) 538.

Section 42 comes to us from the days when solitary confinement at the hands of the court was a lawful punishment. R. S., 1857, c. 140, § 32 reads:

See Laws 1824, c. 282, §§ 12 and 13.

> "If any convict, sentenced to the state prison for life, assaults any officer or other person employed in the government thereof, or breaks or escapes therefrom, or forcibly attempts so to do, he may be punished by solitary imprisonment in the state prison not more than one year, and be afterwards held in custody on his former sentence; but if such offence is committed by a convict sentenced to the state prison for a limited term of years, he may be punished by solitary confinement in the state prison not more than three months, to precede the fulfillment of any former sentence, and, at the discretion of the court, may be further punished by confinement to hard labor for a limited period or during life, to commence after his solitary confinement, or the completion of his former sentence."

The Legislature in 1872 abolished solitary confinement except for prison discipline or to use the words of the present statute "except as a prison discipline for the government of the convicts." Laws 1872, c. 64; R. S., c. 27, § 20.

In *State* v. *Haynes*, 74 Me. 161 (1882), the provisions relating to punishment for solitary confinement were held void, and in the next revision (R. S., 1883, c. 140, § 36) the reference to such punishment was stricken from the statute.

The phrase "at the discretion of the court" on which the petitioner relies heavily, has no significance as we read the statute. The court has so decided recently in an analogous situation.

In *Green* v. *Robbins*, 158 Me. 9, 176 A. (2nd) 743, the statute provided for the transfer of escapees from reformatory to the state prison "where he shall serve the remainder of the term for which he might otherwise be held at said reformatory, or at the discretion of the court he may be punished by imprisonment in the state prison for any term of years." R. S., c. 27, § 73.

The court, in pointing out that an earlier statute called for additional punishment in the reformatory or at the discretion of the court for "any term of years" said, at p. 12: "We are satisfied that the retention in Sec. 73 of the phrase 'or at the discretion of the court' was merely the result of inartistic draftsmanship and no significance should be attached to it." Again on p. 13: "In the latter event, (a criminal prosecution) the inmate upon conviction might be sentenced by the court to a term in the state prison."

Striking the phrase "at the discretion of the court," we have left that "he may . . . be punished by confinement to hard labor for any term of years. . ." The words, "may be punished" in our view have precisely the same meaning in the instant statute that we would give to the more usual phrase "shall be punished." *Green* v. *Robbins, supra.*

Common sense tells us that the Legislature after the repeal of the provision for solitary confinement intended that the court should punish one who forcibly attempted to escape from state prison, or who otherwise violated section 42, within the limits "of any term of years." The Legislature did not act idly. The language is sufficient to give effect to the intention. The statute is not void for indefinite-

ness in the penalty. The petitioner gains nothing from the first objection.

SECOND — The second ground of objection is that the indictment under section 42 is fatally defective from the failure to charge in legally sufficient language: (1) that the respondent was a convict lawfully committed; (2) an essential overt act; (3) a forcible attempt. A fourth objection is that the indictment does not charge an offense under the general attempt statute. (R. S., c. 145, § 4, *supra.*)

The governing legal principles are well established. The difficulty lies in their application. In *Smith, Petr., supra,* at p. 324, an escape case, we quoted with approval the following:

> "As said in *State v. Lynch,* 88 Me. 195 at 196-7: 'It is also necessary that the indictment should employ "so many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, *it must use all the other words which are essential to a complete description of the offense;* (emphasis ours) or, if the pleader chooses, words which are their equivalent in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise." Bishop on Criminal Procedure, Vol. 1, Sec. 612.
>
> "In *State v. Hussey,* 60 Maine, 410, it is said: "An indictment should charge an offense in the words of the statute or in language equivalent thereto." In that case the language used was not equivalent to the statutory words, nor did it have a broader meaning, including the significations of the words of the statute.
>
> "We think it is sufficient if the words used in the indictment are more than the equivalent of the words of the statute, 'provided they include the full significations of the statutory words.' "

The principles are fully discussed in *State* v. *Couture*, 156 Me. 231, 237 *et seq.*, 163 A. (2nd) 646. See also *State* v. *Lashus*, 79 Me. 541, 11 A. 604; *State* v. *Beckwith*, 135 Me. 423, 198 A. 739; *State* v. *Doran*, 99 Me. 329, 59 A. 440; *State* v. *Dumais*, 137 Me. 95, 15 A. (2nd) 289; *State* v. *Michaud*, 150 Me. 479, 482, 114 A (2nd) 352.

(1) One who has been sentenced and is serving the sentence in the state prison is a convict within the fair meaning of section 42. The word "convict" is repeatedly used in this sense in the sections of the statutes relating to the state prison. See R. S., c. 27, §§ 19-51. By the 1959 amendment, "convict" in section 42 now refers as well to one transferred from the reformatory for men or committed under certain circumstances for safe keeping.

We are not concerned with the meaning of "conviction" when the case is in the Law Court. A "conviction" in the appellate stage has been held not a proper ground for revocation of a driver's license (*State* v. *DeBery*, 150 Me. 28, 103 A. (2nd) 523), and of a physician's certificate of registration *Donnell* v. *Board of Registration*, 128 Me. 523, 149 A. 153).

Ordinarily the "conviction" is the verdict of guilty and the sentence is the judgment following conviction. *State* v. *Morrill*, 105 Me. 207, 73 A. 1091; *State* v. *Stickney*, 108 Me. 136, 79 A. 370; *State* v. *Knowles*, 98 Me. 429, 57 A. 588; *Com.* v. *Lockwood*, 109 Mass. 323. We commonly say that X was convicted when found guilty. Sentence comes later.

The word "convict" is not used in the indictment. The validity of the indictment rests not on whether the words of the statute appear, but on whether the statutory elements are set forth with sufficient particularity and clarity. *Smith, Petr., supra.*

We turn to the indictment. The words "lawful imprisonment," taken alone, would not be sufficient to charge an of-

fense under section 42. *Smith, Petr., supra,* at p. 322. The words are not to be taken alone; the entire indictment must be considered.

The indictment charges that the petitioner at the time of the offense was imprisoned at the state prison under a sentence by a named Justice of the Superior Court given at a stated term of court for a described felony. From our study of the indictment, we are drawn irresistibly to the conclusion that the indictment plainly charges the status of the petitioner at the time of the attempted escape as a convict lawfully imprisoned.

The petitioner urges that the failure to allege that a warrant of commitment, or a mittimus, issued from the court to the warden is fatal to the indictment. A mittimus issues as a ministerial act designed to place in the warden's hands an authorization to hold the person convicted and sentenced. It is familiar law that the mittimus is not the judgment, and that an error therein may be corrected to comply with the judgment.

In *State* v. *Couture, supra,* the indictment charged that "the escape occurred while the respondent was lawfully detained in the county jail at said Alfred." The respondent on a plea of guilty was ordered committed to the Reformatory for Men. A mittimus issued and the respondent was immediately taken into custody and placed in the county jail pending his transfer to the reformatory. The respondent was indicted for escape from jail under R. S., c. 135, § 28, applicable to "whoever being lawfully detained in any jail . . . escapes . . ." There was no allegation to the effect that a mittimus had been issued to authorize the detention of the respondent.

In *Smith, Petr., supra,* involving escape while committed for lack of bail, we said at p. 318:

> "Unless the allegations of fact set forth in the indictment show the *'lawful detention'* of the

escapee, and that the detention was *'for a criminal offense,'* the indictment is fatally defective so far as setting forth a violation of this statute is concerned.

" 'Indeed it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment.' *State v. Doran,* 99 Me. 329, 332.

"It is to be noted that of these two elements of the statutory offense the first, 'lawful detention' is also an element of common law escape. The effect of the statute is not the creation of a new and distinct offense. It merely provides a specific penalty for certain common law escapes which are brought within its terms by the other requirements as to the place from which the escape is made and the cause of the detention. It makes certain escapes felonies which were misdemeanors."

The cases of escape pending transfer and while committed for lack of bail are distinguishable from the case at bar. Here we have the plain unmistakable designation of the court sentencing the petitioner for a felony punishable at state prison and of imprisonment pursuant to the sentence. Such imprisonment is lawful imprisonment, and the lack of a mittimus if such be the fact does not alter its lawful character.

Under R. S., c. 149, § 13, as amended, "Prisoners shall not be received until a copy of the record forwarded to the warden and a warrant of commitment is given to the receiving officer at the state prison." This statute, in our view, is designed to aid in the administration and government of the prison. If a prisoner duly convicted and sentenced is in fact received without the delivery of the mittimus and other records, the imprisonment is none the less lawful. So here, if there was no mittimus in fact issued, nevertheless, the facts alleged show that the imprisonment was law-

ful. Thus an essential element under section 42 was met in the indictment.

(2) The second point made by the petitioner is that no overt act was sufficiently alleged. "To constitute an attempt there must be something more than mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made." *State* v. *Doran, supra,* at p. 332.

The principle is illustrated in *State* v. *Hurley* (Vt.) 64 A. 78, and *People* v. *Gilbert* (Cal.) 260 P. 558. In *Hurley,* the Vermont Court sustained a demurrer to the indictment holding that the mere fact that a prisoner procured tools — in this instance hacksaws — adapted to jail breaking did not constitute an attempt to break jail. "To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design." In sustaining a verdict, the California Court in *Gilbert* held evidence that the respondent at night climbed over a balcony and approached doors leading to a bedroom was sufficient to establish the corpus delicti of an attempt to commit burglary. The court said, at p. 559:

> "In order to constitute the offense of an attempt to commit a crime, the attempt must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party. People v. Murray, 14 Cal. 159. While mere intention to commit a crime followed by no overt act is not an offense, here the evidence showed an overt act from which, in view of the circumstances, an intention to commit the crime of burglary might reasonably be inferred; and the evidence was sufficient without the aid of the extra judicial statements to establish prima facie the elements of the offense charged."

See also *Lee* v. *Com.* (Va.) 131 S. E. 212, 214; 4 Words & Phrases pp. 753-757.

The overt act is charged in the indictment before us as follows:

> ". . . and did then and there do a certain act toward the commission of said offense by then and there throwing at the old vehicle entrance guard post sundry rocks and glass jars which had cloth rags inserted through the covers and were filled with inflammable material and ignited, with intent to set fire to said guard post and to escape over the wall with the use of a ladder, but failed in the execution of said offense."

The language, as we read it, plainly describes a forcible attempt to escape. The acts described were adapted to and closely connected with an escape. They were indeed the commencement or, in any event, an integral part of an intended escape. To throw rocks and glass jars with inflammable material ignited with intent to set fire to a prison guard post and to escape over the wall with the use of a ladder most certainly are not the acts of a convict leaving the prison through an open gate. The jury would have been justified in finding on proof of the facts alleged that the prisoner had so far proceeded with his attempt to escape that without interruption the escape would have been consummated. The analogy is with *Gilbert,* not with *Hurley.*
(3) The attack on the ground that the indictment does not sufficiently allege *force,* an essential element under section 42, fails. The lack of the word "forcibly" in the indictment is not fatal.

The words "wilfully, unlawfully and feloniously" are not in themselves the equivalent of the statutory language. *State* v. *Castner,* 122 Me. 106, 119 A. 112; *State* v. *Blake,* 39 Me. 322; *State* v. *Robbins,* 66 Me. 324; *State* v. *Lynch,* 88 Me. 195, 33 A. 978.

The throwing of rocks and jars to set fires, as alleged, are, of course, acts of force. The force so generated by the petitioner was designed to facilitate his escape. No other reasonable construction can be given to the indictment. Cf. *State* v. *McLeod,* 97 Me. 80, 53 A. 878 (forcible). See also Bishop on Criminal Law (6th ed.) § 1081; 1 Burdick, Law of Crime § 312; Russell, Crimes & Misdemeanors (5th ed.) 428; 2 Archbold's Criminal Practice & Pleading (8th ed.) 1869.

The Justice in the Superior Court in dismissing the writ of error placed his decision on the ground that the sentence was valid whether the indictment charged a forcible attempt to escape under section 42, or an attempt to escape without force under the general attempt statute. (R. S., c. 145, § 4.)

We are of the opinion shared by the petitioner in his fourth objection that the indictment was brought under section 42.

It is not necessary for us to determine whether the Legislature in establishing particular offenses under section 42 has eliminated an offense of attempting to escape without force under the general attempt statute. See *People, ex rel Labicki* v. *Brophy, Warden* (App. Div.) 10 N. Y. S. (2nd) 1012.

In any event, it is plain beyond doubt that the State intended to proceed under section 42. It would be unjust to permit the State to turn from attempted escape with force to attempted escape without force — to blow hot and cold — in the situation set forth in the indictment. There is nothing whatsoever in the record to indicate that the court intended to sentence the petitioner under the general attempt statute. The petitioner was indicted, tried, found guilty and sentenced under section 42.

The entry will be

Exceptions overruled.

FRANK S. CARPENTER
vs.
SEABOARD ENGINEERING CO., INC.
AND
U. S. FIDELITY AND GUARANTY CO.

Kennebec. Opinion, July 27, 1962.

Instructions. Performance Bonds. Contracts. Intent. Use.

Instruction to the jury that the liability of the defendants was restricted to items which were substantially consumed in the road construction was erroneous.

Actual intention as expressed in the writing is the chief thing to be looked to and ascertained.

ON APPEAL.

This is an action to collect rental for such time as indispensable heavy road equipment was employed in a specific road making. The issue is whether or not "use" should be considered as substantial "consumption" under the terms of the contract. Appeal sustained.

Stanley Bird, for the plaintiff.

Shur, Sawyer, and Beryer, for the defendant.

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

SULLIVAN, J. Seaboard Engineering Co., Inc., covenanted in writing with the State of Maine to construct a section of public highway and in guarantee thereof gave the State its bond with United States Fidelity and Guaranty as surety.

Seaboard Co. subcontracted with Aaron Construction Co. which on its part rented road making equipment from Lee Brothers and utilized such contrivances in the highway building. Lee Brothers remain unpaid by Aaron Co. for the rentals and the State for Lee Brothers has in this action sued Seaboard Co. and the Guaranty Company to exact payment.

There was a jury trial and evidence which, if believed, established that Lee Brothers for several days let to Aaron Co. one 605 Koehring Shovel to move earth and rock upon the road project, 2 Letourneau - Westinghouse, Tournapull, rear dump units for moving heavy earth and an International bulldozer, model TD24 and that Aaron Co. put the equipment to use on the road project. There were charges for wrecker service, repairs, moving and grease.

The presiding justice at the close of evidence instructed the jury as follows:

> "While the contract, the bond and certain papers will go with you to the jury room I would say to you that under the wording of the bond in this case we are limited considerably in our application of the bond to the facts. While the bond, you will find, in general terms guarantees that Seaboard Engineering Company will pay for all labor, materials and so forth, connected with this job, I will have to say to you that we are here governed by the following interpretation of that contract, namely, that Seaboard and the surety company, the bondsmen, will be responsible to Lee Brothers only for such items as Lee Brothers supply, which items were substantially consumed - - in this operation.
>
> "It is easy to understand that in the building of a road, cement, gravel, fill for shoulders, crushed rock, and so forth, do become incorporated, built into the road, substantially consumed or entirely consumed in the construction, but when we consider the equipment we are dealing with such as

bulldozers, power shovels, and so forth, the question of whether they are substantially consumed is a horse of another color, so to speak.

"So for our purposes the only item in the bill which is presented by Lee Brothers for our consideration which, as the record stands, can fall within the category of being substantially consumed is the 105 pounds of grease."

Plaintiff's counsel at the end of the court's instructions excepted in these words:

"I object to the Charge of the Court when he stated that Seaboard and the surety company were only liable for such items as were substantially consumed on the project. I further object to the statement that the only item on the bill, which as the record now stands, is the question of the 105 pounds of grease - - - -"

The jury returned a verdict for the plaintiff in the amount of $19.84, for the grease and special findings as follows:

"Special Findings

"1. What was the fair rental value per month of a #605 Koehring Shovel during the period September 8 - October 23, 1959?

Twenty Six Hundred Per Month

"2. What was the fair rental value of a Letourneau - Westinghouse rear dump vehicle, otherwise known as an earth mover, otherwise known as a Tournapull, per month for the same period?

Fifteen Hundred & Seventy Two Per Month

"3. What was the fair rental value per hour of a TD 24 (bulldozer with operator) during the period September 14 to October 23, 1959?

Eighteen Dollars Per Hr."

Plaintiff thereupon appealed and states the issue here to be:

> "Are mechanical labor or equipment charges recoverable by the Treasurer of the State of Maine for the use of equipment owner against a prime contractor and its bonding company under the terms of a State Highway contract and its accompanying bond?

In the order of logic as well as in the contemplation of law the expressed intention of the State of Maine and of the defendants is the prime object of our consideration and judicial concern, in the interpretation of the highway contract and bond.

> "- - - Actual intention, as expressed in the writing, is the chief thing to be looked to and ascertained - - -"
>
> *Seed Co.* v. *Trust Co.*, 130 Me. 69, 71.

The sanctioning statute basic to the relations of the parties in this action reads in pertinent respect as follows:

> "The commission (State Highway Commission) shall have full power in the letting of all contracts for the construction of all state highways - - - The commission shall make all - - - specifications and contracts for all proposed work - - - The commission shall have full power in all matters relating to the furnishing of bonds by the successful bidders for the completion of their work and fulfilling of their contracts, - - - -"
>
> R. S., c. 23, § 40 (ante 1961 amendment)

The Standard Specifications of the State Highway Commission, revision of January, 1956, applicable to this case recite the glossary which follows, with most italics added:

> "**Definition of Terms**
>
> **101 - 9, Contract.** The agreement covering the performance of the *work* and the furnishing of materials for the proposed construction.

It should be understood by all concerned that the - - - *'Standard Specifications'* - - - *are a part of the contract and are to be considered as one instrument.*

"**101 - 17, Equipment.** *All machinery, together with the necessary supplies for upkeep and maintenance,* and also all tools and *apparatus* necessary for the proper construction and acceptable completion of the work.

"**101 - 52, Work.** It shall be understood to mean the furnishing of all labor, materials, *equipment* and other incidentals *necessary* or *convenient* to the successful completion of the Project and the carrying out of all duties and obligations imposed by the Contract.

"**103 - 4, Requirements of Contract Bond.** - - - - This bond shall guarantee due execution and faithful performance and completion of the *work* to be done under the contract and the payment in full of all bills and accounts for material and labor used in the work, and *for all other things contracted for or used in connection with the contract;* - - - - "

"**106 - 13, Responsibility for Damage Claims.** - - - - The Contractor shall promptly pay all bills for labor, materials, *machinery,* water, tools, *equipment,* teams, *trucks,* automobiles, freight, fuel, light and power and *for all other things* contracted for *or used by him on account of the work herein contemplated* and if at any time during the progress of the work or before final payment of any money due the contractor under the terms of this contract, any claim for labor, materials, water, tools, *equipment,* teams, *trucks,* automobiles, freight, fuel, light and power, or for any other things specified as aforesaid - - - - "

The contract of Seaboard Engineering Co., Inc., with the State of Maine was an obligation:

> " - - - to supply all *equipment*, appliances, tools, labor and materials and to perform all *work* required for the construction and completion," etc. (Emphasis added.)

That contract affirmatively incorporated by reference the definitions of the Standard Specifications quoted *supra*, by providing that the highway should be constructed:

> " - - - in strict conformity with the provisions of this contract, - - - and *Standard Specifications, Revision of January 1956* - - - " (Emphasis ours.)

The guaranty bond contained the following engagements:

> "The condition of this obligation is such that if the ..... Contractor .... shall faithfully perform the contract on his part and satisfy all claims and demands incurred for the same and shall pay all bills for labor, material, *equipment* and *for all other things* contracted for or *used by him* in connection with the work *contemplated by said contract* - - - " (Emphasis supplied.)

The context of both the contract and of the indemnifying bond, elucidated by the exegetic definitions contained in the Standard Specifications, vouchsafe a single conclusion, that the defendants underwrote all just and unpaid claims for the benefits of equipment, for materials and for services such as the "use" plaintiffs, Lee Brothers, furnished to the subcontractor, Aaron Construction Company, and which were utilized by the latter — and in so far as they were so utilized by it — in the accomplishment of the highway project. The definitional amplifications of the terms, "work" and "equipment," are sufficiently comprehensive.

The heavy equipment involved here was at the trial conceded by the defendants to be essential to highway building which in its present day proportions and tempo could not be accomplished without such powerful instrumentalities for actually transforming landscapes. It follows then that the use of such equipment by the subcontractor was an

eventuality which the defendants are chargeable with having apprehended and foreseen.

The wrecker service, repairs, moving and grease also are valid charges by authority of the Standard Specifications.

The court's instruction to the jury that the liability of the defendants was restricted to items which were substantially consumed in the road construction was erroneous and is negated by this contract and bond.

This case is readily distinguished from *Carpenter, Treas.* v. *Susi*, 152 Me. 1, which was an action upon an indemnity bond brought on behalf of a supplier to recover the sale price of tires and tubes as well as the cost of vulcanizing and retreading services, furnished to the contractor upon a highway project. The evidence failed to demonstrate sufficiently the association of the materials afforded with the particular road construction designated. This court explained that the substantial consumption doctrine would have been controlling adversely as to the tires and tubes bought and sold had the evidence necessitated further decision. The subjoined statement from *Clifton* v. *Norden*, 177 Minn. 288, 226 N. W. 940, was quoted with approval:

> " 'Tires of motor trucks are parts of the complete machine which on principle may or may not be chargeable against the bondsmen, according as there is or is not proof that they were consumed on the particular contract - - - In the absence of proof that they were at least substantially consumed - - - there can be no recovery for such things as - - - tires'."

The case at bar is not a suit to obtain the market value, the great cost or the sale price of the mammoth chattels of Lee Brothers but this is an action to collect rental for such time as that indispensable heavy road equipment was employed in a specific road making. We need give heed here to the elements of attrition, depreciation or consumption of materials only to any extent necessary in ascertaining

the work life of the equipment as such may affect a calculation of fair rental and in respect to the topics of repairs, grease and like incidentals. The major charge is for usage and such is specially validated by contract and bond. There is considerable rational propriety and consistency in a recovery by the "use" plaintiffs. We do not imply that the functioning of their equipment, the moving of earth through distance, is classifiable as "labor" but it was mechanized labor and an astonishingly efficient substitute for thousands of work-hours of human labor. The benefits and contribution in furtherance of highway construction are the same whether the factor be human work or the relocation of dirt and rock by mechanized equipment.

The bond in the case at bar protects the "use" plaintiffs. *Carpenter, Treas.* v. *Susi, supra,* 152 Me. 1, 10.

There are many decided cases interpreting as many variantly worded statutes, highway contracts and appended bonds. The conclusions are divided. The terms, "labor" and "materials," particularly are accorded sometimes very contained and sometimes very elastic scope where the contract and bond are not so explicit and apt as those in the present case. The authorities are assembled in 44 A. L. R. 381 - 386 and supplemental decisions.

A decision as to coverage here must be predicated upon the particular contract, bond, specifications and facts of the case at bar.

The appeal of the plaintiff is sustained. A new trial is granted but only for the assessment of damages in accordance with the special, jury findings and this opinion.

Appeal sustained:

New trial granted only as to damages in accordance with the special jury findings and this opinion.

PUBLIC SERVICE CO. OF NEW HAMPSHIRE
vs.
ASSESSORS OF TOWN OF BERWICK
AND
INHABITANTS OF TOWN OF BERWICK

York. Opinion, July 27, 1962.

Taxation. Appeals. Legislative Intent.

The real meaning of a statute is to be ascertained and declared even though it seems to conflict with the words of the statute.

Statutory canons and rules of interpretation are helpful, time-telling, necessary, and revered but are to be judiciously consulted and applied.

ON REPORT.

The case is before the court upon report, for a decision upon the issue of timeliness of appeal. Motions of defendants overruled; case remanded to Superior Court for further, appropriate proceedings.

Vincent L. McKusick,
Sigrid E. Tompkins, for the plaintiff.

Titcomb, Federson, and Titcomb, for the defendant.

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

SULLIVAN, J. Plaintiff is a corporation resident in New Hampshire and at Berwick, Maine on April 1, 1960 and on April 1, 1961 was the owner of taxable property which the Assessors of Berwick assessed and taxed for each of those respective tax years.

The 1960 tax was committed for collection on July 26, 1960. On July 14, 1961 the plaintiff filed an application

with the assessors for a partial abatement because of asserted overvaluation. The assessors reported no action upon the abatement sought and gave to the plaintiff no written notice of any decision. On March 16, 1962 the plaintiff appealed to the Superior Court for an adjudication.

The 1961 tax was committed for collection on August 1, 1961 and on September 23, 1961 the plaintiff filed an application with the assessors for a partial abatement because of alleged overvaluation. The assessors failed to take action upon the application for abatement and gave no written notice of any decision thereon. On March 16, 1962 the plaintiff filed its appeal in the Superior Court.

The defendants filed motions to dismiss both appeals and insist that the Superior Court is without jurisdiction to entertain either appeal in as much as neither appeal was commenced within the time allotted by the enabling statute of appeal.

The cases are before this court upon report, for a decision upon the issue of timeliness of the appeals. Rule 72, M. R. C. P., 155 Me. 573. The record consists of the complaints, the answers thereto, the motions for dismissal and an agreed statement of facts.

In 1960 and in 1961 the plaintiff dutifully and seasonably supplied the assessors with a list of its taxable property. R. S., c. 91 A, § 34.

Determination of the controversy here is quite completely an exercise in the interpretation of tax statutes and their application.

R. S., c. 91 A, § 48, amended, contains the following commission:

> "The assessors for the time being, on written application, stating the grounds therefor, within 1 year from date of commitment, may make such reasonable abatement as they think proper - - "

R. S., c. 91 A, § 49 ordains:

> "The assessors shall give to any person applying to them for an abatement of taxes notice in writing of their decision upon such application within 10 days after they take final action thereon. *If a board of assessors,* before which an application in writing for the abatement of a tax is pending, *fails to give written notice of their decision within 90 days* from the date of filing of such application, *the application shall be deemed to have been denied,* and the applicant may appeal - - - -"
> (Italics added.)

The time apportioned for appeal is prescribed by R. S., c. 91 A, § 52, as amended by P. L., 1959, c. 317, § 54:

> "The appeal - - - shall be taken *within* 30 days after notice of the decision from which the appeal is being taken, or *not less than 30 days after* the application shall be deemed to have been denied - - - -"
> (Emphasis ours.)

The plaintiff filed its abatement applications with the assessors seasonably within a year from the date of commitment of each respective tax. The plaintiff was accorded no response by the assessors, to either abatement petition.

The subjoined tables chronicle the noteworthy events preponderant here:

1960	1961
July 26, 1960 commitment of taxes.	August 1, 1961 commitment of taxes.
July 14, 1961 abatement application.	September 23, 1961 abatement application.
March 16, 1962 appeal.	March 16, 1962 appeal.

As to the abatement application in respect to the 1960 tax, 90 days had expired on October 12, 1961 without notice of decision by the assessors. The appeal was filed,

March 16, 1962, some 155 days subsequent to October 12, 1961.

As to the abatement application in respect to the 1961 tax, 90 days had expired on December 22, 1961 without notice of decision by the assessors. The appeal was filed, March 16, 1962, some 84 days subsequent to December 22, 1961.

Defendants contend that each appeal to be permissive and cognizable should have been filed *within 30 days after the passage of 90 days* from the presentation to the assessors of each respective petition for abatement. The defendants insist that although R. S., c. 91 A, § 52, as amended, countenances *no filing of an appeal less than 30 days* following the elapse of 90 days after the filing of a petition for abatement there is a readily perceptible clerical error in the amended statute. Defendants argue that the Legislature in spite of its positive language purposed to require an appeal to be instituted *within 30 days* following the duration of those 90 days.

To vindicate the soundness of their contention the defendants correctly recall that in order to synchronize appeals with new time fixation and terminals necessitated by the substitution under the Maine Rules of Civil Procedure, 155 Me. 461, effective December 1, 1959, of trial sessions in the Superior Court in lieu of the pristine calendar terms, the Legislature in 1959 amended R. S., c. 91A, § 52.

The pre-amendment language and the post-amendment wording of R. S., c. 91A, § 52 are collated and contrasted in the following legislative graph:

> "The appeal - - - shall be ~~entered at the term first occurring not less than~~ **taken within** 30 days after notice of the decision from which the appeal is being taken, or not less than 30 days after the application shall be deemed to have been denied. - - - -" P. L., 1959, c. 317, § 54.

Defendants stress that the clause, *"not less than 30 days after the application,"* etc., palpably is an error of the draftsman and intelligibly should read, *"within 30 days after the application,"* etc. They emphasize that an enforced interlude or compulsory arrestment for 30 days after an appeal becomes useful and before it can be availed of is purposeless. They remonstrate that an irrational delay is imposed while an open ended period for appeal is lavished, if the mischievous clause is read literally. Defendants argue that the words, *"not less than 30 days"* must be interpreted as meaning *"within 30 days"* and cite *Warren Co.* v. *Gorham*, 138 Me. 294, 301 for the principle that:

> " 'The real meaning of the statute is to be ascertained and declared even though it seems to conflict with the words of the statute.' "

The legislative amendment of R. S., 91A, § 52 was but one of some simultaneous 420 statutory revisions, additions, amendments, deletions, etc. (P. L., 1959, c. 317), necessary for assimilating the Maine Rules of Civil Procedure into the adjective law of Maine. The task of the Legislature was a teaming technical formulary. Errors were seemingly held to an irreducible minimum. In due candor it must be acknowledged that there is a self-evident oversight in the amending of R. S., c. 91 A, § 52 and that *"not less than 30 days"* should have been altered to say *"within 30 days."* The Legislature neglected to consummate the adaptation of the statute to the new procedural system.

Plaintiff persists that the amended statute is unambiguously worded and must be accepted literally, that if, error there has been, the rectification is for the Legislature and that certitude as to legislative mistake can not be demonstrated here. Plaintiff invokes the rule supported in such authorities as *Sweeney* v. *Dahl*, 140 Me. 133, 140:

> "The Legislative intent in a statute must primarily be ascertained from the language thereof and not

> from conjecture. In other words, the Court will first seek to find the Legislative intention from words, phrases and sentences which make up the subject matter of the statute. If the meaning of the language is plain the Court will look no further; it is interpreted to mean exactly what it says - - - "

Cf. *Bank* v. *Edminster*, 119 Me. 367, 370:

> "It is urged that Section 9 is a consolidation of two statutes enacted at different times, one affirming and the other extending the common law and that the sections should be construed as though such consolidation had not taken place.
>
> "But section 9 is plain. If we read the section without reference to its history and development, we are left in no doubt that the last sentence relates only to the assessment of damages.
>
> "A statute which within itself is clear should be construed as it reads. Resort may be and should be had to the genesis and evolution of statutes to explain, but not to discover ambiguties."

Extracted language is to be had from decided cases of this court to echo the contentions here, contradictory though they are, of both plaintiff and defendants. One might theorize that in statutory interpretation as with the grand and familiar equity maxims broad universals too comprehensive at times for practical classification have been culled to rationalize a conclusion which justice between the parties had already rendered obligatory. Statutory canons and rules of interpretation are helpful, necessary, time-tested and revered but are to be judiciously consulted and applied. One such interpretative truism is stated by this court in *Brackett* v. *Chamberlain*, 115 Me. 335, 340:

> "But neither of these cases presents the aspect of the case before us. In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience and injustices

> are not to be overlooked. Endlich on Stats., c. IX; - - -"

In *Lumber Co.* v. *Electric Co.*, 121 Me. 287, 294, we find:

> "- - - it is a well recognized rule of construction that statutes should be construed in a reasonable rather than in an unreasonable manner and so as to protect the rights of all rather than to sacrifice the rights of any."

In the instant case understandably because of a veritable myriad of amendments involved there is disclosed an oversight in the accommodation of a statute to a reform in court procedure. Resultantly one having occasion to appeal, as did this plaintiff, from a pocket veto by assessors of his tax abatement request is affirmatively forbidden by the amended statute to become an appellant during 120 days from his application. No *raison d'etre* is ascertainable for the enforced delay during those last 30 days.

If the defendants' indictment of plaintiff's appeals is valid and such appeals are fatally tardy because their commencement was not *within the 30 days* following the 90 days of the assessors' reticence, then the plaintiff's conformity with a clear legislative directive was its undoing. That result, to speak mildly, would be incongruous.

It is true that the literal statutory amendment seemingly extends the time for appeal indefinitely. Such a plight serves to subject the municipality to prolonged suspense and hazard as to the integrity of the challenged tax. That anomaly could decide assessors to elect to report their decision to an applicant for abatement but was not so potent here. In fact the defendant assessors by declining to communicate with the plaintiff invited the current dispute. Nor is this plaintiff beyond censure for its delays in instituting its appeals for considerable periods in the wake of 90 days.

If circumspectly possible the plaintiff should be afforded a hearing upon the merits of its appeals. The defendants could have no worthy provocation if the abatements are unwarranted. If the plaintiff's grievance is real, there should be redress. It is our considered conclusion that the objective of balanced justice will be more surely attained under the special circumstances of this case if the motions of the defendants are overruled.

The mandate will be:

Motions of defendants overruled; cases remanded to the Superior Court for further, appropriate proceedings.

RODNEY C. AUSTIN
vs.
STATE OF MAINE

Knox. Opinion, August 6, 1962

Writ of Error. Kidnapping. Sentence.

A single sentence is valid if it is within the permissible limits that could be imposed for one count, even though it exceeds the permissible limits that could be imposed on another of the counts.

Sentence may be imposed on each of several counts charging separate offenses; it is better practice to impose sentence on each count.

Official judgment and sentence will not yield to an error of the clerk in performing a ministerial act.

ON EXCEPTIONS.

This is on exceptions to the dismissal of the plaintiff's writ of error. Exceptions overruled.

Harold J. Rubin, for the Plaintiff.

Richard A. Foley, Asst. Atty. General, for the State.

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

WEBBER, J. Upon a petition for writ of error brought pursuant to the provisions of R. S., Chap. 129, Sec. 11, the justice below ordered that the writ should issue and after notice and hearing determined that the same be dismissed. Exceptions are taken to this ruling.

The record shows that the petitioner was tried by a jury upon an indictment containing ten counts. The first three counts charged the crime of kidnapping in violation of R. S., Chap. 130, Sec. 14, (1) by unlawful confinement and imprisonment, (2) by unlawful and forcible transportation within the state, and (3) by unlawful and forcible transportation to a point outside the state. Count 4 charged abduction in violation of R. S., Chap. 130, Sec. 13. Count 5 charged indecent liberties in violation of R. S., Chap. 134, Sec. 6. Count 6 charged carnal knowledge (statutory rape) of the body of a female child aged fourteen years in violation of R. S., Chap. 130, Sec. 11. The next three counts charged the crime against nature in violation of R. S., Chap. 134, Sec. 3 by (7) buggery, (8) fellatio and (9) cunnilingus. Count 10 charged a prior conviction and sentence to the state prison within the provisions of R. S., Chap. 149, Sec. 3. The jury rendered a verdict of not guilty on count 7 and a verdict of guilty on all other counts. The justice presiding at the trial then sentenced the petitioner in these terms:

> "Rodney C. Austin: The Court, having considered the *offense* of which you stand convicted, orders that you be punished by imprisonment, at hard labor, for the duration of your natural life * * *." (Emphasis ours — formal parts omitted)

The petitioner was duly committed to the Maine State Prison under a mittimus which read in part that he was "convicted of the crimes of kidnapping — abduction — defilement (rape) — indecent liberties — carnal knowledge — crime against nature" and was sentenced "for the duration of your natural life." Pursuant to the provisions of R. S., Chap. 149, Sec. 13 as amended, the clerk forwarded to the warden a record of the case in which he purported to satisfy the statutory requirement of "a reference to the statute under which the sentence was imposed" by setting forth that, "The Court, under the provisions of Section 11 of Chapter 149 of the Revised Statutes, refers to Section 3 of Chapter 149 of the Revised Statutes; as the statute under which sentence was imposed in this case."

By his exceptions the petitioner asserts that he is aggrieved (1) by the imposition of a life sentence under a statute (R. S., Chap. 149, Sec. 3) which provides for a sentence to "any term of years," (2) by failure of the presiding justice to specify as part of the sentence the offense for which sentence was imposed, and (3) by failure of the mittimus to specify the conviction to which the sentence is related or to refer to the conviction as a prior offender. He concludes that his sentence is invalid and that he should be resentenced.

R. S., Chap. 130, Sec. 14 (kidnapping) provides for punishment by a mandatory sentence to imprisonment for life. The penalties established by the other statutes involved in the instant case need not be considered in detail since the effect of a conviction under R. S., Chap. 149, Sec. 3 is to increase the maximum permissible limit of punishment under any of them to "any term of years." It suffices to say that no one of these statutes provided for any sentence greater than a stated maximum term of years. Since the actual sentence imposed was to imprisonment for life it is apparent that the petitioner was sentenced only for kid-

napping. There being three counts in the indictment on which the petitioner was convicted, any one of which would support the sentence, we hold that the writ of error was properly dismissed. The authorities fully support the rule which is well stated in 24 C. J. S. 431, Sec. 1567(4): "The rule is generally well-settled that a single sentence covering a number of counts on which accused is convicted will not be held invalid if the punishment thereby imposed does not exceed the maximum that could have been imposed for any single count sufficient to support it; and thus a single sentence is valid if it is within the permissible limits that could be imposed for one count, even though it exceeds the permissible limits that could be imposed on another of the counts." Bishop's Criminal Procedure (1913) Vol. 2, Page 1150, Sec. 1327; 15 Am. Jur. 112, Sec. 451 and cases cited.

That sentence may be imposed on each of several counts charging separate offenses is clear. *Smith, Pet'r. for Writ of Error,* 142 Me. 1. It has often been said that it is better practice to impose sentence on each of such counts. 24 C. J. S. 424, Sec. 1567(3) and cases cited. We are in accord with this view but are not persuaded that failure to conform to this practice necessarily and in all cases constitutes adequate ground for resentencing. *U. S.* v. *Karavias* (1948), 170 F. (2nd) 968, 971.

In the instant case the sentence was by its own terms imposed for one single "offense." We therefore conclude that the presiding justice who imposed the sentence viewed the evidence in support of the first three counts charging kidnapping as disclosing one single and continuous criminal transaction with but one criminal intent and warranting but one punishment. No sentence was imposed for the other separate offenses proven under the remaining counts nor was any effect given to the petitioner's conviction as a prior offender under count 10. There was no absolute requirement that the presiding justice specify in express

terms the offense for which he was imposing sentence. The omission is supplied by reference to the rest of the record in the case.

The petitioner is in no way prejudiced by any errors or omissions in the mittimus. The several crimes of which he was convicted are correctly enumerated therein. The sentence as therein stated conforms with the judgment of the court. The judgment of course controls the precept. *Breton, Pet'r.,* 93 Me. 39, 44; *Wallace* v. *White,* 115 Me. 513, 521; *Cote* v. *Cummings,* 126 Me. 330, 332; Wharton's Criminal Law and Procedure (1957) Vol. 5, Page 481, Sec. 2239.

As noted above, the record transmitted by the clerk to the warden pursuant to R. S., Chap. 149, Sec. 13 as amended referred to R. S., Chap. 149, Sec. 3 as the statute under which sentence was imposed. This was manifestly incorrect as the record discloses. The correct reference should have been to R. S., Chap. 130, Sec. 14. This error in no way prejudices the rights of the petitioner. It has no effect whatever upon the actual legal sentence which was imposed by the court. No doubt the information contained in the record is useful to the warden and we can see no reason why the clerk should not transmit a corrected record to accord with the facts. The suggestion of the petitioner, however, that the official judgment and sentence must yield to an error of the clerk in performing a purely ministerial act has no merit.

The justice below in dismissing the writ of error stated accurately and succinctly, "When we strip away the non-essential parts of the record, we are left with the sentence for life upon a conviction under the kidnapping statute so-called (R. S., Chap. 130, Sec. 14)." With this summation we agree.

Exceptions overruled.

L. NORTON PAYSON
vs.
HERMAN COHEN

Cumberland. Opinion, August 9, 1962.

Pre-trial. Evidence. Consideration. Value. Promissory Notes.

Value is any consideration sufficient to support a simple contract.

Antecedent debts cannot be restored by the expedient of the maker of a note asserting illegality.

A note is not void solely on the grounds that it was executed and delivered on a Sunday.

A party may not permit evidence to be introduced without objection and later complain of a variance from the pre-trial order.

The defense of illegality is an affirmative defense.

A vital condition of the Sunday contract defense is that the consideration be restored.

ON APPEAL.

The defendant's appeal asserts that the note was invalid because of its execution and delivery on a Sunday, and that the admission of certain evidence is contrary to and not raised by the pre-trial order. Appeal denied.

Louis Bernstein,
Leonard M. Nelson, for the plaintiff.

Charles W. Smith, for the defendant.

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

WILLIAMSON, C. J. On appeal. In this jury-waived action the plaintiff-payee recovered against the defendant-

maker the principal amount with interest of the following promissory note:

"$5500.00 May 1, 1955
On Demand I promise to pay to the order of L. Norton Payson Fifty Five Hundred and no/100 Dollars at 4 ½ percent Interest per Annum
Value received
No._____ Due On Demand

s/ Herman Cohen
Herman Cohen Kennebunk, Maine"

The court found that the note was executed and delivered on Sunday, May 1, 1955, and that the consideration therefor consisted of antecedent debts evidenced by four checks totalling $5000 and a contemplated advance of $500.

The defendant contended that he signed the note, in blank, on July 25, 1955, at the request of the plaintiff for use in negotiating a loan for a corporation in which the parties were interested and that there was no personal obligation on his part to the plaintiff. He also sought to establish that his only indebtedness to the plaintiff consisted of a note for $3500, and that any other advances from the plaintiff were for corporate purposes for which the plaintiff was reimbursed by the issuance of stock.

In this run-of-the-mill situation of conflicting evidence the defendant properly does not attempt to overturn the decision on the ground that the findings were "clearly erroneous." Maine Rules Civil Procedure, Rule 52 (a); *Harriman* v. *Spaulding*, 156 Me. 440, 165 A. (2nd) 47; *Landau Stores, Inc.* v. *Daigle, et al.*, 157 Me. 253, 170 A. (2nd) 673; Field & McKusick, Maine Civil Practice, § 52.7.

The first three points of appeal deal with the issues raised by a Sunday note. The following statutes are pertinent:

"Defendant must restore consideration; actions for injury received on Lord's Day. — No person

> who receives a valuable consideration for a contract, express or implied, made on the Lord's Day shall defend any action upon such contract on the ground that it was so made until he restores such consideration; nor shall the provisions of chapter 134 relating to the observance of the Lord's Day affect in any way the rights or remedy of either party in any action for a tort or injury suffered on that day." R. S., c. 113, § 154.
>
> "**Consideration, what constitutes.** — Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." R. S., c. 188, § 25. (Uniform Negotiable Instruments Law.)

See *Jordan* v. *Goodside*, 123 Me. 330, 122 A. 859; *First Nat'l Bank* v. *Morong, et al.*, 146 Me. 430, 82 A. (2nd) 98.

The note is not void, as urged by the defendant in his first point, on the ground that it was executed and delivered on Sunday. The consideration for the note consisted of the antecedent debts of $5000 and the contemplated advance of $500. Such a debt is "value" although the note is received on implied terms of conditional satisfaction. *Ahern* v. *Towle*, 310 Mass. 695, 39 N. E. (2nd) 561.

The antecedent debts cannot be restored by the simple expedient of the maker asserting the illegality of the note. There was no stoppage of payment on the note as in *DiAusilio* v. *Stavroplus, et al.*, 252 Mass. 69, 147 N. E. 346, cited by defendant. There the Massachusetts Court held that the plaintiff could properly sue on the contract when the defendant had caused payment to be stopped on a check given to settle charges for automobile repairs made on a weekday. The case is not analogous with the situation before us.

The contemplated advance of $500 was in fact made by check on May 10, 1955. There is no suggestion that the defendant has returned this portion of the consideration.

The governing rule was plainly stated in *Wheelden* v. *Lyford,* 84 Me. 114, 116, 24 A. 793, under a statute unchanged to this date, except for actions for torts and injuries.

> "The defendant cannot now defend this action of assumpsit on the ground of the contract having been made on Sunday until he restore that consideration. That he cannot restore it — that in the nature of things it is not restorable, does not relieve him. He need not have made the contract. Having made the contract and received the consideration he must either restore the consideration or abide the contract. If he cannot do the former he must do the latter. The statute is explicit and imperative."

See also *Bank* v. *Kingsley,* 84 Me. 111, 24 A. 794; *Wentworth* v. *Woodside,* 79 Me. 156, 8 A. 763; *Berry* v. *Clary,* 77 Me. 482, 1 A. 360; *Bridges* v. *Bridges,* 93 Me. 557, 45 A. 827.

If the Sunday note issue had been properly raised by the defendant and had been considered by the court, the result would not have been changed. The consideration was not returned and hence the defense would have failed.

In his second and third points the defendant contends the court erred in failing to consider the issue of the Sunday note and in finding that neither the pleadings nor the pretrial order raised the issue. In his answer the defendant stated, as an alternative ground of defense, "that even if he had executed the note in manner and form as the plaintiff has declared, that there was no consideration paid by the plaintiff to the defendant therefor and the note being dated on a Sunday is therefor void."

The pre-trial order does not specifically mention a Sunday note issue. The court, in his findings, says, "In the trial of the cause, comment was made upon the note being dated on a Sunday and the significance of that fact was urged in discussing the case. It must be pointed out that neither the pleading raises nor the pre-trial order determines that this fact is being raised as a defense."

On request for special findings, the court later found:

> "That counsel for defendant in his opening statement urged as one element of his defense that the reference note was executed and delivered on Sunday without consideration then and there paid and that for that reason
>
> x) it was void and no recovery could be had by plaintiff and
>
> y) that defendant had no consideration to restore as a condition precedent to raising the illegality of the note in defense.

and "That plaintiff's counsel interposed no objection to Defendant's statement in opening or to the admission of evidence bearing thereon, except as appears in the record of the case."

The court indicated clearly that the Sunday note issue was not raised properly as a defense. The defense of illegality is an affirmative defense. Maine Rules Civil Procedure, Rule 8 (c); Field & McKusick, *supra*, § 8.16. A vital condition of the Sunday contract defense is that the consideration be restored. R. S., c. 113, § 154, *supra*. The defendant failed to allege the restoration of consideration, therefore the defense was not open. Cf. under the old practice *Baxter-Fraternity Co.* v. *MacGowan, Jr.*, 132 Me. 83, 87, 167 A. 77 (demurrer). See also 50 Am. Jur., *Sundays & Holidays*, § 51; C. J. S., *Sunday*, § 36.

> "Generally a failure to plead an affirmative defense results in the waiver of that defense and it

> is excluded as an issue in the case. However, if evidence relating to an affirmative defense is introduced without objection and the opposite party is not surprised and has ample opportunity to meet the issue, the defense may be permitted even though it has not been pleaded. In proper cases, amendments of the pleadings to set out affirmative defenses are allowed." 1A Barron and Holtzoff, Federal Practice and Procedure, § 279, pp. 166-169.

If the pleadings be deemed sufficient to have raised the issue in light of the conduct of the trial, the Sunday issue was disposed of when the court found consideration for the note. See *Boulet* v. *Beals*, 158 Me. 53, 177 A. (2nd) 665. The defendant does not assert that the consideration was *restored,* but that there was *no consideration* whatsoever. The finding of fact adverse to the defendant on this issue ended the possibility of a defense based on a Sunday contract.

In his fourth point of appeal the defendant objects to the admission of certain evidence "contrary to and not raised by the pre-trial order." The complaint is simply this: The defendant offered and there were admitted five checks totalling $5500 as evidence of consideration for the note. The pre-trial order reads in part:

> "The Plaintiff may testify and may present the custodian of the bank records if it is necessary to present a copy of a check which the Plaintiff contends is the consideration for the note."

The defendant on cross-examination admitted that he had received and cashed the checks. As we have noted, he denied that they represented an indebtedness due from him to the plaintiff. When the checks were offered in evidence counsel for the defendant said, "But I would like to point out to the Court that at the Pre-trial Conference there was supposed to be one check, and I think that is in the Pre-

trial Order, they were going to produce. I have no objection to having these Exhibits offered. They have been testified to, but there is that information in the Pre-trial Order."

The defendant is too late with his objection. A party may not permit evidence to be introduced without objection and later complain of a variance from the pre-trial order. Further, the introduction of the five checks in face of the pre-trial order was within the control and discretion of the court. There is no semblance of abuse in the record. See *Globe Cereal Mills* v. *Scrivener*, 240 F. (2nd) 330 (10th Cir.) ; *Hoeppner Construction Co.* v. *U. S.*, 287 F. (2nd) 108 (10th Cir.).

The defendant did not argue and therefore waived his final point of error in allowance of interest on the note.

The entry will be

Appeal denied.

IN RE JOYCE ESTATE

Hancock. Opinion, August 16, 1962.

Inheritance. Illegitimacy. Descent. Wills. Bastards. Adoption.

Some positive act on the part of the putative father is necessary to make an illegitimate child heir of the father.

Knowledge that any illegitimate child suffers many social and economic deprivations cannot be permitted to govern a decision dealing with the orderly descent of property.

A single man living alone may constitute a family, into which an illegitimate child may be adopted.

ON REPORT.

This case is upon report to determine whether or not an illegitimate child is entitled to the estate of his father. Appeal denied. Decree of Probate Court affirmed.

Herbert T. Silsby, for the appellant.

H. W. Blaisdell, for the appellee.

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

WEBBER, J. On report. On the petition of Liela M. Banks alleging herself to be the niece and only next of kin of the late Sherman Joyce, Sr., her nominee was duly appointed administrator by the Probate Court. This appointment was opposed by Sherman Joyce, Jr. who asserts that he is the illegitimate son of Sherman Joyce, Sr. and was constituted his lawful heir by the affirmative acts of the father. An appeal to the Supreme Court of Probate has been reported to the Law Court for its decision on so much of the evidence as is legally admissible.

There is no adjudication below that Sherman Joyce, Jr. is under age or unsuitable for the trust and the parties recognize that if he is the next of kin, this appeal must be sustained. R. S., Chap. 154, Sec. 19; *Farnsworth, Appellant* v. *Whiting*, 102 Me. 303; *Messer* v. *Jones*, 88 Me. 349.

There is ample proof of the paternity but where rights of inheritance are involved more must be shown. R. S., Chap. 170, Sec. 3 provides the means by which the father may establish the rights of inheritance for his illegitimate son. He may (a) marry the mother of the child or (b) in writing acknowledge before a justice of the peace or notary public that he is the father or (c) adopt him into his family. Since neither (a) nor (b) occurred in the instant case the issue is whether or not Sherman Joyce, Jr. was adopted by his father into his family within the meaning and intendment of the statute.

"Only one objective is in the statute — heirship of intestate estates to and from illegitimates. * * * The statute is of descent pure and simple." *Crowell's Estate*, 124 Me. 71, 73, 74; *Lyon* v. *Lyon*, 88 Me. 395, 404. The issue as to whether or not the father has performed any one of the affirmative acts necessary to constitute the appellant his heir must not be beclouded by that instinctive sympathy which is felt for the innocent sufferer from another's wrongdoing. Knowledge that any illegitimate child ordinarily suffers many social and economic deprivations cannot be permitted to govern a decision dealing with the orderly descent of property. Even though there has been a trend toward modification of the strict rules of the common law dealing with the rights of inheritance of illegitimate children, "there has always existed a requirement of some positive act on the part of the putative father in order to make such illegitimate child heir of the father." *Messer* v. *Jones*, 88 Me. 349, 354.

It may be noted that even the legitimate child has no absolute right to take a share of the property of the parent.

The making of a will in proper form may eliminate him as a beneficiary. Whereas the legitimate child may be deprived of any share of the estate by an affirmative act of the parent, the illegitimate child will be deprived *unless* an affirmative act is performed. Viewed in this light the requirements of the statute are not as harsh or discriminatory as at first sight they might appear.

In the instant case the father never married. For many years he occupied a home with his maiden sister. After her death he lived alone. The son was brought up by the maternal grandmother and resided in her home. Thereafter his work took him to other parts of the country and in time he married and established a home of his own in another state.

The meaning of the phrase "adopts him or her into his family" has not heretofore been determined in this state. The word "family" has an elastic and somewhat varied meaning. *Harry Scott's Case*, 117 Me. 436, 441. That a single man living alone in his own home may constitute a "family" into which the illegitimate child may be adopted has been recognized. *In Re Jones' Estate* (1913), 135 P. (Cal.) 288, 290; *In Re Buffington's Estate* (1934), 38 P. (2nd) (Okla.) 22; *In Re Baird's Estate* (1924), 223 P. (Cal.) 974, 996; *In Re Gird's Estate* (1910), 157 Cal. 534, 108 P. 499, 504. But even accepting this liberal definition of the word "family" as used in this statute, we are constrained to hold that no such adoption took place in the instant case. The undisputed evidence reveals that never at any time while Sherman Joyce, Sr. occupied his home with his sister or while he lived there alone after her death did he take his son into his home to reside there even for a brief period. The father never assumed the care and support of his child. Although the relationship between father and son grew warmer and more cordial during the last years of the father's life, it never ripened into that close and inti-

mate family relationship which the statute requires. Sherman Joyce, Sr. could have executed a will making his son a beneficiary, or he could have taken any one or more of the steps required by the statute if the illegitimate child is to be constituted an heir. Although near the end of his life he seems to have felt some regret for his treatment of his son, he was not sufficiently motivated thereby to take any affirmative action with respect to the descent of his property. Under these circumstances the Probate Court could not do otherwise than to recognize the claim of the niece as next of kin.

Appeal denied.

Decree of Probate Court affirmed.

STATE OF MAINE

vs.

GAYLON L. WARDWELL

Aroostook. Opinion, August 21, 1962.

Murder. Witnesses. Discretion. Corpus Delicti. Admissibility. Confessions.

Continuances and mistrials are within the discretion of the presiding justice.

The granting of a continuance in a criminal case based upon want of time to prepare a defense rests in the sound discretion of the presiding justice.

Photographs properly taken are admissible when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant.

Whether or not a witness called as an expert possesses the necessary qualifications is a preliminary question for the court.

It is sufficient foundation for the admission of a confession or statement by the accused if the State at that time has presented such credible evidence as will create a really substantial belief that the crime charged has actually been committed.

It is not necessary to prove the corpus delicti beyond a reasonable doubt before extra-judicial confessions are admissible.

Where an unlawful killing is proved and there is nothing to explain, qualify or palliate the act; the law presumes the act to have been done maliciously and it is upon the respondent to rebut the inference of malice.

The test of admissibility of confessions or statements is whether they were made willingly or whether they were extorted by threats or elicited by promises.

It is not necessary to identify the accused as the perpetrator of the crime charged before establishing the basis for the admission of an extra-judicial confession.

ON APPEAL.

This case appeals the decision of the presiding justice to deny a motion for a new trial based upon the defendant's bill of exceptions. Exceptions overruled. Appeal dismissed. Motion for a new trial denied. Judgment for the State. Case remanded for sentence.

Ferris A. Freme, County Attorney, for the State.

Melvin E. Anderson, for the Defendant.

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

SIDDALL, J. In the early morning hours of March 6, 1960, the respondent's home was destroyed by fire. The respondent and two of his children escaped the flames. The body of an adult female, burned beyond recognition, was found on a bed in the easterly section of the house. After an investigation the respondent was arrested and charged

with murder. He was convicted of murder after trial by a jury, and, after verdict, seasonably filed a bill of exceptions containing twenty separate exceptions. After denial of a motion for a new trial by the presiding justice, respondent appealed.

EXCEPTION #1.

On April 22, 1960, the court appointed Melvin Anderson, Esq. and Albert Stevens, Esq. counsel for the respondent. A motion for continuance was filed by the respondent through his counsel. The affidavit accompanying the motion, dated April 26, 1960, alleged that counsel could not safely proceed to trial because they felt that they did not have sufficient time in which to adequately prepare for respondent's defense, because it appeared that the cause of death of the alleged victim was uncertain and involved medico-legal problems requiring defense counsel to obtain the advice and opinion of qualified physicians and particularly one specializing in pathology. It also alleged that counsel did not at that time have available copies of the medical examiner's initial report, the autopsy report, or the official report from the superintendent of the State Hospital at Augusta where the respondent had been sent for observation.

On April 27 a hearing was held on the motion for a continuance. At that time it appeared that the respondent's attorneys had in their possession all of the reports mentioned in the motion. It also appeared that the respondent's attorneys had listened to the tape recording made during the investigation, and that the State had made available to said attorneys all evidence then in the possession of the State. The motion was denied by the court.

> "Continuances and mistrials are within the discretion of the presiding justice. *Cunningham v. Long*, 125 Me. 494, 497; *Collins v. Dunbar*, 131 Me.

> 337; *Bank v. Shaw*, 79 Me. 376; *Graffam v. Cobb*, 98 Me. 200; *Rumsey v. Bragg*, 35 Me. 116. In the absence of anything tending to show that this discretion was not properly exercised, the ruling is not subject to valid exceptions. *Fitch v. Sidelinger*, 96 Me. 70, 71. '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.' *Charlesworth v. Express Co.*, 117 Me. 219, 221, see also *State v. Bobb*, 138 Me. 242; *Bourisk v. Mohican Co.*, 133 Me. 207."
>
> *State* v. *Hume*, 146 Me. 129, 134.

The granting of a continuance in a criminal case based upon want of time to prepare a defense rests in the sound discretion of the presiding justice. *Commonwealth* v. *Klangos*, 326 Mass. 690, 96 N. E. (2nd) 176. See also 14 Am. Jur. Criminal Law, Sec. 131; 22A C. J. S., Criminal Law, Sec. 496, p. 146.

At the hearing on the motion for continuance no mention was made in respect to any inability of the respondent's counsel to proceed with the trial. Mr. Anderson had been appointed by the lower court to represent the respondent at the preliminary hearing held in March, 1960. Although his responsibility to the respondent ceased after the hearing, at the time of his appointment by the Justice of the Superior Court he necessarily had knowledge of the general facts in the case. The record satisfies us that the court was justified in believing that respondent's counsel, having received the various reports, were willing to proceed with the trial on the date set by the court. In fact, counsel appointed to represent the respondent in the post-trial proceedings conceded in oral argument that the court was justified in denying the motion for a continuance. However, he took the position that the court, on its own initiative, at some stage in the trial of the case, should have taken steps to

protect the interest of the respondent, presumably by declaring a mistrial and continuing the case. The record shows that the respondent had a pathologist present in court whose testimony was confined to answering one hypothetical question. This exception is overruled.

EXCEPTIONS #2 AND 3 are waived by respondent.

EXCEPTIONS #4 AND 5.

These exceptions relate to the admissibility of photographs of the dead body, one with a cloth wrapped about the neck of the deceased, and the other with the cloth removed. The recent decision of *State* v. *Duguay*, reported in 158 Me. 61 contains an exhaustive review of the law relating to the admissibility of photographs of dead bodies. Reference is made to this opinion and to the cases and authorities cited therein. The substance of the opinion affecting this issue is that the admissibility of such photographs rests upon the exercise of sound judicial discretion; that such photographs when properly taken are admissible when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant.

These photographs were properly taken, and we believe they were relevant to the issues of the case, particularly as an aid to the oral testimony of the physicians in relation to the area of the body beneath the cloth about the neck. They were no more gruesome than the evidence of the physicians and others relating to the condition of the body. We find no abuse of judicial discretion in admitting the photographs in evidence. These exceptions are overruled.

EXCEPTION #6.

During the course of the trial Dr. Philpot, pathologist for the Cary Memorial Hospital of Caribou, was asked to

give his opinion on the cause of death based upon a hypothetical question. The court allowed the doctor to give such an opinion, and his answer was as follows: "My opinion as to the cause of death on this body is death due to strangulation." The only claim by the respondent in his bill of exceptions is that the opinion was not based upon a proper foundation. It appeared in evidence that Dr. Philpot assisted by Dr. Reynolds performed an autopsy on the body of the deceased. The various organs of the body were found to be essentially normal, and the most important abnormalities were found in the examination of the larynx. The autopsy disclosed a fracture in the thyroid cartilage and three fractures of the cricoid cartilage. Dr. Philpot testified that in his opinion the fractures were caused by trauma of considerable force. Muscle tissue was removed from the area surrounding these fractures. This tissue was examined microscopically by Dr. Philpot and the examination revealed hemorrhages therein, indicating, according to his testimony, that the deceased was alive at the time of the hemorrhages. There was also evidence that the autopsy disclosed no evidence of soot or smoke in the inner throat, indicating according to Dr. Philpot's testimony that death had occurred before the fire. At the time of the autopsy, Dr. Philpot withdrew blood from the body for the purpose of chemical analysis. In order to determine whether death was due to carbon monoxide poisoning, a portion of this blood was analyzed by Dr. Chapman for the detection of carbon monoxide. The test used by him was a color test to detect gross differences. After the application of certain chemicals, he compared the color of the blood sample with the color of a blood sample taken from his own body. He found no difference in color, indicating to him that the percentage of carbon monoxide was not higher than normal. He testified that the result of the test was that he could find no evidence of any high or any concentration of carbon monoxide hemoglobin. The test did not purport to show

the exact percentage of carbon monoxide, and a blood sample was sent to the Federal Bureau of Investigation for an exact determination percentagewise. Mr. Strickland, a chemist for the Federal Bureau of Investigation, testified that the blood sample contained approximately 10% carbon monoxide saturation. Dr. Philpot also gave testimony indicating that a much higher percentage than 10% of carbon monoxide was necessary to cause death. The qualification of Dr. Philpot as a pathologist was not challenged, nor was any challenge made of the qualifications of Dr. Chapman and Mr. Strickland to conduct and interpret the tests made by them. The hypothetical question was based upon the complete autopsy performed by the witness himself, including microscopic examination of the organs of the body and of the muscle tissue and upon the results of the blood tests testified to by Dr. Chapman and Mr. Strickland. A sufficient foundation had been laid, and the court was not in error in allowing the question to be answered.

Although this question was not raised by the bill of exceptions, the respondent in argument contends that the doctor by his answer, in effect, testified that someone strangled the deceased. No claim to this effect was made at the time of the answer. The answer carried no inference that the strangulation was caused by a human agency. The doctor was testifying as a medical expert, and his answer is to be interpreted in that light. This was apparently recognized by counsel for the respondent as appears from the following testimony of the doctor in answer to inquiries by respondent's counsel.

"Q Now you have stated your opinion, rather, on the cause of death here as being due to strangulation. Is there any particular type of strangulation that you are referring to?

A No.

Q In other words, there are various means or descriptions of strangulation?

A Yes.

Q What is the medical, as opposed to the common construction of the word "strangulation"? When you say strangulation, would you explain the pathology that ensues to cause death to us?

A Well, the medical term used for the cause of death in strangulation I believe would be anoxia, lack of oxygen.

Q What happens? Would you explain that, the reaction that occurs thereafter?

A Yes. The air passageways are cut off from the external air, and the patient may struggle to breath but it cannot get air into the lungs. There is a lack of oxygen in the blood stream and death results from lack of oxygen."

We find the answer to be a proper expression of opinion. Its evidential weight was for the jury. This exception is overruled.

EXCEPTION #7.

Dr. Philpot was asked if he had formed an opinion as to the cause of death before tests were made on the muscle tissue. He answered in the affirmative and then stated that his opinion before the examination of the muscle tissue was that the death was due to strangulation. The respondent claims the admission of the evidence was error because he claims that Dr. Philpot had previously incorporated a supplemental microscopic examination of the muscle tissue as a basis in forming his opinion as to the cause of death. Dr. Philpot testified on cross-examination that the results of his supplemental report was one of the bases upon which his opinion as to the cause of death was formed. He also later testified that the discovery of blood in the muscle tissue was one of many factors that led him to that conclusion. The doctor testified that the lack of soot and smoke in the

inner throat indicated that death had occurred before the fire, and that the color of certain organs and particularly the color of the blood taken from the body indicated that death was not from carbon monoxide poison. Although the question, in the light of the previous opinion given by the doctor after all tests were completed, probably served no useful purpose in the trial, a proper foundation had been laid for its admission. This exception is overruled.

EXCEPTION #8.

This exception relates to a hypothetical question propounded to Dr. Reynolds and his answer that he believed the cause of death was due to strangulation. Dr. Reynolds at the time of the fire was a medical examiner of Aroostook County. He assisted Dr. Philpot in the autopsy. The hypothetical question was based upon the personal observations and findings of Dr. Reynolds himself; also upon certain assumed results of blood tests made by Mr. Strickland and Dr. Chapman and upon certain assumed results of microscopic tests made by Dr. Philpot.

> "Concerning the form and scope of the hypothetical question and the extent and limitation of its assumption of facts and circumstances much must be left to the discretion of the presiding Justice. In framing a hypothetical question the practice is for the question to contain the assumption of the existence of such facts and conditions as the jury may be authorized to find upon the evidence as it then is, or as there may be good reason to suppose it may thereafter appear to be."
> *State* v. *Vino Medical Co.*, 121 Me. 438, 444.

The respondent claims that a proper foundation had not been laid for the question; that it omitted material facts having a bearing on causation and included material facts and assumptions which were not supported by the evidence. The nature of these facts was not disclosed either in re-

spondent's brief or at the time the objection was raised at the trial. The respondent argues that the question assumed the result of Dr. Chapman's test revealed "no evidence of any high or any concentration of carbon monoxide hemoglobin." Dr. Chapman's test did not purport to show the exact amount of carbon monoxide hemoglobin in the blood, and unless the test showed a high concentration of carbon monoxide in the blood, was not sensitive enough to show if any carbon monoxide was present. On the other hand the test conducted by the Federal Bureau of Investigation was a test designed to show the exact percentage of carbon monoxide hemoglobin in the blood. The jury understood the purpose, scope and limitation of both tests. We find nothing objectionable in the form of the question as propounded. The existence of the assumed facts was warranted by the evidence.

The respondent also claims that the continuity of possession of the various specimens had not been established. We have carefully examined the record and find that the chain of custody of the blood samples was properly accounted for from the time they were taken by Dr. Philpot from the body of the deceased to the time of examination by Dr. Chapman and Mr. Strickland.

The respondent also makes the same claim as in exception six that the doctor was invading the province of the jury in giving his opinion that death was due to strangulation. The contention of the respondent in this respect has already been discussed under his exception #6 in regard to the same opinion expressed by Dr. Philpot. The same considerations apply here. The doctor's answer was a proper expression of opinion, and its weight was for the jury. This exception is overruled.

EXCEPTION #9.

This exception relates to the admission of a certain cloth as an exhibit in the case. At the time of the autopsy the

cloth was taken from around the neck of the deceased. It was identified as being similar in color and design to a nightgown seen on Wednesday before the fire at the foot of the bed used by Anita Wardwell. The exhibit was admissible as bearing on the identification of the body of the deceased. The respondent claims that the continuity of custody of the exhibit had not been sufficiently shown. Again, the respondent does not pinpoint where he claims the break in continuity occurred. We have examined the record and do not find any merit in respondent's claim. The exception is overruled.

EXCEPTIONS #10, 11, 12 AND 13.

These exceptions concern State's exhibits #9, 10, 12 and 13. These were various specimens sent by the State to the Federal Bureau of Investigation laboratories in Washington for analysis. These specimens were delivered on March 21, 1960, by Deputy Sheriff Parlee personally to the laboratory. They were delivered to Ralph W. Strickland, a Special FBI Agent assigned to the laboratory. The specimens were analyzed by Mr. Strickland and returned by him in Washington to Deputy Sheriff Parlee on April 4, 1960. Mr. Strickland testified at the trial. The respondent contends that no testimony was given by Mr. Strickland in regard to where the specimens were kept in the laboratory or under whose custody and control they were or what happened to them during the interval between March 21 and April 4, 1960. The specimens were delivered to a responsible agency of government and received by the same person who made the chemical analysis of them. He appeared in court as a witness and was subject to cross-examination. The witness was allowed to testify in regard to the results of the chemical analyses without objection on the part of the respondent's counsel based upon these grounds. Furthermore, no attempt was made by cross-examination to show

that the specimens were not properly protected while at the laboratory.

Any claim by the respondent that the State did not show sufficient continuity of possession to allow the admission of these exhibits in evidence is without merit. We have carefully gone over the record and are unable to find any break in the continuity of possession or custody. These exceptions are overruled.

EXCEPTIONS #14 AND 15 are waived.

EXCEPTION #16.

This exception relates to the testimony of Frederick D. Gates, a Supervisor and State Fire Inspector. He testified that he had taken courses in fire prevention, arson investigation, and some courses in electricity, heating units, stoves, furnaces, etc. He testified that he had inspected about 500 fires, and had inspected 300 or 350 stoves in the course of his duties. He examined both stoves in the Wardwell home for the purpose of determining whether either of the stoves had exploded, and described the manner of his inspection. Against respondent's objection he was permitted to give an opinion that neither stove had exploded.

Whether a witness called as an expert possesses the necessary qualifications is a preliminary question for the court. The decision is conclusive unless it clearly appears that the evidence was not justified or that it was based upon some error of law. *Hunter* v. *Tolman*, 146 Me. 259, 268. We see no error in admitting this testimony. Its weight was for the jury. This exception is overruled.

EXCEPTIONS #17 AND 18.

These exceptions relate to the testimony of two State Police officers in relation to a confession made by the re-

spondent. The officers testified that the respondent first told them that he had fallen asleep and that when he awoke the room was filled with smoke. He took his children out but the fire was too hot for him to save his wife. The officers also testified in substance that after further questioning the respondent told them that on the night of the fire he and his wife had an argument, and that he grabbed her and choked her until she went limp, and that he then poured kerosene on her and touched it off. The officers testified that he also told them that he had been planning the act for some time. The respondent objected to this testimony on the ground that the State had not established the corpus delicti and that the body had not been identified as that of Anita Wardwell. The respondent also claims that these statements were not voluntarily and freely made.

We take up first respondent's claim that the confession was not voluntarily made. The test of the admissibility of statements or confessions is whether they were made willingly, or whether they were extorted by some threat or elicited by some promise. *State* v. *Priest*, 117 Me. 223, 228.

We find no evidence that the confession was made under threats or induced by any promises. On the contrary, one of the officers advised the respondent that he did not have to answer any questions, but if he did, his answers could be used against him. The record shows that the confession was made willingly and voluntarily.

The use of extra-judicial confessions to prove or corroborate the commission of a crime has been discussed in several recent Maine cases.

In *State* v. *Hoffses*, 147 Me. 221, 226, the court quoted Wharton's Criminal Evidence, Sec. 641, as follows:

> "It has been said that the corroboration of an extra-judicial confession is met if the additional evidence is sufficient to convince the jury that the crime

> charged is real, and not imaginary; and again that it is sufficient if the independent evidence establishes the corpus delicti to a probability."

In *State* v. *Carleton,* 148 Me. 237, 240, the court called attention to the *Hoffses* case and to the quotation in Wharton's Criminal Evidence referred to therein, and said, "We think a proper interpretation of this quotation from Wharton means that to establish the corpus delicti to a probability the evidence introduced must be such that a reasonable inference of the existence of the corpus delicti may be deduced therefrom without reliance to the slightest degree upon the confession."

In *State* v. *Jones,* 150 Me. 242 our court said:

> "We know the Hoffses case established a measure of *some* evidence as held in the Levesque case to be such credible evidence as standing alone to create a really substantial belief that a crime had actually been committed."

In *State* v. *McPhee,* 151 Me. 62, 65, the court said:

> "Any statement by the respondent was not admissible until some evidence independent of such extra-judicial admission or confession had been legally admitted. The meaning of 'some evidence' has been held to be such credible evidence, as, standing alone, will create a really substantial belief that a crime has actually been committed."

In *State* v. *Woodworth,* 151 Me. 229, the court held that before admissions of the respondent are admissible the State must prove to a probability that the crime charged had been committed.

It appears from these decisions that it is not necessary to prove the corpus delicti beyond a reasonable doubt before extra-judicial confessions are admissible. Although the opinions use different language, we do not consider that there is any essential difference in the term "in all prob-

ability" as used in the *Hoffses* and the *Woodworth* cases and in the words "substantial belief" as used in the *McPhee* and *Jones* cases. However, in order to prevent any confusion we rule that it is a sufficient foundation for the admission of a confession or statement by the accused if the State at that time has presented such credible evidence as will create a really substantial belief that the crime charged has actually been committed by someone. It is not necessary to identify the accused as the perpetrator of the crime charged before establishing the basis for the admission of an extra-judicial confession. Such is the overwhelming weight of authority. See Wigmore on Evidence, 3d Edition, Vol. VII, p. 402; Wharton's Criminal Law, Vol. 1, Sec. 348, p. 452; *State* v. *Boswell, et al.*, 73 R. I., 358, 56 A. (2nd) 196; 23 C. J. S. Criminal Law Sec. 916 (1); 20 Am. Jur. Evidence, Sec. 1242; 127 A. L. R. 1130, 1140 (Annotation); 45 A. L. R. (2nd) 1316, 1336 (Annotation). However, when the case finally reaches the jury there must be such extrinsic corroborative evidence of the corpus delicti as will, when taken in connection with the confession or admission, establish in the minds of the jury beyond a reasonable doubt that the crime charged was committed and that the respondent committed it.

In the instant case the State must first establish the identity of the burned body as that of Anita Wardwell. Where, as in this case, the body is burned beyond recognition, circumstantial evidence is admissible to establish identity. Anita Wardwell, at the time of the fire, was pregnant with child to such an extent that her condition was apparent from observation. She was at that time living in the house in which the fire occurred. She was last seen on the premises during the afternoon of the fire. She has not been seen since by those who would be in a position to see her. The evidence indicates that the respondent was on the premises at the time of the fire. The body found on the bed after the fire was that of an adult female. The evidence

indicated that the person burned was pregnant, and the foetus of an unborn child was found on the floor near the bed. The nightgown draped around her neck was similar in color and pattern to one seen on the bed used by Anita Wardwell. Sufficient evidence had been introduced to establish the identity of the dead body as being that of Anita Wardwell.

At the time of the testimony of the State Police Officers, the State had presented evidence that an autopsy had been performed on the burned body. This autopsy, including the microscopic examination of the organs of the body showed no significant abnormalities except in the area of the larynx. The autopsy disclosed fractures in the thyroid and cricoid cartilages. The thyroid cartilage is commonly termed the "adam's apple." The cricoid cartilage encircles the top of the windpipe. There was medical evidence that there were hemorrhages in the muscle tissue in the area of these fractures, indicating, according to that evidence, that the fractures had occurred prior to death. There was testimony by the doctor who performed the autopsy that in his opinion the hemorrhages were caused by a blow or pressure of considerable force. Dr. Reynolds testified that in his opinion the fractures were caused by an external force. There was evidence tending to show that death did not occur from monoxide poisoning. The autopsy disclosed no smoke or soot in the inner throat, which indicated, according to the doctors' testimony that the deceased was dead at the time of the fire. There was evidence that the cloth around the neck of the deceased was in a very tight wad. The doctors testified that in their opinion death was due to strangulation, which in medical terms according to Dr. Philpot means death due to lack of oxygen. These facts are sufficient to create a substantial belief that Anita Wardwell died before the fire from a blow or pressure causing fractures in the thyroid and cricoid cartilages, resulting in death from lack

of oxygen, and, taken together with the occurrence of the fire, are sufficient to create a substantial belief that the crime charged had been committed by someone.

EXCEPTIONS #19 AND 20 are waived.

APPEAL.

The respondent filed a motion for a new trial, setting forth the following reasons therefor:

1. Because it is against the law and the charge of the justice.
2. Because it is against the evidence.
3. Because it is manifestly against the weight of the evidence.
4. Because respondent's counsel did not have time to adequately prepare his defense.

The motion was denied, and respondent filed an appeal.

The issue raised in the fourth reason for appeal has already been discussed under respondent's Exception #1.

The respondent took no exceptions to the charge of the presiding justice and, he does not in argument question any part of the charge. A careful reading of the charge satisfies us that the court gave a correct presentation of the law involved in the case, together with that applicable to the constitutional rights of the respondent. The respondent was ably represented by competent counsel, and his rights were fully protected.

The remaining question involved is whether in view of all the testimony in the case the jury were warranted in believing beyond a reasonable doubt that the respondent was guilty of the crime charged against him. *State* v. *Duguay*, 158 Me. 61, 74; *State* v. *Brown*, 142 Me. 106, 108; *State* v. *Wright*, 128 Me. 404, 406.

From all the evidence in the instant case, the jury was justified in believing beyond a reasonable doubt that the respondent unlawfully choked Anita Wardwell, thereby causing the fractures of the thyroid and cricoid ligaments, and resulting in her death by strangulation. There are sufficient evidence to justify the jury in finding that death occurred before the fire and that the respondent set fire to her body in an endeavor to cover his crime. Where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously, and the burden is upon the respondent to rebut the inference of malice. *State* v. *Turmel*, 148 Me. 1, 6. The respondent did not testify, and the only explanation for the act given to the officers by the respondent was that he had had an argument with his wife. This is not sufficient to rebut the inference of malice. Furthermore, the respondent told the officer that he had been planning for some time to kill his wife. In view of all the testimony in the case the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty of the crime of murder as charged.

The entry will be

Exceptions overruled.

Appeal dismissed.

Motion for new trial denied. Judgment for the State. Case remanded for sentence.

STATE OF MAINE

vs.

ROBERT MOTTRAM

Cumberland. Opinion, September 12, 1962.

Habitual Offender. Lie Detector Tests. Admissibility. Evidence. Exceptions. Motions for a New Trial. Criminal Law. Witnesses.

Refusal or willingness to take a lie detector test is inadmissible.

There is no objection to the introduction of evidence of sound recordings if they are properly taken and are authenticated.

The fact that a recording is partly inaudible or contains immaterial and hearsay matters does not prevent the use of the remainder.

Recordings may be properly used for purposes of impeachment.

The state must prove beyond a reasonable doubt that Respondent has been previously convicted within the Habitual offender statute.

Results of lie detector tests are inadmissible in evidence.

Alleged error in argument made by county attorney in rebuttal is reached by motion for new trial and not by exceptions.

ON EXCEPTIONS AND APPEAL.

Defendant was convicted of larceny of an automobile and of previously having been convicted of a felony and he appealed. The court held that the mere refusal of witness for the state to take a lie detector test was inadmissible as evidence touching credibility of witnesses, and that the ruling that the recordings were inadmissible in condition in which they were in was correct, where respondent could have taken further action to separate good from bad in recordings, but did nothing and sought to introduce them *in toto*. Exceptions overruled, appeal dismissed and judgment for the State.

Casper Tevanian, for the Defendant.

Arthur Chapman, Jr., County Attorney, for the State.

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

WILLIAMSON, C. J. This criminal case is before us on exceptions and appeal. At the January 1958 Term of the Cumberland Superior Court the grand jury returned an indictment against the respondent, charging in the first count the larceny of an automobile being the property of one Staley and one Perkins of the value of $1,000, and in the second count that the respondent previously had been convicted of a felony and sentenced and committed to our state prison.

The respondent was tried and convicted on both counts. The conviction was sustained by our court in *State* v. *Mottram,* 155 Me. 394, 156 A. (2nd) 383. Subsequently on a writ of error *coram nobis* the Superior Court vacated the judgment of conviction and ordered a new trial.

On the second trial, from which the exceptions and appeal arise, the respondent was again found guilty on both counts. At his request he was given a separate jury trial on each count. The jury hearing the larceny count was not informed of the "habitual offender" or second count.

Staley and Perkins were key witnesses for the State. The State contends that the respondent stole the automobile from near a restaurant in Bridgton. The respondent says in substance: that he came into possession of the car lawfully; that Staley and Perkins represented to him that they were in financial difficulties; that to ease their difficulties he was requested to conceal the car and did so; and that the car was in fact delivered to him in Lewiston by Staley and Perkins. Without question, the State's case rested on the credibility of Staley and Perkins.

FIRST COUNT — LARCENY.

EXCEPTION #1. The respondent properly does not press an exception to the refusal of the presiding justice to direct a verdict at the close of the State's case. The exception was waived on introduction of evidence by the respondent. *State* v. *Rand,* 156 Me. 81, 161 A. (2nd) 852.

EXCEPTION #2. The second exception raises the question whether it is reversible error to exclude evidence of the refusal of a witness for the State whose testimony is vital to the prosecution to take a lie detector test in the course of the investigation of the case by the police. The exception reads in its entirety as follows:

> "In the absence of the Jury, while Wendall Perkins, witness for the State was being cross-examined by Respondent's attorney, the following took place:
>
> "Q. (By Mr. Tevanian): Your name is Wendall Perkins?
> "A. Yes.
> "Q. And you are the same Wendall Perkins that was testifying prior to the recess?
> "A. Yes.
> "Q. Now, I ask you, Mr. Perkins, if during the investigation you were asked by the State Police to submit to a lie detector test?
>
> "MR. CHAPMAN: Object.
>
> "THE COURT: Excluded.
>
> "MR. TEVANIAN: If Your Honor please, I feel that I have a right to go into whether or not this man was willing to take a lie detector test on the theory that he is not a respondent in this courtroom, and (2) I am not attempting to show the results of a lie detector test, *only his refusal to take one,* which I think boils down to a matter of credibility. I think the Law Court in the Casale case has ruled that it is not proper to ask if a respondent has refused or has agreed to take a lie detector

test, but here is a man who is only a witness where it boils down to a matter of credibility. For that reason, I would press my objection and I would ask the Court to note my exceptions.

"The basis for this exception is fully set out in the above-copied proceedings." (Emphasis supplied.)

The record continues:

"THE COURT: Anything you wish to add to the record, Mr. Chapman?

"MR. CHAPMAN: Nothing, Your Honor. The objection stands. I think this matter has been fully decided by our Law Court and I will stand on the precedent of that case.

"THE COURT: Anything further?

"MR. TEVANIAN: No.

"THE COURT: Have the jury come down.

"MR. TEVANIAN: I think I got in there my reason, that I anticipated an answer that he refused to take one.

"(The jury then returned, . . .)"

The record also contains the following references to lie detector tests. The respondent testified on direct examination:

"Q. During this interrogation did you — were you brought face to face with Hartley Staley and Wendell Perkins?
"A. Yes, I was.
"Q. And did you in the presence of Detective Holdsworth and others make accusations against Mr. Staley and Mr. Perkins?
"A. Yes, we did. I think Holdsworth asked them about some keys. He denied that, and it was chewed back and forth. Then they refused to take a lie detector test —

"MR. CHAPMAN: Object.
"A. (Continuing): — and I offered to.

"THE COURT: That may be excluded.

"MR. CHAPMAN: May I see the Court? (Bench conference)

"THE COURT: The exclamation made by this witness pertaining to a lie detector test is rather unfortunate because it is not admissible, again under our proceedings in Maine. Under Maine law, lie detector tests are not recognized as legal evidence. If I haven't already ordered it stricken, I do order it stricken and request again that you obliterate it entirely from you minds."

There is no need of discussing the nature and effectiveness of lie detector tests. The subject is thoroughly covered in the cases and other material cited below. It is well known that such tests are valuable tools in the investigation of crime, for example, in developing leads. The lie detector test, however, has not reached the state of scientific development and accuracy that permits admission of the results in evidence. We so held in *State* v. *Casale,* 150 Me. 310, 319, 110 A. (2nd) 588, following the general rule.(1)

---

(1) Cases and material of interest on the lie detector include the following:
Leeks v. *State* (Okla.), 245 P. (2nd) 764;
Lusby v. *State* (Md.), 141 A. (2nd) 893;
Henderson v. *State* (Okla.), 230 P. (2nd) 495;
People v. *Wochnick* (Cal.), 219 P. (2nd) 70;
Commonwealth v. *Andrew* (Pa.), 115 A. (2nd) 867;
III Wigmore, Evidence, 3rd ed. § 999;
2 Wharton, Criminal Evidence, 12th ed. § 666;
20 Am. Jur., Evidence § 762;
23 A. L. R. (2nd) 1306 Anno.;
70 Yale Law Journal 694, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*;
40 Iowa Law Review 440, *Scientific Evaluation of The 'Lie Detector'*;
22 Tenn. Law Review 711, *The Polygraphic Truth Test and The Law of Evidence*;
33 Tulane Law Review 880 (Notes) *Evidence — Admissibility of Lie Detector Evidence*;
46 Iowa Law Review 651 (Notes) *Evidence — Lie Detector Tests — Effect of Prior Stipulation of Admissibility*;
21 Maryland Law Review 176 (Notes) *Evidence — Lie Detector Results Admissible on Prior Stipulation.*

The question excluded was preliminary to the offer of evidence of a refusal to take the test. The respondent intended to show the refusal as evidence of a guilty conscience bearing heavily on the credibility of the witness.

The argument in favor of admissibility is that conduct is evidence of the consciousness of guilt or innocence, or in short, of guilt or innocence. The analogy is with the conduct of one who flees from the scene of the crime, or who secretes stolen property. *State* v. *Lambert,* 104 Me. 394, 71 A. 1092 (respondent armed at time of arrest); *State* v. *Caliendo,* 136 Me. 169, 4 A. (2nd) 837 (respondent's threats to keep witness from trial).

The decisions we make from moment to moment are repeatedly made on the strength of evidence of this nature. The principle is not peculiar to the courtroom; it is drawn from life.

In addition to refusing to admit the result of a lie detector test, the courts have also denied admission in evidence of the refusal or willingness of a respondent to take the test. The underlying reason for this rule rests in the belief that the fact finder would be unable to assess the evidence without assuming a non-existent value for lie detector tests in general.

The worth of evidence of refusal or willingness to take a lie detector test rests, in our opinion, upon a general acceptance of the worth of evidence of the result of such a test. The result does not have the accuracy entitling it to admission in evidence. It follows that a refusal or willingness to take a test of which the result would have been without value in evidence, likewise has no value for the fact finder. *Commonwealth* v. *Saunders* (Pa.), 125 A (2nd) 442 (willingness of respondent inadmissible); *Hayes* v. *State* (Okla.), 292 P. (2nd) 442 (voluntary submission by defendant to lie detector test inadmissible).

In *State* v. *Kolander,* 52 N. W. (2nd) 458, the Minnesota Court held it was prejudicial error to admit the refusal of the defendant to submit to a lie detector test. The court said, on p. 465:

> "The state concedes that the results of a lie-detector test would not be admissible, but contends that it may nevertheless be shown that defendant refused to take such test, since such refusal is evidence of a consciousness of guilt similar to evidence of flight. With this we cannot agree."
>
> * * * * * * * * *
>
> "There was no explanation to the jury of the operation or effect of a lie detector. As a matter of fact, it was not even shown what type of test defendant had refused to submit to. The impact upon the minds of the jurors of a refusal to submit to something which they might well assume would effectively determine guilt or innocence, under these conditions, might well be more devastating than a disclosure of the results of such test, if given after a proper foundation had been laid showing how the apparatus functioned."

The willingness of a state's witness to take the test and the fact that he did so were held inadmissible in *Kaminski* v. *State* (Fla.), 63 So. (2nd) 339, in an attempt to rehabilitate credibility of the witness. The court said, on p. 340:

> "For there can be no doubt that in initiating the inquiry the prosecutor intended to leave in the minds of the jurors the impression that because the witness Newbold had voluntarily submitted to a lie detector test prior to the time of trial he was a man of veracity and hence was telling the truth from the witness stand, no matter how inconsistent his tale might appear to be to the jurors when compared with the testimony offered by other State witnesses."

The respondent here sought to destroy the credibility of Perkins by his refusal to take the test. The Florida case

presents an analogous situation. In each instance, whether willingness or refusal is the immediate fact, the real purpose is to impress upon the jury the weight of the result of a lie detection test.

We have here, however, not the respondent whom it may be argued is entitled to more careful treatment than the witness Perkins who is not on trial. Further, we have a witness whose credibility is of the utmost importance to the State's case and who refused (we assume) to take the test during the investigation by the police of the crime allegedly committed by the respondent.

There is no question whatsoever of the right of the respondent to submit to the jury all evidence reasonably bearing on the credibility of a state's witness. Consciousness of guilt on the part of Perkins in connection with the affair from which the charge against the respondent arose obviously would be important evidence for consideration of the jury in evaluating Perkins' testimony.

Under the rule urged by the respondent, the refusal of the witness to take the test necessarily would be open to explanation. The refusal may have been based on a belief that the lie detector test was inaccurate and without any value, or on his condition let us say, of nervousness, or illness, or simply fear of taking a strange and unknown test. We do no more than suggest lines of evidence available to rehabilitate the witness from the adverse effect of the refusal.

In our opinion, far reaching as the explanation might be, the jury in practice would give weight to the refusal to take the test in the belief that the test itself would have had value if taken. The inference would be quickly and erroneously drawn from refusal to consciousness of guilt to guilt.

Wigmore writes of refusal to undergo a superstitious test as evidence of guilt. II Wigmore, Evidence, 3rd ed. § 275. He cites as an example evidence that the defendant at the

morgue was requested with others to put his hand on the corpse of the murdered man but he refused. *State* v. *Wisdom* (Mo.), 24 S. W. 1051. The case at bar has only a superficial likeness to such a situation.

Conduct is measured in the Wigmore example against a superstitious belief, and in our daily living against our own experience. Here the respondent seeks to measure conduct against a machine popularly believed to operate on scientific principles, but as yet unaccepted as an accurate instrument to determine truth. Until the result of such a test is admissible, we are of the view the refusal must be excluded.

The entire incident, including the critical question of Perkins, the objection of the prosecutor, and the offer of proof properly took place in the absence of the jury. The offered proof, giving it the widest range, goes no further than to establish the refusal of the witness to take a lie detector test without reasons for the refusal.

Mere refusal or willingness to take such a test is inadmissible for reasons we have stated. In reaching this conclusion we by no means exclude from consideration other possibilities. For example, consciousness of guilt could be shown by evidence that a witness refused to take a lie detector test on the ground that he believed the test was trustworthy or dependable. If, however, the evidence showed a contrary belief by the witness, namely, that the test was not trustworthy or not dependable, no inference of consciousness of guilt could be drawn.

In the case at bar the proof offered stops short of an admission destroying or tending to destroy credibility. There is only the refusal to take a lie detector test offered as a base in evidence touching credibility. Hence the evidence offered was not admissible.

Cases cited by the respondent in which a lie detector test has been mentioned in evidence do not in our view reach

the issue before us. In *Tyler* v. *United States,* C.A. D.C., 193 F. (2nd) 24, 31, the court approved the following ruling of the trial court:

> " 'The statement of the witness (polygraph operator) that he told the defendant that the machine indicated he was lying is not admitted as evidence of any alleged lying of the defendant, but merely as evidence bearing upon the question whether the confession was, in fact, voluntary.' We think the ruling was correct. This court has held the results of a lie detector test to be inadmissible. Frye v. United States, 1923, 54 App. D. C. 46, 293 F. 1013. We do not mean to impair that ruling. But here the circumstances are different. The evidence had a material bearing upon the conditions leading to Tyler's confession and was relevant upon the vital question as to whether the same was voluntary."

In *LeFevre* v. *State* (Wis.), 8 N. W. (2nd) 288, without objection by the respondent facts of a stipulation relative to use of findings in proposed tests were admitted. The findings, however, were excluded on objection by the State. There is language in the opinion indicating that evidence of willingness of a respondent to take a test may be admissible. We are not persuaded that this should be the rule.

In *State* v. *Sheppard,* C. A. Ohio, 128 N. E. (2nd) 471, 498, the court said:

> " 'Did you, Mr. Houk, submit to a lie detector test?' to which he answered over defendant's objection, 'Yes.' The results of the test were not inquired about, and the simple fact that a test was made by agreement of the witness under the circumstances could not prejudice the defendant's case."

If the Ohio Court considers the evidence inadmissible, as we do, the opinion stands on ground of harmless error. The issue here is not error from admission but from exclusion of evidence.

The ruling was correct and the exception is overruled.

EXCEPTION #3. The exception reads as follows:

"During the course of the trial, the attorney for the Respondent offered as evidence certain sound recordings of an interview that took place in the office of that County Attorney prior to Respondent's first trial on these charges which was held at the January Term of Court, 1958. Present at this interview were the Respondent, his attorney (Mr. Tevanian), witness for the State, Law Enforcement officers, and a representative of the County Attorney's office. Relative to Respondent's proffer ance of this evidence the following colloquy occurred:

"THE COURT: As I understand it, you are offering the records for the purpose of playing them before the jury?

"MR. TEVANIAN: That is correct.

"MR. CHAPMAN: May I be heard, Your Honor?

"THE COURT: You may be.

"MR. CHAPMAN: I must object to the playing of these records to the jury. They were recorded, I might call it, in an informal interrogation session. There is a great deal of irrelevant matter on there; there is matter that pertains to other cases; there is, in fact, a host of various irrelevant matters, hearsay matters, that are on those records. Now, Mr. Tevanian has had complete access to them. The County Attorney's office hired a Hi-Fi record player in an attempt to bring out these records to the highest fidelity, the recording machine wasn't working properly at that time; parts of the records are completely unintelligible; some parts can be heard with close attention, and Mr. Tevanian and myself spent all of last Friday afternoon listening to those records; Mr. Tevanian

made notes so that he has had complete access to their contents and he has complete access now. The machine is right in there. If he wishes to play them back again, or Mottram for any reason wishes to listen to them, they are available for counsel to use, but I would object for these reasons to the entire records being played on a machine to the jury.

"THE COURT: What do you have to say to that, Mr. Tevanian?

"MR. TEVANIAN: Your Honor please, for the purpose of the record, may I first question Holdsworth (state police officer); then I will attempt to answer the County Attorney.

"THE COURT: You may, sir.

"Q. (By Mr. Tevanian); You have made — You were present when these records were made, and assisted in making them; is that not correct?
"A. Yes, sir.
"Q. And this contains the interview that you had with Mr. Hartley Staley, Mr. Wendall Perkins and Mr. Robert H. Mottram?
"A. Yes, sir; plus —
"Q. And as a matter of fact, it is the complete recording of all of the interrogation of January 28, 19*60*, is it not?
"A. All of the people that were there; I believe so, sir.
"Q. And these records were made on what type of a machine?
"A. On a Soundscriber.
"Q. And they were made by you and Regina?
"A. Yes, sir.

"MR. TEVANIAN: Now, as to the contention that my Brother has, if Your Honor please, I agree with my Brother that there are many immaterial and irrelevant matters on the records. I also am forced to agree with him they are not completely intelligible, that I had a difficult time understanding and following some parts, but on some of the

records I found some vital information that I think would be of value to the jury.

"THE COURT: If those vital parts that you refer to could be separated from that which is not intelligible and that which is not material and separated from matters that perhaps might be matters that would offend the issues in this case or might tend to be confusing rather than aiding, then I should admit that part of the record, if it can be separated, that you desire and which you think would be helpful to the defense in this case; but if it is all intermingled so that you cannot separate it, then I would be compelled to exclude the use of those records for the reasons that I have just stated.

"MR. TEVANIAN: I am not — I have no idea whatsoever, if the Court please, whether or not they can be separated, whether they can be segregated. I do know there are sections that do go into vital parts that are also within other sections that are inadmissable. I just don't know what to do.

"THE COURT: Well, of course if you don't know, I certainly don't know, You have tried to listen to those records and you know what is in them and I don't. Apparently, from what you now state, I can't see how they are admissable in the condition which they are in. I shall, therefore, exclude them.

"MR. TEVANIAN: Might my exception be noted?

"THE COURT: It may be noted.

"MR. TEVANIAN: That is all.

"Thus the exclusion of this evidence *in toto*, when Respondent contended that parts of it were vital to his defense, denied Respondent a substantial right, deprived him in part of asserting his defense greatly to his prejudice."

There is no objection in general to the introduction in

evidence of sound recordings properly taken and authenticated. *State* v. *Lorain,* 141 Conn. 694, 109 A. (2nd) 504, 507; *Commonwealth* v. *Bolish* (Pa), 113 A. (2nd) 464, 477. The fact that the recording is partly inaudible does not prevent the use of the remainder. No more does the fact that the recording contains immaterial and hearsay matters which cannot be segregated render the recording inadmissible for that reason alone. *U. S.* v. *Schanerman,* 150 F. (2nd) 941, 944; *People* v. *Feld,* 305 N. Y. 322, 113 N. E. (2nd) 440; 58 Am. Jur., Witnesses § 114. Recordings may also be properly used for purposes of impeachment. *State* v. *Porter* (Mont.), 242 P. (2nd) 989. There is no dispute about the applicable principles.

The point of the judge's refusal to admit all of the recordings lies in his statement that, "I can't see how they are admissible in the condition which they are in."

There was no flat refusal to admit recordings in violation of the accepted principles. The respondent could have taken further action to separate the good from the bad, the admissible from the inadmissible in the recordings. He did nothing but chose, in spite of his knowledge of their contents, to leave the recordings "in the condition which they are in." He sought to introduce the recordings *in toto* with no attempt whatsoever to select the good and abandon the bad. The ruling was correct and the exception is overruled.

SECOND COUNT — "HABITUAL OFFENDER."

EXCEPTION #1. At the commencement of the trial the respondent moved to quash the indictment on the ground that there are two distinct statutory provisions set forth below which enlarge the sentence for one who has been convicted more than once for the crime of larceny. The contention of the respondent is that the indictment must specify the statute with the violation of which he is charged that

he may defend himself adequately and be protected in the event of a subsequent trial for the same offense.

The first count of the indictment charges the larceny of an automobile. The second count of the indictment, with which we are here concerned, reads:

> "And the Grand Jurors upon their oath aforesaid, do further present that the said Robert H. Mottram was convicted of a felony in the State of Maine, to wit: On the 17th day of June in the year of our Lord one thousand nine hundred and fifty-two, at the Superior Court in the County of Androscoggin and State of Maine, he was convicted of the crime of larceny of an Automobile of the value of over One Hundred Dollars and was sentenced by the Honorable Arthur Sewall, Justice of the Superior Court, to serve a term of not less than one year nor more than two years in the Maine State Prison, and in pursuance of said sentence was committed to the said Maine State Prison; against the peace of said State, and contrary to the form of the statute in such case made and provided."

The statutes to which the respondent refers are:

> "**Common Thief.** — Whoever, after being convicted of larceny as principal or as accessory before the fact, is again convicted thereof, or is convicted of 3 distinct larcenies at the same term of court, shall be deemed a common thief and be punished by imprisonment for not less than 1 year nor more than 15 years." R. S., c. 132, § 10.
>
> "**Punishment when convict previously sentenced to any state prison.** — When a person is convicted of a crime punishable by imprisonment in the state prison, and it is alleged in the indictment and proved or admitted on trial, that he had been before convicted and sentenced to any state prison by any court of this state, or of any other state, or of the United States, whether pardoned therefor or not, he may be punished by imprisonment in the

state prison for any term of years." R. S., c. 149, § 3.

We find no merit in the contention of the respondent. It is plain on reading the indictment that the State sought to bring the charge within R. S., c. 149, § 3, relating to punishment of a convict who has been previously sentenced to a state prison. There could have been no confusion in the minds of the respondent, the court, or the jury in this respect. The exception is overruled.

EXCEPTION #2, relating to denial of motion for continuance, was waived by the respondent.

EXCEPTION #3. At the close of the evidence in the trial of the "habitual offender" count, the respondent moved for direction of a verdict of not guilty. Exception was taken to denial of the motion. The argument was made on the ground that the State "has not negated the possibility of an appeal and a final conviction," to use the words of respondent's attorney.

In our view the prior conviction of the respondent was sufficiently shown in evidence. It was not necessary for the State to deny the possibility of an appeal. This is not the situation wherein an appeal was pending. See *State* v. *DeBery,* 150 Me. 28, 103 A. (2nd) 523.

The State must maintain its burden of proving beyond a reasonable doubt that the respondent has been previously convicted within the meaning of the "habitual offender" statute. This does not preclude, however, the shifting of the burden of going forward with the evidence under certain circumstances. We see no reason why, when the State has offered credible proof of the conviction of a respondent, thus establishing a prima facie case, the burden should not shift to the respondent to go forward with evidence to show, for example, that the case is on appeal.

In *State* v. *Mottram, supra,* the issue was not raised by

the respondent, although open to him then as now. It is of significance that in the many years since the enactment of the "habitual offender" statute this issue has not been brought before us, so far as we are aware. The exception is overruled.

EXCEPTION #4. The respondent gains nothing from the exception to the following argument made by the county attorney in rebuttal:

> "The State has proven that Mottram was convicted, that he was sentenced, and in pursuance of said sentence he was committed to the Maine State Prison, and if Mr. Tevanian (defense counsel) or Mr. Mottram desired in defense they could have come forward with defense to show that the prima facie case as presented by the State, and rebut the presumption — and rebut the evidence — I don't say 'the presumption'; I mean 'evidence'; I am sorry."

The error complained of is reached by a motion for new trial and not by exceptions. *State* v. *Martel,* 103 Me. 63, 68 A. 454; *State* v. *Carter,* 121 Me. 116, 115 A. 820. We have, however, considered the issue as properly raised and conclude there has been no error warranting a new trial.

The respondent argues that the county attorney improperly commented on the failure of the respondent to take the stand and testify in his own defense. R. S., c. 148, § 22 reads: " . . . and the fact that he (the accused) does not testify in his own behalf shall not be taken as evidence of his guilt." See *State* v. *Banks,* 78 Me. 490, 7 A. 269; *State* v. *Landry,* 85 Me. 95, 26 A. 998.

The State urges that the county attorney did not comment on the failure of the respondent to take the stand, but only on his failure to introduce evidence in rebuttal.

We need not decide the issue from the rebuttal argument alone. It sufficiently appears that the presiding justice

made clear the rights of the respondent in the charge. Any ambiguity in counsel's remarks was thereby removed. The charge reads:

> "A respondent is not required to take the witness stand and give testimony, and if he sees fit not to testify, that shouldn't be used as evidence of his guilt. When he does not take the witness stand, he is merely exercising his constitutional right. We do not compel a respondent to give evidence against himself and, if he does not see fit to take the witness stand, it must not be considered as evidence in any way of the guilt of a respondent. The law puts the burden upon the State to prove its case without assistance or aid on the part of the respondent."

EXCEPTION #5 was waived. The same point was raised and determined under Exception #3.

SECOND COUNT — APPEAL.

The respondent, as a sole ground for appeal following denial of motion for new trial on the second count, argues that "The charge of the Presiding Justice, as a whole, had the effect of removing the issue of prior conviction from the jury's consideration."

The following excerpts from the charge are called to our attention:

> "So that you have before you the second count, and it is for you to decide on the evidence presented whether the respondent in this case is the same Robert Mottram that was convicted here today on the first count of this indictment. If he is not the same Robert Mottram and he is not the Robert Mottram that was convicted in the Androscoggin County Superior Court on the 17th day of June, 1952, then he is entitled to a verdict of not guilty."
>
> * * * * * * * * * * * * * * * *
>
> "But the mere fact that there is a record does not necessarily prove the guilt of this respondent be-

cause you must be satisfied from the evidence presented here that the record that was admitted in this case refers to the Robert Mottram who was the respondent in the first count of this indictment and was the respondent in the indictment that was returned by the grand jury of Androscoggin County at their June Term, 1952."

* * * * * * * * * * * * * * * * *

"Was this Robert Mottram that is the respondent at the bar here the same Robert Mottram that was convicted by the Androscoggin County Superior Court on June 17, 1952, and was he sentenced to the State's Prison?"

It is sufficient to say that there were no exceptions to the charge as given and no requests for instructions on this point. The respondent was in no way prejudiced. This is not a proper case for granting of appeal under the doctrine of *State* v. *Wright,* 128 Me. 404, 148 A. 141. There was no manifest error depriving the respondent of his lawful rights. On reading the record, we are satisfied that the jury was fully justified in finding that the respondent was an "habitual offender" within the statute.

The entry will be

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

STATE OF MAINE

vs.

WILLIAM L. DINAN, JR.

Piscataquis. Opinion, October 1, 1962.

Admissibility. Evidence.

A bill of exceptions must include all that is necessary to decide whether or not rulings complained of were erroneous.

ON EXCEPTIONS.

The respondent took exceptions to the admission of certain photographs and to the refusal of the presiding justice to direct a verdict of not guilty. Exceptions overruled. Judgment for State.

Arthur C. Hathaway, County Attorney, for the State.

Anthony J. Cirillo, for the Defendant.

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

TAPLEY, J. On exceptions. The respondent was charged, by complaint, with the careless shooting of a human being while engaged in hunting (Chap. 37, Sec. 146, R. S., 1954, as amended). The case was tried before a jury at the March Term, A. D. 1960 of the Superior Court, within and for the County of Piscataquis. The verdict was guilty. During the course of the trial respondent took exceptions to the admission of certain photographs and to the refusal of the presiding justice to direct a verdict of not guilty in behalf of the respondent.

A review of the bill of exceptions filed by the respondent discloses that they fail to show any exceptions taken to the admission of the photographs. Therefore, this question is not before us. A bill of exceptions must include all that is necessary to decide whether the rulings complained of were

or were not erroneous. *Bradford* v. *Davis, et al.*, 143 Me. 124.

A study of the record convinces us that there was no error on the part of the trial justice in refusing to direct a verdict of not guilty.

Exceptions overruled.
Judgment for the State.

GROVER S. PERKINS, ET AL.
vs.
RUSSELL M. PERKINS

York. Opinion, October 10, 1962.

Wills. Passage Ways. Use. Grants.

The purpose for which a right of way or passage is granted should be considered in using, defining, or restricting it.

If the object of a grant is stated or known from the surrounding circumstances, then the quality and quantity of the right of way or passage which will give effect in concrete form to the presumed object or intention of the party using the language.

The owner of the servient lot, by reason of his ownership of the title to the land may not be deprived of the use of his own land except when and where it becomes reasonably necessary for the enjoyment of the servitude by the dominant estate.

The mere inconvenience to the theater patrons in a more circuitous use of the defendant's land in the exercise of the right of passage is not sufficient to prevent the defendant's more economical use of his land.

Findings of fact shall not be set aside unless clearly erroneous.

ON APPEAL.

The plaintiff appeals the decision of the presiding justice that the said right of passage was not threatened by the

contemplated addition to the restaurant building; and that the preliminary injunction be dissolved. Appeal denied.

Harvey and Harvey, for the Plaintiff.

George D. Varney,

Charles W. Smith, for the Defendant.

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

DUBORD, J. This case is before us upon the appeal of the plaintiff from a judgment entered by the presiding justice who heard the cause, by agreement, without a jury.

The plaintiff, George S. Perkins, and defendant are brothers and sons of one Annie M. Perkins. The evidence discloses that Annie M. Perkins was the owner of land and buildings located on the easterly side of the Shore Road, also known as Kings Highway, in the village of Ogunquit in the Town of Wells. Upon this parcel was located a building known as the Perkins Theatre Block. To the north of the theatre, abutting upon the highway was located another building known as the Perkins Block. In the rear of both of these buildings was located the so-called Homestead Lot.

By her will executed on October 14, 1948, the testatrix divided this real estate into three parcels and she devised the parcel upon which the theatre is located to the plaintiff, Grover S. Perkins, for the term of his natural life. To the defendant, Russell M. Perkins, she devised the parcel upon which is located the so-called Perkins Block and the Homestead property she devised to her daughter, Gladys L. Worcester. We are not concerned with the Homestead Lot in the consideration of this cause.

Annie M. Perkins died within about a month after the execution of her will and the plaintiff and defendant went into possession of the parcels of land devised to them. The

building owned by the defendant had been occupied as a restaurant. To the rear of this restaurant building there is a rather large open area covered with asphalt. On the northerly side of the theatre there is a fire exit door leading to the open area and to the north of the restaurant building is an open space permitting passage from the rear of the Perkins Block Lot, so-called, to the main highway. The defendant, at the request of his tenant started construction of an addition to the rear of his restaurant building, this new construction to be approximately twenty-five feet in length measured from west to east and the southerly wall of the new construction to be approximately six feet northerly of the northerly wall of the theatre building. This new construction would extend approximately sixteen feet to the east, so that an alley-way on the defendant's property leading to the fire exit door would be about sixteen feet long and about six feet in width. The fire exit door itself is four feet wide. Thus anyone coming out of the theatre instead of being able to walk in a direct line over the open area and thence to the highway, would now find it necessary upon coming out of the door to pass to the right and around the extension of the restaurant building.

Before the construction was started, plaintiff notified the defendant that the construction would impair and interfere with rights of passage obtained under the will of his mother. The defendant, nevertheless, proceeded with the work and so the plaintiff instituted an action seeking an injunction against the defendant. The plaintiff, having only a life estate in the Perkins Theatre Lot, subsequently filed a motion, which was granted, making the remaindermen parties plaintiff.

An interlocutory order for a preliminary injunction was granted to the plaintiff pending trial on the merits.

After a full hearing, the presiding justice found in favor of the defendant and entered a decree to the effect that the

plaintiffs were devised a right of passage on foot over the defendant's land for the benefit of the patrons of their Theatre Building for use from the fire exit door in the northerly wall of said Theatre Building in cases of emergency only; that said right of passage was not threatened by the contemplated addition to the restaurant building; and that the preliminary injunction be dissolved.

It is this decision from which the plaintiffs appealed.

As previously pointed out, title to these two parcels of land with which we are now concerned, as well as the Homestead Lot, was in a single owner. By her will, Annie M. Perkins divided her land into three parcels and in the second paragraph of her will she made the following statement: "All of said lots are devised subject to the rights of passage over various portions of said lots as now existing for the use of the various devisees herein. . . ."

The issue requires a determination of the effect of this clause.

We quote the following excerpts from the memorandum of facts, law, and the decision of the presiding justice.

> "The plaintiffs claim their right of passage over the area of the Perkins lot rear yard where the defendant is building his addition to his restaurant under that clause in the will, asserting their right of free access from a fire exit door on the northerly side of the theatre for the patrons of the theatre to reach the highway from said fire exit door in the most direct route, also asserting a right to have trucks back up to said door for purposes of rubbish removal either from the theatre or from the two stores in the theatre building, and also for purposes of deliveries to the stores through that door and for other purposes generally.
>
> "The intended addition to the restaurant would prevent the backing of trucks to the fire exit door, and would interfere with the passage of theatre

patrons from the theatre only to the extent that they would have to semicircle around the restaurant addition to reach the highway. But it is a fact that theatre patrons would still have sufficient passageway from the theatre to the highway, if in a more circuitous route, as the remaining distance between the theatre building and the intended addition will not be less than six (6) feet.

"Annie M. Perkins executed her will on October 14, 1948, and died testate in November of the same year, that is, within approximately one month thereof, so that it matters not if we do not differentiate in the surrounding circumstances between one or the other of these two dates to interpret what the testatrix meant by the language used in her will, since the circumstances would be substantially the same on either of these relatively close dates.

"What rights of passage did the testatrix have in mind, when she subjected her respective devises to existing rights of passage over various portions of the three lots, to wit, the Perkins Theatre Block Lot, the Perkins Block Lot and the Homestead lot, for the use of the various devisees . . . ?
"The general rules to be applied in the construction of wills have been cited so often that it is not necessary at this time to enumerate the authorities, and it should be sufficient to refer to the case of First Portland National Bank vs Kaler-Vaill, et al, 155 Me. 50, for the following rules: (1) the intention of the testatrix in this case must be gathered from the language that she used in the will; (2) it is the intention of the testatrix that existed at the time of the execution of the will; (3) in cases of doubt or ambiguity, the language used in the will may be interpreted in the light of conditions existing at the time the will was executed, which conditions were known to the testatrix or may be supposed to have been in the mind of the testatrix.

"The testatrix's coinage of the expression 'rights of passage' instead of the common-place and usual

terms of 'rights of way' does not authoritatively support any substantial difference in meaning. The word passage way cannot be any broader in its signification than way or highway, and can have essentially no different meaning. . . .

"Furthermore, the Perkins lot back yard, i.e. the defendant's back yard, adjacent to the northerly side of the plaintiffs' theatre building, was fully improved by asphalt surface by the defendant himself. No specific delineated way on the surface of the ground marked any restricted portion of the yard area within which the devised rights of way 'as now existing' were to be enjoyed. The testamentary grant is silent as to the exact nature (quality) and location (quantity) of any of the rights of passage.

"Under the circumstances, unless the evidence specifically projects onto the ground a fixed and definite usage commonly accepted by the parties as the way contemplated by the ambiguous language, the grantees of the dominant lot are entitled to have the use and enjoyment of a way located upon the servient lot in such a manner that it would not be unreasonably inconvenient or injurious to the owner of the servient lot and at the same time be reasonably suitable and convenient to the owners of the dominant lot, having reference to the purposes for which the right of passage was granted in the first place, the situation of the lots in relation to each other and to public streets, and all other circumstances existing at the time of the drafting of the will creating the rights of passage, illuminating if possible the mental processes of the creator of such rights.

"And if the object of the grant is stated or known from the surrounding circumstances, then the quality and quantity of the right of way or passage, may be determined by finding the reasonable way or passage which will give effect in concrete form to the presumed object or intention of the party using the language, here the testatrix.
"But in construing the testamentary grant in this

case, one must not lose sight of the fact, that the owner of the servient lot, by reason of his ownership of the title to the land, must not be deprived of the use of his own land except when and where it becomes reasonably necessary for the enjoyment of the servitude by the dominant estate.

"The only need in the mind of the testatrix at the time she devised rights of passage in her will in favor of the various devisees and others, so far as the lands of plaintiffs and defendant are concerned, was the need of the theatre block to have rights of passage from the fire exit door as such to the highways. She was aware of the need of the fire exit door in the operation of the theatre and where she was dividing her holdings between the plaintiffs and defendant upon the northerly wall of the theatre building, it is only logical that she had in mind that a right of passage over the Perkins lot, so-called, from the fire exit door to the highways had to be appurtenant to the operation of the theatre.

"The plaintiffs failed to prove any greater right-of-passage rights. The backing of trucks to the fire exit door for deliveries to the adjacent stores on the dominant estate or for rubbish or waste disposal or other activity connected with the theatre, was not shown to be a recognized reasonable necessity in the mind of the testatrix and was more of an occasional use which if known to the testatrix, would not be protected by express servitudes except by clear language to that effect.

"The evidence shows that the rights of passage from the fire exit door of the theatre will not be unduly interfered with by the contemplated structure of the defendant. The mere inconvenience to theatre patrons in a more circuitous use of the defendant's land in the exercise of the right of passage is not sufficient to prevent the defendant's more economical use of his land.

"This court does not find any reliable evidence which might show a different mutual interpretation by the parties."

In their statement of points of appeal to be relied upon, the plaintiffs set forth the following:

"1. The Court erred in finding: that the Testatrix when creating the right of passage or way as 'now existing', was solely aware of the need of the fire exit door in the operation of the theatre, and that where she was dividing her holdings between the Plaintiffs and Defendant upon the northerly wall of the theatre building, it is only logical that she had only in mind that a right of passage over the Perkins lot, so-called, from the fire exit door to the highways had to be appurtenant to the operation of the theatre.

"2. The Court erred in finding: that Plaintiffs failed to prove any greater right of passage, and that any inconvenience to theatre patrons in using the right of way in a more circuitous use of the Defendant's land in the exercise of the right of passage is not sufficient to prevent Defendant's more economical use of his land.

"3. The Court erred in finding: that the backing of trucks to the fire exit door for deliveries to the adjacent stores on the dominant estate or for rubbish or waste disposal or other activity connected with the theatre, was not shown to be a recognized reasonable necessity in the mind of the Testatrix, and was more of an occasional use which if known to the Testatrix, would not be protected by express servitudes except by clear language to that effect.

"4. The Court erred in finding: that the right of passage from the fire exit door of the theatre will not be unduly interfered with by the contemplated structure of the Defendant.

"5. The Court erred in finding: that there was no reliable evidence which might have proven a different mutual interpretation by the parties.

"6. The Court erred in finding: that evidence of loss of rental had no bearing in the solution of the issues in this case.

"7. The Court erred in finding: that altho the

Plaintiffs were devised solely a right of passage on foot over the Defendant's land for the benefit of the patrons of their theatre building for use from the fire exit door in the northerly wall of said theatre building in cases of emergency, said right of free passage is not threatened by the contemplated additional building by the Defendant.

"8. The decree of the Court is against the law.

"9. The decree of the Court is against the evidence."

Counsel for the plaintiffs not having argued the issue raised by point of appeal number six, it is assumed that this point has been waived.

A careful study of the record in this case convinces us that the findings of fact are supported by the evidence. Moreover, the conclusions of law of the presiding justice concerning the intention expressed by the testatrix in her last will and testament, as well as the law relating to rights of way where the exact location has not been designated upon the face of the earth are correct.

This is definitely a case where M. R. C. P. 52 (a) applies to the effect that "findings of fact shall not be set aside unless clearly erroneous."

This court has already indicated the effect of this rule in several opinions rendered since the promulgation thereof. *Harriman* v. *Black,* 156 Me. 440, 146 A. (2nd) 47; *Inh. of the Town of Winthrop* v. *Foster,* 157 Me. 22, 170 A. (2nd) 152; *LeBlanc* v. *Gallant,* 157 Me. 31, 40, 172 A. (2nd) 74; *Bouchard* v. *Johnson,* 157 Me. 41, 170 A. (2nd) 372; *Pratt* v. *Moody,* 157 Me. 162, 170 A. (2nd) 389; and *Willmann & Associates* v. *Penseiro,* 158 Me. 1, 176 A. (2nd) 739.

It is our opinion that the appellant has not sustained the burden of showing that the decision from which he had

appealed is clearly erroneous. The decree of the sitting justice is, therefore, affirmed.

The entry will be:

Appeal denied.

MARY ALICE CHIVVIS

vs.

ALMOND B. CHIVVIS

Cumberland. Opinion, October 18, 1962.

Separation. Right of Inheritance.

The fact that the appellant obtained a separation decree from the appellee in no way purges his guilt and makes him an innocent party.

An adjudication that the appellee has abandoned the appellant can not be turned to the benefit of the appellee and result in a justification for his subsequent living apart from the appellant.

To prove that a separation was for just cause, some affirmative failure of the marital duty or some misconduct on the part of the appellant is necessary.

ON REPORT.

This case is upon report to determine whether or not the decision of a New York court granting an order of division of all the properties of the parties would now be inequitable if the Appellant was given additional rights in the Appellee's property. Appeal sustained. Petition dismissed.

Sidney W. Wernick,

John J. Flaherty, for the Appellant.

Peter G. Hastings, for the Appellee.

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

SIDDALL, J. On Report. This proceeding was brought under the provisions of R. S., 1954, Chap. 166, Sec. 45, the pertinent parts of which read as follows:

> "If a wife, without just cause, deserts her husband, or if he is living apart from her for just cause, and if such desertion or living apart has continued for the period set out in section 44, the probate court may upon petition of the husband . . . enter a decree that such husband is so deserted or is so living apart, and such husband may thereafter convey his real property in the same manner as if he were sole, and no portion of his estate shall descend to his said wife at his decease, neither shall she be entitled to receive any distributive share thereof or to waive any will made by him in her favor."

A petition was brought by the husband Almond B. Chivvis, hereafter called the appellee, alleging that he had been actually living apart from his wife Mary Alice Chivvis, hereafter called the appellant, for just cause for a period of at least one year prior to the date of the petition, April 8, 1961. The appellee asked the court to decree that he had been living apart from the appellant for just cause.

The decree of the Probate Court was "that Almond B. Chivvis is living apart from his wife Mary Alice Chivvis for just cause, and that said living apart has continued for a period of at least one year next prior to the filing of said petition."

The parties entered into the following stipulation:

> "The authenticated copy of the judgment entered September 20, 1954 at a special term of the Supreme Court held in and for the County of Suffolk at the Court House at Riverhead, New York on the fifteenth day of September, 1965, the same being identified herein as Exhibit A and being annexed

> hereto, incorporated herein as a part hereof shall be considered as a part of the evidence.
>
> Since the entry of said judgment as described aforesaid, the said Mary Alice Chivvis and the said Almond B. Chivvis have in fact been living apart continuously from said date to the date of this stipulation."

The appellant was awarded a judgment of separation from the appellee by the Superior Court, Suffolk County, New York. The judgment was entered September 20, 1954, and the court ordered, adjudged and decreed "that the plaintiff Mary Alice Chivvis, be, and she hereby is separated from the defendant, Almond B. Chivvis, and from his bed and board forever, as prayed for in the complaint, upon the ground of abandonment of the said plaintiff by the defendant . . . " The court thereupon ordered alimony to the appellant, and a property settlement of certain properties of the parties embodied in a stipulation annexed thereto but not included in the record.

The appellee claims that in view of the fact that the court in New York made an order of division of all of the properties of the parties that it would now be inequitable to give the appellant additional rights in appellee's property. He also contends that the order of judicial separation supersedes the state of abandonment which existed prior to the judgment, and that a new relationship was thereby created which gave the parties the right to live apart under the sanction of law without the obligation on the part of either spouse to make his abode with the other.

The New York decree, not being a decree of absolute divorce but merely a divorce *a mensa et thoro,* commonly known as a divorce from bed and board, did not dissolve the marriage between the parties. Since a marriage is not terminated by a divorce *a mensa et thoro,* inchoate dower will not thereby be barred in the absence of an express statute to the contrary. See American Law of Property,

Sec. 5136 and cases cited. See also *Cole* v. *Blankenship,* 30 Federal Reporter (2nd) 211, *Adair* v. *Adair* (Ala.), 62 S. (2nd) 437, 444; Re *Bennett's Estate,* 34 N. Y. S. (2nd) 27; Thompson on Real Property, Sec. 841; 17A Am. Jur. Dower, Sec. 116; 28 C. J. S. Dower, Sec. 53. Similarly, dower will not be barred by an interlocutory decree of divorce which has not become final. *Rollins* v. *Gould,* 244 Mass. 270, 138 N. E. 185. The same principle applies to statutory rights of inheritance in lieu of dower.

In this state we have no statutory provision whereby rights of inheritance of one spouse in the property of the other are barred by a divorce *a mensa et thoro.*

R. S., 1954, Chap. 166, Sec. 35 provides that:

> "A married person . . . may own in his own right real and personal property . . . 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." R. S., 1954, Chap. 166, Sec. 35.

R. S., 1954, Chap. 166, Sec. 44 makes provision for a judicial separation by a wife against her husband. Sec. 45 contemplates proceedings brought by a husband against a wife for the purpose of obtaining a decree authorizing him to convey his real estate as if sole. If his petition be granted, he may convey his real estate without the joinder of his wife and no portion of his estate shall descend to his wife. Sec. 46 contemplates similar proceedings brought by the wife, and a favorable decree has the same effect as to her property and estate.

These provisions were originally enacted together as a part of the same act in 1915. P. L., 1915, Chap. 328. Each of these sections contain the words "for just cause." Their meaning is exactly the same in all of the sections. In a

proceeding under any of these sections the petitioner must prove that he is living apart from his spouse for just cause, and that such living apart has continued for at least one year next prior to the filing of the petition.

Our court has not passed upon the meaning of the words "for just cause" as used in Sec. 45. However, *Albee's Case,* 128 Me. 127 was a petition brought under the Workmen's Compensation Act by a widow of a deceased employee claiming that she was his dependent. The act provided that a wife shall be considered to be wholly dependent for support upon her husband from whom she was living apart for justifiable cause. On page 129 of this case the court said:

> "Justifiable cause which will excuse a wife for living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such, for instance, as could be made, without turning on the same length of time, the foundation for a judicial separation. See R. S., Chap. 66, Sec. 10. *A wife does not live apart from her husband for justifiable cause, if he is not recreant to marital duty. Newman's Case,* 222 Mass., 563." (Emphasis supplied.)

Newman's Case, reported in 222 Mass, 563, cited in the above opinion, was brought under a similar provision in the Workmen's Compensation Act of Massachusetts. The court there said on page 566: "Where a woman lives apart from her husband, and it is contended that such separation is for justifiable cause, ordinarily it must appear that such living apart is due to some failure of duty or misconduct on the part of the husband." It is not necessary that the cause be sufficient to entitle her to a divorce. *Newman's Case, supra.*

On a petition for separate maintenance the court in *Goldberg* v. *Goldberg,* 237 Mass. 279; 129 N. E. 392, said:

> "A wife is not justified in living apart from her husband and claiming separate support from him when the husband is without blame and the separation is not the result of ill treatment, misconduct, or failure of marital duty on his part."

In this case the only evidence before us is a copy of the judgment and a stipulation that the parties have lived apart since its date. The appellee must prove that the separation from the appellant was for a just cause. In order to do this he must affirmatively show some failure of marital duty, or some misconduct on the part of the appellant, not necessarily, however, such as to present a ground for divorce. This case is devoid of evidence of that nature.

The appellee, however, claims that the New York decree gave the parties the right to live apart under sanction of the law, and that, therefore, the appellee was living apart from the appellant for just cause. We must disagree with the appellee's theory in this respect. We fail to perceive how an adjudication that the appellee has abandoned the appellant can be turned to the benefit of the appellee and result in a justification for his subsequent living apart from the appellant. The appellee was the guilty party causing the separation in the first instance. The fact that the appellant obtained a separation decree from the appellee in no way purges his guilt and makes him an innocent party. The decree cannot be considered as giving the appellee just cause for living apart from the appellant.

This proceeding is brought under the provisions of R. S., 1954, Chap. 166, Sec. 45. The appellee has not offered any evidence to justify relief under this legislation. The New York decree cannot, in and of itself, form the basis of a finding that the separation since its date was for just cause, and the case contains no proof of improper conduct on the part

of the appellant. If any equitable considerations exist favorable to the appellee, the record does not disclose them.

The case is reported to the court for such final decision as the rights of the parties require.

The entry will be

Appeal sustained.
Petition dismissed.

STATE OF MAINE
vs.
JOSEPH CROTEAU

Cumberland. Opinion, October 18, 1962.

Rape. Criminal Law. Carnal Knowledge.
Sex Relations.

Carnal knowledge, force and commission of act without consent or against the will of ravished woman are necessary elements of rape.

Proof of carnal knowledge by the respondent is indispensable to a conviction of rape.

All carnal knowledge is sex relations, but the converse is false.

A defendant who appeals from denial of motion for a new trial, which is based on claim that verdict is against the law and against the evidence, and against the weight of the evidence, must demonstrate that upon the evidence the verdict was not justified in order to prevail.

"Carnal knowledge" as used in rape statute is synonymous with sexual intercourse.

ON APPEAL.

This is an appeal from the denial of defendant's motion for a new trial. Held, that evidence was insufficient to

establish carnal knowledge necessary for conviction of rape. Appeal sustained and motion for new trial granted.

Arthur Chapman, Jr., County Attorney,
for the Appellee (State).

Henry Steinfeld,

Robert A. Wilson, for the Appellant.

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

SULLIVAN, J. Respondent had been indicted and thereby accused of the crime of rape of a female of 19 years of age. R. S., c. 130, § 10. He was tried by jury and the verdict was guilty. He filed a motion for a new trial, asserting that the verdict was against the law, against the evidence and manifestly against the weight of the evidence. The motion was denied and he appeals such ruling.

R. S., c. 130, § 10 pertinently is as follows:

> "Who ever ravishes and carnally knows any female of 14 or more years of age, by force and against her will, - - - - shall be punished by imprisonment for any term of years."

To prevail in this case the respondent must demonstrate that upon the evidence the verdict was not justified.

> "On appeals from the denial of a motion for a new trial in felony cases, - - - - the single question before this court 'is whether in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt and therefore in declaring by their verdict' that the respondent was guilty as charged - - - -" *State* v. *Morin,* 149 Me. 279, 281.

In requisite degree the proof of carnal knowledge by the respondent is indispensable to a conviction of rape.

"In any event there are three elements which must

> be present to constitute rape, viz: carnal knowledge, force, and the commission of the act without the consent or against the will of the ravished woman - - - - " *State* v. *Flaherty,* 128 Me. 141, 144. Cf. *State* v. *Dipietrantonio,* 152 Me. 41, 46.

Carnal knowledge is synonymous here with sexual intercourse.

> " - - - - Carnal knowledge means sexual intercourse and is complete upon proof of penetration of the female organ by the male organ, however slight." *King* v. *Com.,* 165 Va. 843, 183 S. E. 187, 189.

> " - - - - But from very early times, in the law, as in common speech, the meaning of the words 'carnal knowledge' of a woman by a man has been sexual bodily connection; and these words, without more, have been used in that sense by writers of the highest authority on criminal law, when undertaking to give a full and precise definition of the crime of rape, the highest crime of this character. - - - - " *Com.* v. *Squires,* 97 Mass. 59, 61.

The prosecutrix and specified victim in the instant case is the daughter of the respondent. We allocate and now array all testimony which approximates the element of carnal knowledge in the court record.

> (From prosecutrix)
>
> "Then what did he (respondent) do?
>
> Well, then he got on me, got on top of me. This is embarrassing, - - - -
>
> But what did he do after he got on top of you?
>
> Could you answer that for me? What did he do after he got on top of you?
>
> I just don't know what to say.
>
> Did he have sex relations with you?
>
> Yes.
>
> How long was he on top of you?

Oh, about fifteen or twenty minutes, I guess. I really couldn't say, but it seemed awful long.

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

Did he hurt you, - - - - ?

Yes.

What sort of pain did you experience at that time?

It was awful.

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

When did you first see your father the next morning?

Oh, about nine.

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

What did he say, - - - - ?

He said, he says, 'About last night,' he says, 'if anything should happen,' he says, 'you say that you have gone out with somebody.' He says, 'Do you hear?' And I said, 'Yes.' He says, 'Don't worry,' he says, 'I will take care of you.'

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

At the time, (later, the same day) did you tell your mother what happened Sunday morning in your house on Park Avenue?

Did you make a complaint to your mother of rape on behalf of your father?

Yes.

And after the alleged rape took place, your father went to sleep, is that right?

Yes.

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

Now, at the time you were in the Municipal Court getting a warrant for your father's arrest on an assault and battery, did your mother say anything to the Judge in your presence about this alleged rape?

No.

She knew about it, didn't she?

Yes.

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

Now, how long after the officer left did this alleged attack, or rape, take place?

I couldn't tell you exactly how long.

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

And you want this Court and Jury to believe that a man that had that much liquor was able to concentrate, was able to dance with you, was able to punch you, was able to take you into the bedroom and ravish you? Is that what you want?

Yes."

(From the arresting officer)

"Now, after you talked with (prosecutrix), did you go in search of someone?

I did, sir.

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

Did you place Joseph Croteau under arrest?

I did, sir.

On what charge?

Rape charge."

The prosecutrix upon oath stated that the respondent had had "sex relations" with her. Sexual relations comprise a comprehensive genus of which sexual intercourse and the latter's equivalent, carnal knowledge, are species. All carnal knowledge is sex relations but the converse is false. Carnal knowledge and sex relations are not constantly convertible terms.

"- - - - 'Sexual relations' ought not to be treated as synonymous with sexual intercourse." *Herriman* v. *Layman,* 118 Iowa 590, 92 N. W. 710, 711.

"- - - - The term 'sexual relations,' which is found in the information, is one of common usage and meaning connoting lust and sensuality - - - -"

People v. *Kohler*, 413, Ill. 283, 109 N. E. (2nd) 210.

The prosecutrix failed to confront the respondent with articulate testimony of the gravamen of the crime of rape.

She told the jury that she had experienced "awful pain" during the crisis of the attack upon her. There is considerable evidence in the record to verify that the young lady had been beaten, kicked, scratched and mauled. She gave no detail as to the precise locale of the specific "awful" pain and more decisively she did not affirmatively correlate such suffering with the perpetration of carnal knowledge. Her bodily condition and her pathetic but laconic description are equivocally consistent with brutal sex relations without or with carnal knowledge.

Prosecutrix related that on the same harrowing day she had complained to her mother "of rape on behalf of" her father. The word, "rape," had been tendered in the question addressed to the prosecutrix by the State's attorney. She had already described the outrage in formal testimony as sex relations. The limited questioning of the prosecutrix as to her report to her mother was justified.

> "There is practical unanimity of opinion, that the fact such a complaint (of rape) was made is always admissible as a part of the State's evidence in chief, if the prosecutrix takes the stand, *in corroboration of her evidence,* but not the details of the complaint - - - -" (Emphasis supplied.) *State* v. *King*, 123 Me. 256, 258.

Prosecutrix' complaint to her mother was, therefore, in corroboration, if at all, of her declaration in court that the respondent had forced her into resisted sex relations. Prosecutrix had given no testimony of rape or penetration but had had a full opportunity to do so. We are not being ultra discriminating here nor are we now delimiting the rules of a mere contest. This matter is grave. The instant case constitutes an accusation of rape, a heinous crime to be

drastically punished upon requisite proof. The State's attorney proffered the noun, rape, in a question to elicit collateral and corroborating testimony and to characterize what the girl had related to her mother. The prosecutrix tersely affirmed the term submitted to her. Under the circumstances of this case we have irrepressible misgivings that proof beyond reasonable doubt of carnal knowledge could be or was attained by mere indirection and by such a curative and efficient exercise or expedient. The technique is too perfunctory and the hazards therefrom are unacceptable. Nor is the doctrine of *State* v. *King, supra,* in conflict with our position but rather justifies it. To constrict or narrow sex relations to carnal knowledge or rape demanded here testimony more forthrightly and fulsomely detailed than that contributed by the condensed and ancillary question and reply concerning this daughter's complaint to her mother.

Prosecutrix related that upon her next meeting with the respondent several hours after her sordid experience with him he enjoined her to shield him, to dissemble and not to implicate him "if anything should happen." As a component with testimony of penetration such proposals if made by the respondent would have been exceedingly condemnatory. For want of evidence in the case at bar of carnal knowledge respondent's suggestions to the prosecutrix might indicate, e. g., only a natural and deep concern upon the part of the respondent that because of the prosecutrix' bruised and scratched condition and the state of her clothing her mother or some observer might discover that the girl had been attacked and outraged to some degree.

Under cross examination, as it appears earlier in this opinion, the prosecutrix was asked if she desired the court and jury to believe, *inter alia,*

"- - - - that a man (respondent) that had that much

> liquor was able - - - - to take you into the bedroom and ravish you? - - - - "

Her reply was, "Yes."

Arguably and inclusively the prosecutrix accepted and affirmed the word, "ravish," one meaning of which is rape. Literally her assent to the question confirmed only her father's temporary potencies and condition rather than any acts of his. The inquiry was complex and cumulative. As elicited, prosecutrix' assent to the term, "ravish," was oblique and, without more, is much less than adequate to sustain a grave conviction of carnal knowledge and penetration which the prosecutrix had not otherwise vindicated in this case.

Rape is an atrocious crime. Its punishment and deterrence are indispensable to the decency, order and existence of society. Rape accusations and trials are extremely conducive to the fomenting of the indignation and wrath of the citizenry. The charge is especially susceptive of perfidy. The penalty is ruinous. The gravamen of the offense is to be demonstrated beyond any reasonable doubt.

In reaching the conclusion that the case must be remanded for a new trial we do not thereby indicate in any way views upon the guilt or innocence of the accused. We do no more than say that the evidence here presented by the prosecutrix or from any other source was not sufficient to establish the vital fact of penetration. Carnal knowledge was not demonstrated beyond all reasonable doubt and we must conclude that the jury was not warranted in its verdict of guilty.

The mandate must be:

Appeal sustained.
Motion for new trial granted.

THERESA NELSON
vs.
LEO'S AUTO SALES, INC.

Somerset. Opinion, October 18, 1962.

Fraud. Evidence. Contracts. Parol Evidence.
M. R. C. P. Rule 50. Deceit.

Parol evidence is inadmissible if it tends to alter a written instrument.

Parol evidence is admissible for the purpose of showing fraudulent representation.

The measure of damage under the factual circumstances is the difference between the actual value and value received if the representation had been true.

An owner may give his opinion as to the fair market value of his property, and not as to the value to him.

ON APPEAL.

The Defendant appeals the Denial of motion for a Directed verdict, judgment *n.o.v.* and for a new trial. Because of the character of the plaintiff's testimony as to value, the jury received and considered evidence which was not in accordance with the rule of damages applicable to this case. The verdict as to damages is excessive. Case remanded to the Superior Court for a trial on damages only.

Clinton B. Townsend, for the Plaintiff.

Richard J. Dubord, for the Defendant.

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

TAPLEY, J. On appeal. Plaintiff in her action charges the defendant with fraud, in that she was fraudulently induced to purchase an automobile on the false representation that it was a new vehicle. She executed an agreement to

buy with the defendant and later signed a conditional sales agreement covering the same automobile. The defendant filed answer and counterclaim. The defendant, through counterclaim, sought to recover a balance of $93.00 alleged to be due on a note executed and delivered to the defendant. The jury found for the plaintiff and assessed damages in the sum of $2,000.00, and for the defendant, on its counterclaim, in the amount of $83.00. At the conclusion of the plaintiff's case defendant orally moved for a directed verdict. The motion was denied. Later, after submission of all the evidence, the defendant again moved for a directed verdict. This motion was also denied. After verdict defendant seasonably filed a motion for judgment *n.o.v.* and alternatively for a new trial. (Rule 50, M. R. C. P.). The motion was denied and final judgment entered. Defendant appeals from the final judgment.

Defendant's points of appeal are, in substance, as follows:

1. The court erred in not granting defendant's motion for judgment *n.o.v.* and for a new trial based on grounds of insufficient evidence.

2. There was error in refusing to grant defendant's motion for judgment *n.o.v.* and for a new trial because there was insufficient evidence that the plaintiff relied upon the alleged false representations of defendant's agent, or that plaintiff could not have discovered such alleged falsity by the exercise of reasonable care.

3. There was error on the part of the court in refusing to grant a new trial on the grounds that the damages were excessive.

4. That the court refused to grant a new trial on the grounds that the verdict was contrary to the evidence.

5. That in admitting parol evidence which tended to alter, vary and contradict a written contract between the parties, the court was in error.

We will first give our attention to the objection against the admission of the parol evidence. The plaintiff desired to purchase an automobile from the defendant. The parties entered into two written agreements, one being in the nature of an agreement to sell and buy, and the other a conditional sales agreement. During the trial of the cause plaintiff sought introduction of parol testimony concerning conversations she had with an agent of the defendant as to the age of the car, her contention being that false representation was made to her that the car was new and that the representation took place before she signed the written documents. Defendant, objecting to the admission of such testimony, argued the well established and recognized rule of evidence that the testimony was inadmissible as it tended to alter a written instrument and that the documents must speak for themselves. If the complaint was based on a written contract between the parties the rule would apply but the complaint does not sound in contract but alleges that the defendant, by and through its agents, falsely represented that the automobile was new and the plaintiff, because of this false representation, was induced to purchase the vehicle. The nature of the action allows the plaintiff to introduce testimony aliunde, not for the purpose of altering the written contracts but rather to evidence the fact, as she says, a false and fraudulent representation made for the purpose of inducing her to execute them. The principle is enunciated in 17 C. J. S. — Contracts — Sec. 595:

> "FRAUD: Fraud may be shown by the positive declarations or admissions of the person charged or by indirect evidence, such as the acts, conduct, and other circumstances attending the transaction; and it has been said that courts will not trouble themselves about fine distinctions in the admissibility of evidence when the purpose is to unkennel a fraud."
>
> "A provision that the writing contains the entire agreement does not prevent one party from assert-

ing that the making of the contract was induced by fraud. A stipulation in a written contract disclaiming responsibility for unauthorized collateral agreements or warranties made by agents cannot prevent the interposition of the defense of fraud which has induced the making of the contract. Similarly, a stipulation in a written contract that neither party shall be bound by attempted changes in it, unless they are in writing and signed by the parties thereto, does not preclude the defense of fraud in securing the contract." 12 Am. Jur. — Contracts — Sec. 146.

"A party is not precluded from introducing testimony of other allegations made at the time than those contained in the written contract for the purpose of proving fraud." *Portland Morris Plan Bank* v. *Winckler, et al.,* 127 Me. 306 at 310.

"There can be no doubt that fraud or false representations made as an inducement to a contract may be shown for the purpose of avoiding the contract by the party upon whom such fraud has been practiced. A written instrument may be shown to be void by parol evidence." *Marston, Executrix* v. *Kennebec Mutual Life Insurance Company,* 89 Me. 266 at 273.

"A representation made as an inducement in the sale of an automobile, as to its age or the length of time it has been in use, is undoubtedly material as affecting value; and if false, it is actionable." *Ross* v. *Reynolds,* 112 Me. 223 at 226.

The testimony objected to was properly admitted.

The defendant attacks the verdict by contending that the plaintiff has failed to produce sufficient evidence to clearly and convincingly establish the elements of an action of deceit and, therefore, the verdict of the jury must not be allowed to stand. According to the record, the jury would be justified in finding that the plaintiff was told by an agent of the defendant that the car which she was purchasing was a new car; that the conditional sales agreement on its

face recited the fact that it was new; that the so-called agreement to sell and buy showed some indication of an alteration of a material fact in that the written word "used" appears to have been written over another word which has some semblance of the word "new"; that she acted in good faith and was induced to purchase the automobile on the representation that the vehicle was new. The presiding justice charged the jury on the law as it pertains to the action of deceit. The charge as given stands free of attack. Insofar as the element of liability is concerned we find that the triers of fact were presented with evidence sufficient in its probative force to justify the verdict.

Counsel for the defendant, in further argument, presents that the damages as found by the jury were excessive; that there was insufficient evidence to support the amount of damages.

The evidence, as to damages, consists of the testimony of the plaintiff and that of two defense witnesses, both employees of the defendant. The defense testimony places the difference in value as being between one hundred and two hundred dollars. The plaintiff testified:

"Q. I believe that you have testified that you later discovered that the car had been at some time damaged, that the frame had been bent, and that there had been some repair work to it. What would the value of a car be which had been damaged to that extent?

A. To me at this time?

Q. At the time you bought it.

A. Say that again?

Q. What would the value of the car have been to you at the time you bought it?

A. At the time I bought it I feel that the price that I gave for the car —

Q. As a new car?

A. Yes.

Q. But if you had known that the car was damaged —
A. I would say $500."

The measure of damages under the factual circumstances of this action of deceit is the difference between the actual value of the vehicle when delivered to the plaintiff and the value of the motor vehicle she would have received if the representations had been true.

> "227. **Benefit-of-bargain or Majority Rule.** — The great weight of authority sustains the general rule that a person acquiring property by virtue of a commercial transaction, who has been defrauded by false representations as to the value, quality, or condition of the property, may recover as damages in a tort action the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true. In other words, the defrauded party is entitled to recover the difference between the real and the represented value of the property. As frequently stated by courts following this doctrine, the defrauded party is entitled to the benefit of the bargain. This rule compels the party guilty of fraud to make good his misrepresentations, and under its operation the parties are placed in the same position as if the contract and representations had been fully performed. It so results that the measure of damages in a tort action for fraud in the sale of personal property is the same as in actions for breach of warranty, and requires the person disposing of the property to make good his representations just as though he had given a warranty to that effect."
>
> * * * * * *
>
> "----, a person who is induced to purchase an automobile on the misrepresentation that it is a new car whereas in fact it is secondhand may recover the difference between the actual value of the car at the time of sale and its value if it had

been as represented." 24 Am. Jur., Sec. 227, pages 55-57.

See *Adams* v. *Burton,* 107 Me. 223; *Chellis* v. *Cole, et al.,* 116 Me. 283; *Bragdon* v. *Chase,* 149 Me. 146; *Shine* v. *Dodge,* 130 Me. 440; *Rice, et al.* v. *Price, et al.,* 164 N. E. (2nd) 891 (Mass.) (1960); *Cedar* v. *McCarthy, et al.,* 70 N. E. (2nd) 698 (Mass.); *Falkner* v. *Sacks Bros. et al.,* 30 N. W. (2nd) 572 (Neb.); *Paquin* v. *Van Houtum,* 72 N. W. (2nd) 169 (Mich.); *Lutfy* v. *R. D. Roper & Sons Motor Co.,* 115 P. (2nd) 161 (Ariz.); *Anderson, et al.* v. *Tri-State Home Improvement Co.,* 67 N. W. (2nd) 853 (Wis.); *U. S.* v. *Ben Grunstein & Sons Company, et al.,* 137 F. Supp. 197. Reference is made to a comprehensive treatment of the subject of damages in fraud and deceit actions in 124 A. L. R., with annotations, beginning on page 37.

An owner may give his opinion as to the fair market value of his property. *Kerr* v. *The Great Atlantic and Pacific Tea Company,* 129 Me. 48. In 37 A. L. R. (2nd) 967 will be found an annotation treating of opinion evidence given by an owner as to value of his property.

In the instant case the plaintiff testified as to the value of the car to her — not its market value.

Because of the character of the plaintiff's testimony as to value, the jury received and considered evidence which was not in accordance with the rule of damages applicable to this case.

The verdict as to damages is excessive.

Case remanded to the Superior Court for a trial on damages only.

PATRICK L. RODRIGUE, ET AL.
vs.
LEVENIE LETENDRE, ET AL.

Kennebec. Opinion, October 22, 1962.

Right of Way. Evidence. Motion for New Trial.
Admissibility.

A party excepting to the exclusion of evidence always has the burden of showing affirmatively that the exclusion was prejudicial to him.

In a motion for a new trial on the ground of newly discovered evidence, there must be an end to litigation and the evidence must be very strong.

Appellants were precluded from asserting error as to the exclusion of exhibit where excluded exhibit was not made a part of record of appeal.

If evidence is no more than memorandum kept for the convenience of witness, its exclusion is proper.

Evidence which is newly discovered only in the sense that it was not made known by the absent party to his agent or attorney before trial which was conducted in his absence, is not a just cause for a new trial.

To be entitled to a new trial on the ground of newly discovered evidence, it must appear that 1) the new evidence will probably change result on new trial; 2) the evidence has been discovered since the trial; 3) it could not have been discovered before trial by exercise of due diligence; 4) it is not merely cumulative or impeaching.

ON APPEAL.

In this case the defendants appeal from the judgment by the court finding for plaintiffs in an action for injunctive relief for obstruction of right of way claimed by plaintiffs, and from the denial of a motion for a new trial based upon newly discovered evidence. Appeal denied.

Richard B. Sanborn, for the Plaintiff.

F. Boardman Fish, Jr., for the Defendant.

Thomas F. Monaghan, for the Defendant.

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

WEBBER, J. Plaintiffs by complaint sought injunctive relief against defendants for obstruction of a right of way claimed by plaintiffs. Defendants by counterclaim likewise sought injunctive relief against plaintiffs based upon alleged encroachment of plaintiffs' building on land of defendants. Pursuant to M. R. C. P. Rule 39(c) the justice below submitted issues of fact to a jury for special findings and adopted these findings in ordering judgment for plaintiffs. Defendants have appealed from the final judgment and from the denial of a motion for a new trial based upon alleged newly discovered evidence.

The attorneys who now prosecute this appeal were not of counsel either when the case was tried below or when appeal was initiated. Special leave was granted by the Law Court upon their petition to perfect and prosecute this appeal because of exceptional circumstances and to prevent any possible injustice. Of the several points of appeal asserted, only two are pressed and require consideration here. 1. Did the justice below err in excluding from evidence an exhibit marked for identification Defendants' Exhibit #2? 2. Did the justice below properly deny the motion for a new trial based upon a claim of newly discovered evidence?

As to the first issue, the defendants are precluded from asserting error since the excluded exhibit was not made a part of the record before us on appeal. With reference to certain exhibits said to have been improperly excluded, we said in *Richardson* v. *Lalumiere,* 134 Me. 224 at 225: "The exceptions, however, are not accompanied by the books in question, nor are the entries claimed to be admissible made a part of the record. The court cannot determine their admissibility without knowing what they are." So here

not only is the exhibit itself lacking but the record contains no offer of proof as to the nature of any notations or entries made therein. "A party excepting to the exclusion of evidence always has the burden of showing affirmatively that the exclusion was prejudicial to him. What the record of the certificate would have shown does not appear. * * * It might, on inspection, show very differently than the recital of the bill implies. About that, on this record, no one can tell, 'and no one has a right to guess.' " *Gross* v. *Martin,* 128 Me. 445, 446. The defendants seem to assert in argument that the exhibit was an "account book" kept by a witness in the regular course of business and therefore admissible as an exception to the hearsay rule under the provisions of R. S., Chap. 113, Sec. 133 (The Shopbook Rule). If such were the case the record shows no proper basis established for its admission by examination of the witness who prepared it. The justice below seems to have regarded the exhibit as no more than a memorandum kept for the convenience of the witness since he permitted the witness to testify as of her own knowledge using the exhibit to refresh her recollection. The exhibit was before him for observation and examination. If it was merely a memorandum, then under the circumstances of this case and for the purpose for which it was offered, it was properly excluded. *Richardson* v. *Lalumiere, supra; Hunter* v. *Totman,* 146 Me. 259, 265; *Ouelette & Ouelette* v. *Pageau, et al.,* 150 Me. 159, 164; cf. *Hunter* v. *Totman,* 151 Me. 365, 366. It is unnecessary here to consider other arguments advanced by the plaintiffs in support of the exclusion. Defendants show no error and no prejudice.

The motion for a new trial based upon a claim of newly discovered evidence was denied by the justice below on the ground that all the evidence alleged to have been first discovered after the completion of the trial "could have been obtained before and at the time of trial by the exercise of reasonable diligence." The applicable rules were fully set

forth in *Harrison, Pro Ami* v. *Wells,* 151 Me. 75 at 81. "The law and rules of practice relating to a new trial for alleged newly discovered evidence are well established. Five things must appear (1) that the new evidence is such that it will probably change the result upon a new trial, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue and (5) that it is not merely cumulative or impeaching. Applications for new trials on the ground of newly discovered evidence are not favored by the courts. Proof must be convincing. * * * It was early held in Maine, and consistently followed, that where there is a motion for new trial on ground of newly discovered evidence there 'must be an end to litigation' and 'the evidence must be very strong.'" In *Kimball* v. *Clark,* 133 Me. 263 at 267 it was stated: "The law holds parties to the exercise of due diligence in the preparation of their cases, and public welfare as well as the interest of litigants requires that suitors should prepare their cases with reference to all the probable contingencies of the trial." In the instant case one of the two defendants was in the military service and outside the continental United States. His mother, the co-defendant, admittedly served as his agent in connection with the real estate owned by him and involved in this litigation. Moreover, he was represented by counsel who appeared and tried the case. Both the agent and the attorney were in communication with him. Pleadings were filed on his behalf. No request was made of the court for continuance on the ground of his absence in the military service. Admittedly, all of the alleged newly discovered evidence was known to the defendant owner before trial and was "newly discovered" only in the sense that it was not made known by the party to his agent and to his attorney before trial. The affidavits from several potential witnesses filed in support of the motion disclose that all lived within a radius of five miles from the place of trial.

Upon analysis we do not appear to be presented with a question of "newly discovered evidence" in its proper sense, but only with a failure of preparation "with reference to all the probable contingencies of the trial." In addition to the foregoing considerations, we must express some doubt as to whether the additional evidence "would probably change the result upon a new trial." Upon a conflict of testimony the evidence of two disinterested witnesses *presented by the defendants* seems to have been accepted and believed by the jury and the court in reaching a verdict and judgment favorable to the plaintiffs. We can discover no error in the ruling of the court denying a new trial.

Appeal denied.

JOSEPH JOHN DEC

vs.

GRACE IRENE DEC

GRACE IRENE DEC

vs.

JOSEPH JOHN DEC

York. Opinion, October 23, 1962.

Custody. Testimony. Witnesses. Discretion. Evidence.

Paramount consideration as to custody of children at the time of the divorce or requested alteration of a divorce decree is the present and future welfare and well-being of the child.

When custody is given to the parents, to a third party or to some suitable society or institution for the care and protection of the children, the court may alter its order from time to time, as the circumstances require.

In the event no stenographic record at a hearing or a trial is made, the appellant may prepare a statement of evidence or proceedings from the best available means, including his recollection.

If actual custody is given to a third party, then that party is considered as an indispensable person in all future hearings or trials regarding the custody of the child.

If the record does not contain a transcript of the testimony or a statement, it is impossible to determine whether the findings of the justice were clearly erroneous.

ON APPEAL.

Proceeding on divorced husband's postdecretal petition for complete custody of child whose custody had been awarded to him with proviso that child reside with maternal grandparents. The wife filed a cross-petition for custody. The court granted the husband's petition, and the wife appealed. The court held that the maternal grandparents were not "indispensable parties," and that wife was required to show that findings were clearly erroneous and this she could not do where record did not contain transcript of testimony or statement in lieu thereof. Appeal denied.

Berman, Berman, Wernick & Flaherty,
for the Plaintiff.

J. Armand Gendron, for the Defendant.

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

TAPLEY, J. On appeal. Joseph John Dec, the appellee in these proceedings, obtained a decree of divorce from the appellant, Grace Irene Dec, at the January Term, A. D. 1959 of the Superior Court, within and for the County of York. He was granted the care and custody of the minor child of the parties. The custody portion of the decree, after granting care and custody to the father recites: "but with the order, constituting part and parcel of this decree, that the child shall be kept by said libellant in the home of George E. Gendron and Flora N. Gendron of Hollis, Maine, maternal grandparents of said child (they having expressed

to this Court their assent thereto), and have her home with them, until further order of Court." The father, by petition dated July 20, 1959, sought to amend the custody portion of the decree, seeking full and complete custody of the child. The mother in turn submitted a petition to amend the decree to the end that she be given custody with the provision that the child remain in the home of the child's maternal grandparents. A hearing was had on both petitions on August 18, 1959 which resulted in a denial of both. Subsequent to the denial of the petitions to amend the decree, the father remarried and by motion dated May 23, 1961 sought to amend the custody portion of the decree so that he would be entitled to full and complete custody of the child. The mother countered with a motion seeking a change of custody decree to the effect that she be given custody and the child to remain with the maternal grandparents. The motions were heard by a Justice of the Superior Court, the result of which was an amendment of the decree by decreeing custody to the father, with rights of visitation on the part of the mother and the maternal grandparents at reasonable times, with rights of visitation by the child with her maternal grandparents and her mother at stated times. From this judgment, the mother has appealed. Subsequent to the filing of the judgment, the mother, through counsel, filed a motion for rehearing containing the following reasons: (1) That at the original hearing no stenographic record of the testimony was taken; (2) That George E. Gendron, maternal grandfather of the child, was in the hospital on the date of the hearing and was unable to give his testimony. Bearing the same date as the motion for rehearing was another motion addressed to the presiding justice to amend his original findings by making additional findings and to amend the judgment. It is indicated in this motion that it is brought by authority of Rule 52 (b) of Maine Rules of Civil Procedure. After hearing on these two motions the presiding justice denied

the motion for rehearing and, as to the motion for amended findings and additional findings and for amended judgment, he allowed some requested findings, denied others, and denied the motion to amend the judgment. The mother appealed that portion of the judgment that was adverse to her.

The appellant presents the following statement of points upon which she relies:

"1. It was abuse of discretion in this case to deny appellant a rehearing in order that a record of the testimony could be made for purposes of appeal.

2. The Court was without power to enter the judgment made in this case inasmuch as the parties indispensable therefor were not before the Court.

3. The evidence in the case does not support the decision under the doctrine of Grover v. Grover, 143 Me. 34, 54 A2d 637."

(NOTE: The Grover case holds to the principle that the paramount consideration as to custody of children at the time of the divorce or a requested alteration of a divorce decree is the present and future welfare and well-being of the child.)

> "**Statement of Points.** 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." Rule 75 (d) M. R. C. P., 155 Me. 463.

The appellant contends that the justice below abused his discretion when he denied her a rehearing in order that a record of the testimony could be made for the purposes of appeal. It is to be noted that the appellant was represented by an attorney who was capable and efficient in the trial of

her cause and presumed to be knowledgeable of the necessity of a record of the proceedings for appeal purposes. The motion for a rehearing for the purpose of providing a record for appeal was unnecessary. Rule 75 (m) of Maine Rules of Civil Procedure provides available procedure to supply the lack of a stenographic report of the evidence at a hearing:

> "(m) **Appeals When No Stenographic Report Was Made.** In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the court for settlement and approval and as settled and approved shall be included in the record on appeal."

There was no error on the part of the presiding justice in denying the motion.

Another point of appeal is that the court was without authority to enter the judgment as indispensable parties were not before the court. This objection refers to the fact that the maternal grandparents were not made parties to the motion to amend the decree. This reasoning is based on the order in the decree that the child was to remain in their home. The original divorce decree gave care and custody to the libellant and, in addition, provided as a part of the decree, "that the child shall be kept by said libellant in the home of George E. Gendron and Flora N. Gendron of Hollis, Maine, maternal grandparents of said child - - - - and have her home with them, until further order of Court." Counsel for the appellant contends that because the decree ordered the libellant to place the child in the home of her

maternal grandparents until further order of court that this order made the grandparents indispensable parties for any future proceedings to alter or amend the custody decree.

Chap. 166, Sec. 70, R. S., 1954, as amended, reads in part:

> "The court making an order of nullity or of divorce may make an order concerning the care, custody and support of the minor children of the parties and with which parents any of them shall live, or grant the care and custody of said children to a 3rd person or to some suitable society or institution for the care and protection of children or to the department of health and welfare, and may alter its order from time to time as circumstances require upon motion of either party or the state department of health and welfare; - -."

Under the provisions of this statutory enactment the court may decree custody of a minor child to the parent or parents, to a third person, to some suitable society or institution for the care and protection of children or to the department of health and welfare. When custody is given to any one of these classifications the court "may alter its order from time to time as circumstances require upon motion of either party or the state department of health and welfare."

In the instant case the grandparents were not given custody but the court by decree granted custody of the child to the father, ordering that she reside with her maternal grandparents. Under the circumstances, where custody was not given to the maternal grandparents, they are not indispensable parties. In the case of *Grover* v. *Grover,* 143 Me. 34, the court amended a divorce decree by giving the care and custody of a child to her grandmother. Later the mother brought a petition to further amend the decree by granting custody to her. In this case the grandmother was made a party respondent to the petition for the obvious reason that the court had previously granted her custody.

There is no merit in appellant's contention that the grandparents were indispensable parties to the motion for the modification of the divorce decree.

One of the appellant's points of appeal is that the evidence in the case does not support the decision that it would be for the best interests and welfare of the child to change the custody provision of the original decree. Appellant must show the findings to be "clearly erroneous."

> "- - - - 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) M. R. C. P.

The record does not contain a transcript of the testimony or a statement under Rule 75 (m) which makes it impossible for us to determine if the findings of the justice below were clearly erroneous. There is only available to us the findings of the justice of the trial court and from a review of them we find no error.

The entry will be,

Appeal denied.

GENE RALPH VASHON
vs.
EDWARD J. QUIRION

Kennebec. Opinion, October 26, 1962.

Alienation of Affections. Evidence. Stipulations.

Parole evidence is not admissible for purpose of contradicting a stipulation.

ON APPEAL.

The court held that where stipulation of parties stipulated that there was on deposit in certain bank in name of defendant $2,250 less $140 owed by the defendant to the bank, and that deposit had been attached by plaintiff, trial court properly refused to permit defendant's wife to testify that she was equitably entitled to portion of deposit because she and defendant worked and pooled their earnings and deposited them in bank. Appeal denied.

William P. Niehoff, for the Plaintiff.

Burton G. Shiro, for the Defendant.

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

SIDDALL, J. On appeal. This is a complaint for alienation of the affections of plaintiff's wife. The complaint alleges criminal conversation. After trial, the jury returned a verdict for the plaintiff for Two Thousand Dollars.

At the trial of the case the parties made the following stipulation:

> "It is stipulated that there is on deposit in the Waterville Savings Bank in the name of Edward J. Quirion the amount of Two Thousand Two Hundred and Fifty (2,250) Dollars, less One Hundred and Forty (140) Dollars which he owes to the

> bank, which amount has been attached by the plaintiff in this action."

During the course of the trial the defendant sought by the testimony of his wife to show that she was equitably entitled to a portion of the bank account. He made an offer of proof in the form of testimony by his wife in the absence of the jury that during the greater part of their married life the defendant and his wife both worked and pooled their earnings and that their savings were deposited in the bank account in the name of the husband. The testimony was excluded by the court. The defendant on appeal claims that the court erred in not admitting such testimony.

The stipulation between the parties was obviously made for the purpose of showing the financial condition of the defendant in the event that punitive damages were awarded. The only qualification in the stipulation was that the defendant owed the bank One Hundred Forty Dollars of the account. No reference was made to any claim of the defendant that there was any other claimant to any part of the account. The court was justified in interpreting the stipulation as signifying that the defendant was the owner of the bank account, less the amount owed to the bank. Under this stipulation we are not concerned with any equitable claims of third parties against the bank account. These rights, if any, may be adjudicated by proper proceedings between the attaching plaintiff and claimants to the fund.

The court was correct in his ruling that the testimony offered was not admissible.

There is another reason why the defendant cannot prevail in this appeal. He has not shown that he is aggrieved by the court's ruling. The issues of actual and punitive damages were not separately submitted to the jury. We must assume that no request was made by the defendant for such a specification. The record before us does not contain

a full transcript of the testimony in the case, and we cannot assume that a verdict of Two Thousand Dollars included more than compensatory damages.

The entry will be

Appeal denied.

CHARLES M. MCCARTY
vs.
GREENLAWN CEMETERY ASSN.

MAYNARD A. ELLIS AND GLADYS E. ELLIS

Waldo. Opinion, October 29, 1962.

Real Estate. Lien Claims. Statutory Law. Taxation.

When a statute imposing or enforcing a tax or other burden on the citizen, even in behalf of the state, is fairly susceptible of more than one interpretation; the court will incline to the interpretation most favorable to the citizen.

The Legislature of Maine is vested with the full power of taxation and that power is measured not by grant, but by limitation.

Each parcel of land should be exclusively holden for the tax with which it is charged.

Where separate and distinct real estate belong to the same owner, they are to be considered as distinct subjects of taxation, and must be separately valued and assessed; each estate is subject to a lien for the payment of that portion only of the owner's tax which shall be assessed upon such particular estate.

ON REPORT.

This is a complaint to remove a cloud upon title to real estate. Judgment for the Plaintiff.

David A. Nichols, for the Plaintiff.

Niehoff & Niehoff, for the Defendant.

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

SULLIVAN, J. Plaintiff filed his complaint [to remove a cloud upon title to real estate] in Swanville, Maine. R. S., c. 172, §§ 52, 54, as amended. Defendants have answered and the case is before this court upon report.

Plaintiff on June 21, 1955 had been granted a mortgage upon the premises in controversy by the record owner, Maple Terrace Farms, Inc. Waldo County Registry of Deeds, Book 527, Page 486. Plaintiff foreclosed that mortgage by a publication process devised to acquire title for him in default of a redemption upon the expiration date, May 7, 1959. Waldo Registry, Book 565, Page 171; R. S., c. 177, §§ 5, 7.

On July 3, 1956 Maple Terrace Farms, Inc. purported to convey a 5 acre parcel of the mortgaged real estate to Maine School Building Authority but the record in this case yields no evidence of any release by the plaintiff - mortgagee. Waldo Registry, Book 535, Page 246. The report of the pretrial conference and order, however, informs us that the 5 acre lot has been eliminated by the parties from the issues here.

Real estate taxes assessed against the property in litigation for the tax year 1957 were committed for collection on April 22, 1957 and have never been paid. Seasonably the Tax Collector on May 9, 1958 commenced forfeiture process by tax mortgage liens. R. S., c. 91-A, § 88 ff. The statutory period for redemption of such self foreclosing, priority mortgage terminated on November 9, 1959. The municipality of Swanville thereafter, on February 10, 1960 conveyed all its title to a portion of the controverted real estate to Green Lawn Cemetery Association and on March 4, 1960 quitclaimed the rest of that property to Maynard A. and

Gladys E. Ellis. Waldo Registry, Book 575, Page 329; Book 576, Pages 1, 8.

The issue formulated by consensus of these litigants is as follows:

> "If the tax liens (for 1957 taxes) are valid, judgment is to be entered for the defendants; if invalid, and subject to amendment, the defendants reserve the right to amend in accordance with the law and facts. If the tax liens (for 1957 taxes) are invalid and their invalidity cannot be corrected by amendment, then judgment is to be entered for the plaintiff."

The Valuation Book of the Swanville assessors for the tax year 1957 contains this entry:

> "Description - - - - As recorded at this (Waldo) County Registry of Deeds — Land bounded (Book) 469/ (Page) 205.

No. of Lot	No. of Acres	Value of Land	Value of Bldgs.
H			$600
B			500
B			300
Sh	94	700	100
	100	400	

Total Value of real estate — $2,600

Robinson, Doris J. and/or Maple Terrace Farms, Inc."

It is to be noted that 2 distinct units of real estate had been thus assessed — one composed of 94 acres of land valued at $700 with buildings thereon individually appraised to an aggregate amount of $1,500 — the other consisting of 100 acres of land valued at $400. The assessors had obviously estimated and recorded

> "- - - separately the land value, exclusive of buildings, of each parcel of real estate." R. S., c. 91-A, § 36; P. L., 1955, c. 399, § 1.

The testimony in this case verifies the existence of 2 par-

cels of real estate. Witnesses stated that there were 2 divisions of the property set apart from each other by a county road known as Route 141 and that all of the buildings were located upon but one of those property divisions.

For a description of the real estate assessed the foregoing assessment record makes reference to the deed from Archie Philo to Doris Joan Robinson, dated October 15, 1948 and recorded in Waldo Registry in Book 469 at Page 205. The Philo deed is in the chain of title prior in time to the deed from Doris Joan Robinson to Maple Terrace Farms, Inc. Waldo Registry, Book 497, Page 142, *supra.* The Philo grant conveyed 4 parcels of property and included in its disposition more real estate than is described in the Robinson-Maple Terrace Farms, Inc. instrument. The assessors made no effort to allocate any of the 4 parcels of the Philo deed to either of the separately estimated land items and values of the assessment record.

On May 9, 1958 the Tax Collector filed in the Registry of Deeds 2 lien certificates against:

"Maple Terrace Farm, Inc. Doris Robinson
- - - - as owner"

One lien certificate was for an unpaid tax of $32.80 and claimed a lien upon the real estate described as:

"Land
Book 469 page 205 Waldo County
Registry of Deeds"

The other lien certificate was for an unpaid tax of $181.40 and claimed a lien upon the real estate described as:

"Land and Buildings
Book 469 page 205 Waldo County
Registry of Deeds"

Manifestly the Tax Collector filed a lien against each of the 2 units of real estate which the assessors had separately

valued in their Valuation Book and through each lien attempted to effect forfeiture of all of the land described in the Philo to Robinson deed recorded in Waldo Registry in Book 469, Page 205. The second lien in addition sought to acquire title to the buildings on such land. In fine each lien certificate for the unpaid tax upon one of 2 physically detached and separately taxed portions of a gross property aspired and presumed to expropriate the gross property in its entirety. Were such technique of the Tax Collector permissive the taxpayer would be obligated to pay all taxes upon the gross property in order to redeem from forfeiture either one of the individually taxed units.

In derogation of the mandate in R. S., c. 91-A, § 88 neither lien certificate contained a description of the real estate on which the respective tax had been assessed.

Notwithstanding the presumption of validity conferred upon tax mortgage liens by R. S., c. 91-A, § 93, in assaying established defenses to such liens the court must apply to such forfeiture process:

> "- - - - that strict construction which well established rules of law require to be put upon statutes affecting the property of the citizen, and by which it may be taken from him, as by taxation - - - -"
> *Carlton* v. *Newman,* 77 Me. 408, 417.

> "The principle that strict compliance with statutory requirements is necessary to divest property owners of their titles for non-payment of taxes has become firmly established by a long line of decisions running back to one rendered by our first Chief Justice at the beginning of our statehood, Porter v. Whitney, 1 Me., 306. - - - -"
> *Warren* v. *Norwood,* 138 Me. 180, 183.

> "It is a familiar principle that when a Statute imposing or enforcing a tax or other burden on the citizen even in behalf of the State is fairly susceptible of more than one interpretation, the court

> will incline to the interpretation most favorable to the citizen - - - - If the statute imposes a penalty it is, to that extent, a penal statute to be construed strictly against the party claiming the penalty - - - If a statute is penal even though it is also remedial it must be strictly construed - - - -; and a statute providing for the total forfeiture of property for the non-payment of one tax is certainly highly penal. On the other hand, statutes enacted to relieve the citizen from a forfeiture incurred should be construed liberally - - - - "
> *Millett* v. *Mullen,* 95 Me. 400, 415.

The Legislature of Maine is vested with the full power of taxation and that power is measured:

> " - - - - not by grant but by limitation."
>
> Opinion of Justices, 123 Me. 573. *Portland Terminal Co.* v. *Hinds,* 141 Me. 68, 72.

R. S., c. 91-A, § 36 commands assessors to estimate and record separately the land value, exclusive of buildings, of each parcel of real estate.

In *Wallingford* v. *Fiske,* 24 Me. 386, 390 this court said:

> " - - - - The legislature were careful, that, so far as it could be done, each parcel of land should be exclusively holden for the tax with which it was charged; that no unnecessary inconvenience should arise from advertising and selling in gross different parcels of estate in which different interests might exist; that on a redemption of the title conveyed upon such a sale, each individual might obtain his own land by the payment of the tax thereon, and the expense arising from the sale, thereby avoiding the disputes which would grow out of claims for contribution, where one tract was burdened with the taxes upon itself and others also. In *Hayden* v. *Foster,* 13 Pick. 492, it was decided that where separate and distinct real estates belong to the same owner, they are to be considered as distinct subjects of taxation, and must be sep-

> arately valued and assessed, and each estate is subject to a lien for the payment of that portion only of the owner's tax which shall be assessed upon such particular estate."

This court in *Nason* v. *Ricker*, 63 Me. 381, 382 in adjudging a tax sale deed to be invalid used language quite applicable here:

> "The valuation and assessment were made upon two separate lots in gross. Each of those lots was a distinct subject of taxation, and liable to a lien for the payment of that portion of the owner's tax only which should be assessed upon that particular estate. The owner had a right to redeem each of those lots by paying the taxes specifically assessed thereon, without being obliged to pay the tax assessed upon the other lot also, which constituted no lien upon the lot he might wish to redeem. The assessment and valuation of both lots in gross, if upheld, would deprive the owner of this right by compelling him to pay the taxes assessed upon both lots, or forfeit his right to relieve either from the lien imposed by the tax upon it. - - - -"

The use by the assessors of the gross description contained in the Philo-Robinson deed, *supra,* in conjunction with both of the separate valuations of the 2 parcels of real estate made valid tax liens impossible of attainment in the present case. Nor is an amendment possible under the provisions of R. S., c. 91-A, § 95 for the errors and defects in the liens here are not circumstantial but essential.

> "- - - - The collector must obtain his information from the assessment. He has no authority to add to or take from it; nor can the assessors, after the completion of the tax, add to the description so as to make that certain which was before uncertain. The assessment must be complete in and of itself as much as a deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in

> the buts or bounds. These must be ascertained from what is written and from that alone. - - - - " *Greene* v. *Lunt,* 58 Me. 518, 533.

Both attempted tax mortgage liens for the tax year 1957 are invalid. Because of that conclusion there remains no necessity for our considering the other objections by the plaintiff to the tax forfeiture process as it was exercised in this case.

In conformity with the stipulation of the parties litigant and in accordance with the provisions of R. S., c. 172, § 54, as amended, a decree shall be entered declaring, in so far as the parties of record in this case are concerned, the validity, as of the date of the institution of this cause, of the title in fee simple of this plaintiff, Charles M. McCarty, in and to the real estate as it was described in the mortgage, since foreclosed, of Maple Terrace Farms, Inc., to the same Charles M. McCarty, dated June 21, A. D. 1955 and recorded in Waldo County Registry of Deeds in Book 527 at Page 486, with the exception of the real estate described in the deed of Maple Terrace Farms, Inc., to Maine School Building Authority, dated July 3, A. D. 1956 and recorded in the same Registry of Deeds in Book 535 at Page 246.

The mandate shall be:

Judgment for the Plaintiff in accordance with this opinion.

LUCERNE-IN-MAINE VILLAGE CORP.

vs.

RUTH BENNOCH

Hancock. Opinion, October 30, 1962.

Towns. Tax Collector's Compensation.

Town tax collector, as collector of village appropriation taxes, is entitled to percentage in fact received as collector of town taxes, rather than higher rate of compensation resulting from determination based purely on votes of town.

When town votes to furnish tax collector with any expenses of collection, in addition to compensation, the collector is entitled to receive similar expenses from village corporation embraced in town.

ON APPEAL.

This is a complaint by Lucerne-in-Maine Corporation against the tax collector of the town of Dedham for a declaratory judgment interpreting and construing the statute relating to the compensation of the defendant, and to determine the amount improperly withheld by her. The court held that tax collector of village corporation is entitled to the same compensation as collector of town taxes. Appeal denied.

Everett W. Gray,
Frank G. Fellows, for Plaintiff.

Herbert T. Silsby, II, for Defendant.

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

WILLIAMSON, C. J. This is a complaint by Lucerne-in-Maine Village Corporation against the collector of taxes of the town of Dedham for a declaratory judgment interpreting and construing the statute relating to the compensation of the defendant and to determine the amount, if any, im-

properly withheld by her. Lucerne-in-Maine is a village corporation incorporated in 1927 and comprises a portion of the town of Dedham.

Under the charter the collector of taxes of the town of Dedham collects the taxes of the plaintiff village corporation. The charter reads, insofar as is pertinent, as follows:

> "The town of Dedham shall have the same powers relative to the collection of taxes within said corporation's limits as it has in the collection of town taxes, and said collector shall have the same rights and powers to collect and recover any taxes committed to him under the provisions of this act by suit or otherwise that he has for the collection of town taxes committed to him and the town of Dedham shall have the same right to recover and collect town taxes assessed therein. The collector of the town of Dedham shall be entitled to receive the same percentage for the collection of taxes assessed under this section and the same fees in connection with the collection thereof which he receives for the collection of the town taxes; which percentage and fees shall be deducted from and paid out of the tax collected under this section."
> Private and Special Laws 1927, c. 43, § 11.

The statutes in effect in 1927 were:

R. S., 1916, Chap. 11, §§ 11, 12.

> "**Sec. 11. Compensation of collectors.** When towns choose collectors, they may agree what sum shall be allowed for performance of their duties."

> "**Sec. 12. Fees of collector.** In case of distress or commitment for non-payment of taxes, the officer shall have the same fees which sheriffs have for levying executions, . . ."

The statute on compensation applicable to the years here in controversy reads in part:

> "**Sec. 61. Collector's compensation.** When municipalities choose tax collectors, they may agree

> what sum shall be allowed for performance of their duties. Provided, however, that if the basis of compensation agreed upon is a percentage of tax collections, such percentage shall be computed only upon the cash collections of taxes committed to him." R. S., 1954, c. 91-A.

There has been no change of significance for our purposes in Section 12, *supra*. See R. S., 1954, c. 91-A, § 100.

What is the proper method of computing the defendant's compensation for the collection of village corporation taxes? The defendant contends she is entitled to compensation in accordance with votes of the town of Dedham as follows:

1959 — 2½% but not to exceed $1,000;

1960 — 2½% plus $200 but not to exceed $900;

1961 — $200 plus 2½% but not to exceed $900.

The percentage is computed upon the cash collections.

On its part the plaintiff argues that the defendant as collector of the village corporation taxes is entitled to the percentage *in fact* received by her as collector of the town taxes.

The presiding justice correctly accepted the construction placed upon the charter by the village corporation.

In the table below we show the application of the theories to undisputed facts. The figures are approximate.

Town taxes

					Compensation Ceiling	% in fact
		Rate %	Plus	Total		
1959 —	$51,600	2½	—	$1,290	$1,000	1.94
1960 —	52,700	2½	$200	1,520	900	1.709
1961 —	59,200	2½	200	1,680	900	1.521

Village Corporation taxes

	Defendant's theory					Plaintiff's theory	
		Rate %	Plus	Compensation	% in fact	%	Compensation
1959 —	$5,600	2½		$140.88	2.5	1.94	$109.32
1960 —	9,200	2½	$200	430.02	4.65	1.709	157.24
1961 —	8,600	2½	200	414.29	4.7	1.521	129.38
				$985.19			$395.94
				—395.94			
	Difference			$589.25	($589.27	in judgment for plaintiff)	

The $200 fixed sums in the 1960 - 1961 votes were not, as contended by the town, "fees" under the statute, but were part of the compensation of the collector. "Fees" in the sense used are the statutory fees of the type noted in the statutes, *supra*. It is of interest to note that on the collector's theory her compensation for 1960 and 1961 was substantially less than 2% of the town taxes and over 4.5% of the village corporation taxes. Obviously the "ceiling" established by the town was designed to reduce sharply the compensation measured by the town taxes. It could not, in any reasonable view, be of the slightest assistance to the village corporation.

The Legislature did not intend that the voters of Dedham could impose a higher rate of compensation for collection of taxes in the village corporation than in the town. This, however, would clearly result from acceptance of the collector's theory.

The percentage of the village corporation tax to which the tax collector is entitled must await final settlement of collections in the town. This problem, in our view, is of little weight and may readily be solved.

In each of the years we note the town voted that the "postage and supplies" of the collector should be paid by the town. We are in accord with the views expressed by the presiding justice in entering judgment to the effect that when the town votes to furnish the collector with any expenses of collection, such as necessary postage and supplies, in addition to the compensation stated, the collector is entitled to receive his similar expenses from the village corporation.

The entry will be

Appeal denied.

HENRY PEAVY, ET AL.
vs.
CHESTER R. NICKERSON, ET AL.

Waldo. Opinion, November 8, 1962.

Due Process. Legislative Intent. Property.
School Districts.

The Legislature has authority to create school administrative districts directly by its own act without the intervening services of an administrative body.

The intention of the Legislature is plain and certain, that the certificate of organization issued by the School District Commission shall be conclusive evidence of its lawful organization.

The interest of the tax paying inhabitants in the creation of a school district is not a property interest.

ON APPEAL.

The plaintiffs appeal the decision of a lower court which ruled in favor of the school administrative district in an action to enjoin the school district from borrowing money

upon the credit of the district in the theory that the district had been illegally constituted. The Supreme Court held that failure of the school district commission to have the required notice and hearing prior to issuance of the certificate of organization for school administrative district was cured by special legislative act constituting the district and validating its existence. Appeal denied.

Judson A. Jude, for the Plaintiffs.

George A. Wathen, for the Defendants.

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

SULLIVAN, J. The plaintiffs are 14 taxable inhabitants of School Administrative District No. 3 which has 11 constituent towns. The defendants are the directors of such district. The allegations, grievance and quest for relief of the plaintiffs are recited in their complaint as follows:

> "3. Pursuant to the provisions of Section 111-F (IV) of Chapter 41, of the Revised Statutes of Maine, 1954, as amended, the School District Commission of the State of Maine on July 31, 1958, ordered the Municipal Officers of nine towns in the said County of Waldo to call town meetings to consider several articles or questions incident to the organization of a school administrative district.
>
> 4. Notwithstanding that Section 111-G of the said Chapter 41 authorized the said School District Commission to issue a certificate of organization for a school administrative district only if the Commission found
>
> (a) that at each town meeting a majority of the residents voting on each of the articles or questions had voted in the affirmative and
>
> (b) that all other steps in the formation of the proposed school administrative district were in order and in conformity with law, nevertheless on August 15, 1958, the said School District Commis-

sion summarily made its findings and issued a certificate of organization for School Administrative District No. 3, embracing the said nine towns, without notice and without hearing as were required in such an adjudicative process by the Fourteenth Amendment to the Constitution of the United States.

5. Subsequently, on March 5, 1959, the said School District Commission issued a new certificate of organization for the purported School Administrative District No. 3, superseding the original certificate and adding two more towns to the original nine towns; this action likewise being taken without the required notice and without the required hearing.

6. Without authority of law the said Defendants have been using and exercising the rights and powers of school directors, and they are now undertaking to borrow the sum of seven hundred and thirty thousand dollars ($730,000) upon the credit of the putative School Administrative District No. 3 and the eleven towns which it purportedly embraces.

WHEREFORE the Plaintiffs demand that the said Defendants be permanently enjoined from using and exercising the rights and powers of school directors and from borrowing the said sum of seven hundred and thirty thousand dollars ($730,000), or any portion thereof, upon the credit of the putative School Administrative District No. 3 and the eleven towns which it purportedly embraces."

Defendants by their answer admit the facts recited by the plaintiffs in their complaint but deny that the 14th Amendment to the United States Constitution necessitated notice and hearing on the part of the School District Commission as a prelude to issuance by that commission of a certificate of organization to School Administrative District No. 3. Defendants negate that the directors of such District have acted or are functioning without competent authority and

interpose additional defenses of *res adjudicata* and of estoppel by judgment. Defendants invoke the curative provisions of P. & S., 1959, c. 221.

The case was heard by a Justice of the Superior Court who decided in favor of the defendants. The justice amongst other holdings ruled that there had been no lack of due process as plaintiffs contend, that P. & S., 1959, c. 221 had validated School Administrative District No. 3 as of March 5, 1959 and that plaintiffs' arguments to disprove the legitimacy of School District No. 3 had been repudiated by this court in fully considered precedents of relatively recent rendition. Plaintiffs have appealed from the decision of the justice and protest as error the three rulings just enumerated. Plaintiffs included other points on appeal but if the justice was correct as to the foregoing three, plaintiffs obviously cannot prevail here.

The issuance of the certificate of organization to School Administrative District No. 3 by the School District Commission was:

> "- - - - conclusive evidence of the lawful organization of the School Administrative District."
> P. L., 1957, c. 443, § 2, Sec. 111-G.

In *McGary* v. *Barrows* (1960), 156 Me. 250 this court stated its maturely considered conclusions which are controlling here. We quote:

> @ 259 "The power of the Legislature to create quasi-municipal corporations for educational purposes separate and distinct from municipalities is not questioned. Kelley v. School District, 134 Me. 414, 187 A. 703; Knapp v. Swift River School District, 152 Me. 350, 129 A. (2nd) 790; North Yarmouth v. Skillings, 45 Me. 133; 78 C. J. S., Schools and School Districts § 27; 47 Am. Jur., Schools § 12 et seq.

@ 262 The Legislature, as we have indicated, has the authority to create School Administrative Districts directly by its own act without the intervening services of an administrative body. There is no requirement under the Constitution of Maine for the submission of the question of formation of a School Administrative District to popular vote in the municipalities within the proposed District. There is no constitutional obligation to give this measure of home rule to the people of the communities involved.

@ 263 The remaining objection to Sec. 111-G relates to the conclusive effect of the certificate of organization. Here again we see no objection under the constitution to the action of the Legislature in making such a certificate conclusive evidence of the fact of incorporation.

We have seen that the Legislature could have created this or any other School Administrative District by special act. Here the Legislature gives to the School District Commission (and later to the State Board of Education) the authority to speak finally for the State without right of appeal on the question of the organization of each School Administrative District. It is the issuance of the certificate that completes the organization of a School Administrative District.

@ 264 The purpose of such provision is plain. It is to make clear and certain to all who may deal with School Administrative Districts that there are no hidden difficulties in the organization and that all may consider that the necessary statutory steps have been duly and properly taken.

@ 265 The intention of the Legislature is plain and certain, that the certificate of organization issued by the School District Commission

shall be conclusive evidence of its lawful organization.

The question before us is whether the Legislature has exceeded its constitutional powers and this we find was not the case. We hold, therefore, there are no constitutional objections to the exercise by the School District Commission of the powers set forth in Sec. 111-G, and further, that the lawful organization of School Administrative District No. 9 is conclusively evidenced by the certificate of the School District Commission issued under Sec. 111-G.

Third issue: Sec. 111-G does not in our opinion violate 'due process.' '- - - nor shall any State deprive any person of life, liberty, or property, without due process of law; - - -' Fourteenth Amendment, U. S. Constitution.

@ 266 The interest of the taxpaying inhabitants in the creation of a school district is not a property interest - - - -

@ 267 Having no property interests at stake in the creation of the District, the plaintiffs cannot be said to have suffered a deprivation of property through the organization procedures under Sec. 111-G. See Baxter v. Waterville Sewerage District, supra (146 Me. 211, 79A. (2nd) 585); North Yarmouth v. Skillings, supra (45 Me. 133)."

The Legislature by P. & S. Laws of 1959, c. 221, effective April 29, 1960, enacted a validating law declaring that the 11 municipalities comprising School Administrative District No. 3:

"- - - - are hereby constituted to be and to have been since March 5, 1959 a School Administrative District, known as School Administrative District No. 3, with all of the powers, privileges and franchises granted to School Administrative Districts - - - -"

That law also confirmed in their office the school directors, past and incumbent, of such Administrative District No. 3 and validated all of their past official proceedings of record and their consequential actions personal and vicarious.

In *Elwell* v. *Elwell* (1960), 156 Me. 503, plaintiffs other than those of the instant case litigated the same issue as to whether this, very controverted certificate of organization of School Administrative District No. 3 is lawful. Those earlier plaintiffs likewise contended that such certificate of organization had been issued illicitly, without notice or hearing. This court affirmed the reasoning and decision of *McGary* v. *Barrows, supra,* as convincing and authoritative.

Finally, in *Blackstone* v. *Rollins* (1961), 157 Me. 85, 91, it was said:

> "This court decided in the very recent case of *McGary v. Barrows,* 156 Me. 250, 163A (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, 167A (2nd) 18.
>
> -
>
> 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 organ-

ization issued by the Maine School District Commission."

In the case at bar no authority has been cited or theory advanced, nor have we independently discovered such, to unsettle us in the reasoned convictions which this court has unanimously expressed in its three recent decisions reviewed above.

The mandate shall be:

Appeal denied.

RAYMOND E. SMITH

vs.

DONALD DRINKWATER

Penobscot. Opinion, November 13, 1962.

Contributory Negligence. Due Care. Ordinary Care. Foreseeability. Proximate Cause.

Ordinary care depends on circumstances of each case; where the risk is great, the person must be especially cautious.

A person whose attention has been directed to what he knows to be dangerous or believes to be dangerous, has a duty to look and to see that which was readily apparent and to take reasonable precautions for his own safety.

One is bound to see that which an ordinary and reasonably prudent person would see under the same or similar circumstances.

ON APPEAL.

The plaintiff appeals an adverse judgment for injuries sustained by him while unloading logs from a truck. The court held that even if defendant was guilty of negligence which was the cause of injuries sustained by truck driver

while unloading logs, truck driver was contributorially negligent when he was admittedly aware of possible danger. Appeal denied.

Abraham J. Stern,
John Evans Harrington, for the Plaintiff.

John A. Platz, for the Defendant.

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

WEBBER, J. This was an appeal by plaintiff from a judgment ordered by the court below for the defendant notwithstanding a verdict for the plaintiff. The plaintiff was the only witness on the issue of liability so that his testimony constitutes the evidence most favorable to him and the facts are not in dispute.

The plaintiff was employed by one Thayer and was engaged in the loading and transportation of logs. The defendant was the owner of a truck being used for the purpose and was also participating with Thayer and the plaintiff in the loading operation. The defendant operated a crane attached to the vehicle which lifted the logs from the ground to the truck. The plaintiff and Thayer did the work of attaching the hoist chains to the logs and assisting in placing the logs on the truck and releasing the hoist chains. There were fifteen logs involved, the size of which is not disclosed by the record. They were loaded in the form of a pyramid with five on the bottom tier and one at the top. After the top log was dropped into place by the crane, the boom of the crane as it swung sideways knocked the log askew with one end outside the groove formed by the two logs comprising the next to the top tier. The plaintiff called the defendant's attention to the position which the log had assumed and the defendant replied that they "would put some bind chains around it and let it go and watch it." The plaintiff

made no further comment, suggestion or objection to the defendant or to his employer, Thayer. The plaintiff worked on the top of the load and at times on the top log itself but it did not move or change position. Three binding chains were passed over the top of the load and made fast. Plaintiff then left with the load and drove approximately 130 miles to the mill. Neither the defendant nor Thayer accompanied him. From time to time during the trip the plaintiff checked his load but he arrived at his destination without incident, the top log still remaining in the exact position in which it had been loaded. Upon arrival the load was scaled by a third party and the plaintiff then began his preparations for unloading. He released all three binding chains and pulled two of them off the load. When he started to remove the third chain he was at the side of the truck just back of the cab. He relates that as he pulled the third chain clear he was looking at the top log, the position of which he considered to be dangerous. He testified that he kept his attention fixed on the log as he started to pull the chain over but he did not see it move. The log fell rapidly over the side of the truck striking the plaintiff and inflicting very severe injuries to his person.

It is apparent from the record that the defendant and the plaintiff did not stand in the relationship of employer and employee. The complaint recites and the evidence clearly shows that plaintiff was employed only by Thayer. The plaintiff made no effort to prove the interest of the defendant in the loading and hauling operation. As above stated, the defendant did own the truck and he did participate in the loading. Whether he furnished the truck and his own services to Thayer for hire or was a gratuitous bailor and helper or was a fellow servant employed by Thayer does not appear and we cannot conjecture. The applicable law must therefore be applied as though plaintiff and defendant were strangers in this transaction. Cases based upon the duty of an employer to his employee have no application here. We

note, however, that even if evidence had been introduced tending to prove an employment relationship between the parties, the plaintiff would still have been barred from recovery. *Blacker* v. *Oxford Paper Co.*, 127 Me. 228, 231; *Millett* v. *Railroad Company*, 128 Me. 314; *Merrill* v. *Wallingford*, 154 Me. 345, 350. The limitations upon the exercise by the plaintiff of a free and voluntary choice which based the decision in *Reid* v. *Steamship Co.*, 112 Me. 34, were not present in the instant case.

We express some doubt as to whether any negligence of the defendant was the proximate cause of the plaintiff's injury. We have had occasion to consider the element of *legal foreseeability* in negligence cases. *Hatch* v. *Globe Laundry Co.*, 132 Me. 379; *Hersum, Admr.* v. *Kennebec Water District*, 151 Me. 256. Assuming some negligence on the part of the defendant initially in leaving the top log askew on the load, was it legally foreseeable that that log, after riding over the highway for many miles and arriving at its destination apparently secure and unmoved from its original position, would during the unloading process conducted by a skilled and experienced person fall and cause injury to anyone? If a person having experience in the loading and hauling of logs, in the exercise of ordinary care, would reasonably and properly conclude at the destination point that this log was sufficiently well lodged and supported so as to be in no apparent danger of falling from the load, then its actual fall was not a foreseeable consequence of the loading error and the defendant's negligence was not a proximate cause of the accident as a matter of law. We note that the plaintiff testified that he felt that if the log had traveled 130 miles and he had pulled the other two chains over, it was safe enough to pull the third one. He also disclosed that he was a person experienced in the loading and trucking of logs. We pass this question, however, because the issue of the plaintiff's contributory negligence is determinative in this case.

Assuming without deciding that defendant's negligence was a proximate cause of the injury, the plaintiff was clearly at least as much at fault as the defendant. Plaintiff was admittedly aware of a possible danger or hazard arising from the position of the top log, the very danger upon which he rests his case against the defendant. The plaintiff's duty to exercise due care for his own safety was discharged only if his care and caution were commensurate with the risk and hazard confronting him. Where the risk is great, the person must be especially cautious. Ordinary care depends on the circumstances of each case. *Albison, et al.* v. *Robbins & White,* 151 Me. 114, 122. The plaintiff participated in the loading operation working on top of the load. He stood upon the top log after it was laid in place. As already noted, he was experienced in the loading and trucking of logs. Although he called the defendant's attention to the fact that the top log was somewhat askew, he made no demand that the log be moved. He made no complaint to his own employer but proceeded with the work of securing the load without further comment or suggestion. When he arrived at his destination he noted that the log had not changed position during the long trip. Nevertheless he says that he was "beware" or "scared" of it and felt that it presented a danger. There were men working in the yard at the destination point but he made no request for assistance in unloading. A scaler arrived and estimated the quantity in the load but the plaintiff made no request to him for any aid or help. He voiced no objection to proceeding alone to begin the unloading process. Although the destination was a lumber mill where loads of lumber were undoubtedly frequently delivered and where tools and devices useful in handling logs are ordinarily available, the plaintiff made no effort whatever to secure or make use of any such tools or devices which might serve to prevent the top log from moving after it was released from the binding chains. The plaintiff's own explanation of what he did do is unsatisfactory and in

fact conclusive as to his own lack of due care for his own safety. As he pulled the last chain over the load, he says he kept his eyes fixed on the top log as a possible source of danger. Yet he cannot say when or why it started to move or what course it took as it came toward him. We think it fair to infer that these logs were of substantial weight and size in view of the fact that only fifteen logs comprised the load, that they were stacked in pyramid form, and that the fall of only one log was the cause of such serious injury to the body of the plaintiff indicative of great force and violence. It is incredible that a log of such size resting in a state of immobility poised on the top of the load could start to move and instantaneously gather such speed that a person looking at it could not follow its movement with his eye or take any action for his own safety. In this respect the plaintiff was in no different case than the operator of a motor vehicle, of whom it has been so often said that one must look and be vigilant to apprehend the dangers of the highway. But mere looking will not suffice. One is bound to see that which an ordinary and reasonably prudent person would see under the same or similar circumstances. So this plaintiff with his attention directed to what he knew or believed to be a point of danger had a duty to look and to see that which was readily apparent and to take reasonable precautions for his own safety. *Morrissette* v. *Cyr,* 154 Me. 388; *Gregware* v. *Poliquin,* 135 Me. 139, 143; *White* v. *Schofield,* 153 Me. 79, 87. It is obvious upon this record that the plaintiff failed to take any action whatsoever to assure his own safety either before or at the moment the log fell, and the price of his failure was grievous injury to himself. The defendant was not an insurer of the safety of the plaintiff and on no other theory could he be made to respond to the plaintiff in damages. The justice below could do no other than to order judgment for the defendant.

Appeal denied.

HASCO MANUFACTURING CO.

vs.

MAINE EMPLOYMENT SECURITY COMMISSION

Cumberland. Opinion, November 15, 1962.

Taxation. Employment. Employment Security Law.

Burden rested upon manufacturer to establish that earnings of individuals who sold manufacturer's products on commission were exempt from contribution to unemployment compensation fund.

To establish exemption of earnings from contribution to unemployment compensation fund the three conditions specified by statute must be met and to satisfy only one or two of them leaves relationship, for purpose of act, one of employment. R. S., 1954, c. 29, § 3, Subd. 11, Par. E, Subpars. 1-3, Subd. 19.

Common law rules relating to master and servant do not govern meaning of statutes relating to exemptions from contributions to unemployment compensation fund.

Individuals who sell manufacturer's products to consumers subject to manufacturer's acceptance or rejection of order and who receive commissions, are employees of manufacturer whose earnings were subject to contribution to unemployment compensation fund.

"Control" as used in statute setting forth one of the conditions which must be met if the individual is to be considered an employee means general control, and right to control may be sufficient even though it is not exercised.

ON APPEAL.

This case arising under the Maine Employment Security Law, is before us on appeal from the decision sustaining on review the action of the Employment Security Commission. Appeal denied.

Walter E. Foss, Jr., for the Plaintiff.

Frank A. Farrington,

Milton L. Bradford, Asst. Attys. Gen. Employment Security Commission, for the Defendant.

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

WILLIAMSON, C. J. This case arising under the Maine Employment Security Law is before us on appeal from the decision of the Superior Court sustaining on review the action of the Employment Security Commission. R. S., c. 29, § 5, XIV. The issue is whether the services of certain individuals selling products of the appellant Hasco Manufacturing Company (for convenience herein called "Hasco") constituted "employment" under the statute. If so, the individuals were "employees," and not dealers or independent contractors as contended by Hasco, and their earnings were subject to contribution to the unemployment compensation fund.

Three points of appeal are designated; namely, that the decision is (1) against the law, (2) against the evidence, and (3) manifestly against the weight of the evidence. We are not concerned with points (2) and (3), which are applicable in the review of a jury verdict. In the instant case the findings of the court are "not to be set aside unless clearly erroneous." Maine Rules Civil Procedure, Rule 52 (a). Under point (1) we have before us the application of the statute properly construed to the facts found within the "clearly erroneous" test.

The pertinent provisions of the Employment Security Law (R. S., c. 29) are:

> "**Sec. 3, XIX.**
>
> " 'Wages' means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash."
>
> "**Sec. 3, XI, E,** (commonly known as the 'ABC' test.)
>
> "Services performed by an individual for remuner-

> ation shall be deemed to be employment subject to the provisions of this chapter unless and until it is shown to the satisfaction of the commission that:
>
> "1. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
>
> "2. Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> "3. Such individual is customarily engaged in an independently established trade, occupation, profession or business."

The burden rested upon Hasco to establish exemption by meeting the conditions in (1), (2), and (3) of paragraph E. It is well established that the *three conditions* must be met. To satisfy one or two, and not all three, leaves the relationship for purposes of the Act one of "employment." *Schomp, et al.* v. *Fuller Brush Co.*, 124 N. J. L. 487, 12 A. (2nd) 702; aff. 126 N. J. L. 368, 19 A. (2nd) 780; *Ross* v. *Cummins* (Ill.), 131 N. E. (2nd) 521; *State* v. *Stevens* (Vt.), 77 A. (2nd) 844.

The common law rules relating to master and servant do not govern the meaning of the statutes. As the Vermont Court said, in construing like provisions:

> "Unlike some of the unemployment statutes that may have been adopted in other states our statute contains no mention of the terms 'master,' 'servant' or 'independent contractor.' It is plain from its terms that the three concomitant conditions bring under the definition of 'employment' many relationships outside of the common law concepts of the relationship of master and servant."
>
> *State* v. *Stevens, supra,* at p. 847.

The findings of the presiding justice in the Superior Court set forth below are fully supported by evidence.

> "A fair appraisal of the contentions when reduced to a simple narrative reveals the appellant to be corporation engaged in the fabrication of aluminum products in the form of windows, doors, storm sash, combination windows and garages. At its headquarters in Westbrook, Maine the company maintains its general business office and a product display area; there, prospective customers may examine products and make contact with salesmen, directly or by reference from the company management or clerical employees; telephone service is maintained; also it is about these products that Hasco conducts its institutionalized advertising program.
>
> "The services of 'employees' as found by the 'Commission' are acquired by management upon the application of an individual desiring to sell Hasco products. No formal application for such service is made. No written contract for service is engaged in by the Company with a prospective seller of its merchandise; no formal training course is provided new salesmen, though the neophyte is given an opportunity for assistance in following 'a couple leads to give . . . the idea' . . . to 'show . . . how it is done, and you catch on in this manner.' When on his own, the salesman armed with sample kit, business cards, price list, contract of sale, (changed November 6, 1958) with or without leads he commences his canvass without limitations as to area, number of contact or minimum number of sales. A 'closing' achieved, the purchase order is presented to Hasco, here it may be accepted or rejected. If approved, cash is accepted therewith, or if financed, it is processed at a financial institution, providing credit security is sanctioned. When a 'sale' is paid for in cash or if financed successfully, salesman receives 'commission' inclusive of expenses accountable as the difference in Hasco price list, cost and contract sale order price. Installation and costs thereof borne by Hasco is pro-

> vided for in sales order, unless otherwise stated. Title to fixtures remains in Hasco on terms specified in 'Contract of Sale', or 'Purchase Order' form. A sales tax is paid by purchaser to appellant. Customer complaints are referred to salesman who serviced purchase. Fixtures improperly measured or rejected by purchaser are charged against commissions of salesman involved. For sale leads company 'floor space' is made available to salesmen based on volume of sales without charge. Hasco does not require activity reports of salesmen; nor does it sponsor regular sales meetings. Occasional sales contests are promoted by Hasco, with awards given to the most successful salesmen."

The contract of sale used until November 6, 1958, was headed 'Contract of Sale — Hasco Manufacturing Company" and called for signatures of the purchaser and the salesman and acceptance by Hasco. There was nothing whatsoever in the "contract of sale" to indicate that the "salesman" was a dealer or an independent contractor.

On November 6, 1958, Hasco replaced the "Contract of Sale — Hasco Manufacturing Company" with a form headed "Purchase Order" and directed to "you (meaning the individual whose status is in issue) or your assignee." The order requires the signatures of the purchaser and the dealer. The name "Hasco Manufacturing Company" does not appear thereon. In terms the purchaser orders windows of an unknown make from "you or your assignee." The presiding justice well said, "It (the purchase order) is adroitly drawn to suggest a different relation, but the difference is a semblance only." Indeed, it is no more than a subterfuge designed unsuccessfully to escape the "salesman" of the "contract of sale."

The facts so found fail to require as a matter of law an ultimate finding that the three conditions in Sec. 3, XI, were shown "to the satisfaction of the commission."

Control contemplated by the statute is general control and the right to control may be sufficient even though it is not exercised. *Ross* v. *Cummins, supra.* The court was not compelled blindly to accept the weight given to the facts by Hasco. Taken in their entirety with the reasonable inferences to be drawn therefrom, the facts justified a finding of control within the meaning of clause (1). It is not surprising that on the "contract of sale" the seller of Hasco's product bore the descriptive and revealing designation of "salesman."

Under clause (2), admittedly the services were within and not outside the usual course of business. Accordingly the first of the alternative conditions was not met. We need consider only whether the services were performed "outside of all the places of business of (Hasco)."

Of controlling significance, in our view, on this point was the availability of "floor space" or "floor time" to the salesman (or "dealer" in Hasco's words) at the Hasco showroom. The man on the "floor" was engaged in performing the services under examination. He was a Hasco salesman selling Hasco products at the Hasco place of business with obviously increased opportunities of acquiring "leads" to other sales.

The presiding justice in his opinion said, "Place of business extends to where sales are made." We are not prepared to accept a finding under the circumstances here disclosed that Hasco's place of business included, let us say, the customer's home where the individual whose status is in issue made a sale. It is unnecessary in light of the use and availability of use of the showroom that we determine whether Hasco had a place of business elsewhere.

Lastly, under clause (3) the evidence failed to establish that the individuals were "customarily engaged in an independently established trade, occupation, profession or busi-

ness." We do not have here the barber, the baker, the plumber, the doctor, the lawyer, or a man with an independent calling. To say that the individual selling Hasco products had a proprietary interest in an occupation or business to the extent that he could operate without hindrance from any source stretches the relationship between Hasco and the individual beyond recognition. See *Murphy* v. *Daumit,* 387 Ill. 406, 56 N. E. (2nd) 800.

As we pointed out earlier, we are dealing with "employment" under the statute and not master and servant, or of independent contractor at common law. In construing the Employment Security Law, we have in mind the broad objectives in the statement of policy as follows:

> "**Sec. 1. Statement of policy.** — Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which may fall upon the unemployed worker, his family and the entire community. The achievement of social security requires protection against this greatest hazard of our economic life."

The entry will be

Appeal denied.

SCHOOL ADMINISTRATIVE DISTRICT #3

vs.

MAINE SCHOOL DISTRICT COMMISSION

AND

WARREN G. HILL, J. WESLEY OLIVER,

MARK SHIBLES AND CLIFFORD ROSMOND

IN THEIR CAPACITY AS MEMBERS OF THE

MAINE SCHOOL DISTRICT COMMISSION.

Kennebec. Opinion, November 20, 1962.

School Administrative Districts. Declaratory Judgments. Ratification. Municipal Corporations. Contracts.

An *ultra vires* contract is a contract which is beyond the power of a municipal corporation to make, and such a contract cannot be ratified.

Directors, having the authority to start an action, may later ratify the previous unauthorized act in instituting the action.

Personal property of a quasi-municipal corporation may be taken to pay any debt due from the body corporate.

A person dealing with officers or agents of a municipality does so at his peril, it is his duty to determine whether or not the parties with whom he is contracting were authorized to make the contract.

A committee, which has been given authority to make a certain contract on behalf of a municipal corporation, may ratify such a contract when made by a minority of its members.

ON REPORT.

This is a complaint for declaratory relief reported to the Supreme Judicial Court, sitting as the law court, upon the complaint, answers, exhibits, and upon so much of the evidence adduced before the presiding justice as is legally admissible, for such final decision as the rights of the parties

require. Remanded to the justice below for a decree in accordance with this opinion.

George A. Wathen, for the Plaintiff.

Richard A. Foley, Asst. Atty. General,
(for the Commission)

Bartolo M. Siciliano (for the Intervenors)
for the Defendants.

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

SIDDALL, J. On report. This is a complaint for declaratory relief brought by School Administrative District #3, hereafter called the District, against the Maine School District Commission, hereafter called the Commission, and the members of said Commission. By agreement, Alfred Ellis and nine other taxable inhabitants of the town of Brooks, one of the towns constituting the District, and also the Inhabitants of the Town of Brooks, were permitted to intervene as parties defendant.

It was stipulated that the action is reported to the Supreme Judicial Court, sitting as the Law Court, upon the complaint, answers, exhibits, and upon so much of the evidence adduced before the presiding justice as is legally admissible, for such final decision as the rights of the parties require. The stipulated issues presented for decision are summarized as follows:

1. Did the District have authority to initiate a complaint for declaratory relief on the grounds set forth in the complaint, and can the act of instituting the action in this case be ratified by the directors of the District?

2. Is the note dated September 14, 1961, issued to Alonzo J. Harriman, Inc. by the District outstanding indebtedness for capital outlay purposes as defined in Sections 111-P and 237-H, Chapter 41, R. S., 1954, as amended?

3. Was the vote of the special town meeting held at Brooks on March 15, 1962, effective to initiate dissolution proceedings of said District?

The first question to be considered is whether the District had authority to institute a complaint for declaratory relief on the grounds set forth in the complaint. The defendants concede in argument that the District had the power to sue or to be sued. The Town of Brooks has intervened as a party defendant. Obviously there is a bona fide controversy over the question of whether the Town of Brooks can legally petition for dissolution of the District. This question depends upon whether at the time the proceedings were initiated to dissolve the District there was outstanding indebtedness of the District, defined in Sec. 111-P as bonds or notes for capital outlay purposes issued by the directors of the District pursuant to approval thereof in a district meeting of the District. The controversy is of sufficient moment to justify a determination thereof by this court. This proceeding will terminate the controversy and remove the uncertainty which now exists in regard to whether the Town of Brooks can legally initiate proceedings to dissolve the District. We believe that the Declaratory Judgment Act was designed to provide a suitable remedy in cases such as this. Apparently this action was instituted upon order of a committee of the directors of the District and by the secretary of the directors. It was stipulated that such action on the part of the committee and secretary has been ratified by the directors of the District. The directors, having authority to start this action, may later ratify the previous unauthorized act in instituting the action.

The next question is whether the note dated September 14, 1961 constitutes outstanding indebtedness for capital outlay purposes as defined in R. S., 1954, Chap. 41, Secs. 111-P and 237-H, as amended. The determination of this question involves two issues, (1) whether the employment

of the architect previous to the authorization by the Inhabitants of the District of a bond issue to finance the construction of the schoolhouse could be legally ratified by the directors, and if so, was it ratified, (2) whether parol evidence was admissible to show that the vote taken at the meeting of September 12, 1961 authorized the issuance of a note in anticipation of the sale of the bonds.

The applicable provisions of the statutes are as follows:

Sec. 111-K. "When an issue of capital outlay bonds or notes has been properly authorized, the board of school directors prior to the issuance of said bonds or notes may borrow in anticipation of their sale by issuing temporary notes and renewal notes, the total face amount of which does not exceed at any one time outstanding the authorized amount of the capital outlay bonds or notes."

This provision became effective Sept. 12, 1959.

Sec. 237-H. " 'Capital outlay purposes' as the term is used in this chapter shall mean . . . cost of architectural, engineering and other legal expenses, plans, specifications, estimates of costs, ... "

Sec. 111-P. "No such vote on a petition for dissolution shall be permitted while such school administrative district shall have outstanding indebtedness. Outstanding indebtedness is defined as bonds or notes for capital outlay purposes issued by the school directors pursuant to approval thereof in a district meeting of such school administrative district, ... "

Sec. 111-P became effective May 5, 1961.

It is here noted that by legislation effective on May 5, 1961, a participating municipality was authorized to peti-

tion for the dissolution of a district, but any dissolution was subject to the requirements of the above quoted provision contained in Sec. 111-P.

During the month of March 1961, the Inhabitants of the District authorized the issuance and sale of bonds and notes in the amount of $730,000.00 for capital outlay purposes to finance the construction and equipping of a combined primary and secondary school.

At a meeting of the directors of the District held on May 13, 1961, it was voted to issue a note to the architect, Alonzo J. Harriman, Inc. in the sum of $8,850.00 in anticipation of the sale of bonds. A note of the District, executed by its Treasurer and countersigned by the Chairman of the Board of Directors of the District was given in accordance with such vote. Subsequent to the date of this meeting the architect released its note, apparently to give one of the towns in the District an opportunity to initiate action to dissolve the District.

At a district meeting of the Inhabitants of the District a majority voted not to dissolve the District. Thereafter, on September 12, 1961, the directors of the District took the following vote: "It was moved (Mr. Couturier) and seconded (Mr. Keller) to issue a note to Mr. Alonzo Harriman for $8,850. This money is owed to him. Voted 8 for with 3 abstaining." A note was then given by the District signed by the Treasurer and countersigned by the Chairman of the Board of Directors. The note given was in the form of a note in anticipation of the bond issue and was made payable to Alonzo J. Harriman, Inc., on or before September 1, 1962.

At a special town meeting of the Town of Brooks held on March 15, 1962, the town voted to petition to dissolve the District.

The record discloses that the District was organized on

September 23, 1958. The directors of the District were elected on the same date. Over three years later, during the month of March, 1961, a bond issue to finance the construction of the school was authorized by the inhabitants of the District. Although the exact vote of the inhabitants of the District is not set forth in the record, no claim is made that the construction of the schoolhouse was authorized prior to March, 1961, and it is obvious that the inhabitants during that month voted to build the schoolhouse and at the same time authorized the bond issue to finance its construction. The architect was employed by the directors shortly after the organization of the District. Substantial services were performed by it prior to the month of March, 1961, and the bill rendered by it for which the note was given included services to May 5, 1961. The directors of the District had no authority to employ an architect prior to the vote of the District to authorize the bond issue. After that vote the directors undoubtedly, as a necessary incident to the construction of the schoolhouse, had authority to contract for architectural services to be performed. A question arises in regard to the authority of the directors to ratify an unauthorized contract, entered into on behalf of the District before the bond issue was authorized, for services performed before the authorization of the bond issue.

By virtue of R. S., Chap. 41, Sec. 111-K the District was declared to be a quasi-municipal corporation within the meaning of Chap. 90A, Sec. 23. This section provides that the personal property of the residents and the real estate within the boundaries of a quasi-municipal corporation may be taken to pay any debt due from the body corporate.

Our court has been zealous in protecting the rights of property owners from seizure for the debts of the municipality. On numerous occasions the rule has been stated that a person dealing with officers or agents of a municipality does so at his peril, and that it is his duty to determine

whether the parties with whom he is contracting were authorized to make the contract. *Michaud* v. *St. Francis,* 127 Me. 255, 259; *Stewart* v. *York,* 117 Me. 385, 387; *Van Buren Light and Power Co.* v. *Inhabitants of Van Buren,* 116 Me. 119, 124; *Morse* v. *Inhabitants of Montville,* 115 Me. 454, 457.

The term *"ultra vires"* has been given many different meanings. Strictly speaking an *ultra vires* contract is a contract which is beyond the power of a municipal corporation to make. Such a contract cannot be ratified. *Portland Tractor Co.* v. *Inhabitants of Anson,* 134 Me. 329, 332; *Williams* v. *Inhabitants of Vinalhaven,* 123 Me. 505, 508; *Van Buren Light and Power Co.* v. *Inhabitants of Van Buren,* 118 Me. 458, 462.

An *ultra vires* contract is to be distinguished from one which is within the power of a municipal corporation to make but which has been made irregularly.

Our court has cited with approval the following quotation from Dillon's Municipal Corporations (3rd Ed.) Sec. 463 and 797 as follows:

> "A municipal corporation may ratify the unauthorized acts and contracts of its agents and officers, *which are within the scope of the corporate powers, but not otherwise." Morse v. Inhabitants of Montville,* supra, at p. 458. *Lincoln v. Inhabitants of Stockton,* 75 Me. 141, 146.

This rule is, however, subject to certain limitations. In *Lincoln* v. *Stockton, supra,* the court said:

> "The limitations upon the rule just stated, that formal municipal action is not always required as evidence of ratification by the town of an unauthorized act or contract, need not be considered in the present case; as, for instance, that the act or omission relied upon to show the ratification must be by the town itself or by some agent whose authority

> goes to that extent; that ratification, however proved, cannot make good an act for which prior authority could not legally have been given, one without the scope of the corporate powers or in excess of such powers in violation of law, or where, in certain instances, the officers in doing it violate or disregard the terms of a statute or a charter under which they are acting. There is nothing in this case to require a consideration of the limits of the application of the rule. There is no doubt the town is liable to the plaintiff for the amount of her loan, if it has either authorized or ratified its procurement."

And in *Power Company* v. *Van Buren, supra,* the court said:

> "It is urged by the plaintiff that the defendant is liable because the supposed contract was ratified by the inhabitants of the town, and it is a rule of law 'that a municipal corporation may ratify the unauthorized acts and contracts of it's agents and officers, which are within the corporate powers, but not otherwise.' But there is no admissible testimony in the record that shows that the unauthorized acts of the so called committee or agents in entering into the contract was an act of the agents or officers of the town, and the admissible testimony fails to show the so called committee or agents were ever authorized to enter into any contract for the town. They had no authority from and were not agents or a committee of the town, and the above rule as to ratification does not apply."

The law is well settled that a committee, which has been given authority to make a certain contract on behalf of a municipal corporation, may ratify such a contract when made by a minority of its members. *Hanson* v. *Inhabitants of Dexter,* 36 Me. 516. The facts in the instant case, however, differ from those in the *Hanson* case. There, the committee, at the time of the unauthorized action of a minority of its members, had authority to make the contract. The committee, having authority in the first instance to make

the unauthorized contract, could give it validity by the process of ratification. Here, the directors, at the time the contract was made in the first instance, had no authority to bind the District by making such a contract. No case has been cited which deals with the power of officers or boards of a municipal corporation to ratify an unauthorized contract made under such circumstances. The plaintiff in its brief cited several cases in support of its position that the contract had been ratified. These cases, however, involved contracts which were within the scope of the corporate authority and in which the ratification was made by the voters of the municipal corporation or by officers having original authority to make the contract. The plaintiff also cited 78 C. J. S. Schools and School Districts, Sec. 302. In this section we find the following statement:

> "However, as a general rule, in order to constitute a valid ratification, there must be some affirmative corporate action with a full knowledge of the facts by voters or boards or officers having original authority in the matter."

This general rule has been stated in numerous cases, but we find no case among them having facts similar to those in the instant case. In *Yaeger* v. *Giguerre* (Minn.), 23 N. W. (2nd) 23, suit was brought to enjoin the payment of further compensation for the services of a police officer. The police officer, before taking a leave of absence, obtained approval of the chief of police but failed to procure the approval of the city Civil Service Commission as required by law. The claim was made that the leave of absence was invalid and that the police officer had forfeited his civil service status. The court said:

> "There can be no question that the commission had the authority in the first instance to approve the leave as granted by the chief of police. It is a general rule that whatever acts public officials may do or authorize to be done in the first instance may

subsequently be adopted or ratified by them with the same effect as though properly done under previous authority. * * * * * Applying this rule to the instant case, it is clear that the civil service commission by its belated action ratified the granting of a leave of absence with the same effect as if originally authorized."

"It is elementary of course that a contract, to be binding upon a municipal corporation, must be executed by the department, board committee, council, officer or agent vested by law with power to make it. 3 McQuillin Municipal Corporations, 2d Ed., Sec. 1266. And the authority must be exercised by the proper authorities in their official capacity and in the manner provided by law. 3 McQuillin Municipal Corporations, 2d Ed., Sec. 1279; *Paul v. Seattle,* 40 Wash. 294, 82 P. 601; *Jones v. Centralia,* 157 Wash. 194, 289 P. 3. Likewise, ratification of a contract may be effected only by the officer or body originally empowered to make it. 3 McQuillin Municipal Corporations, 2nd Ed., Sec. 1360; *Jones v. Centralia,* supra; *Marsh v. Fulton County,* 10 Wall. 676, 77 U. S. 676, 19 L. Ed. 1040." *Hailey* v. *King County,* 149 P. 2d. 823, 824 (Wash.).

"A contract may be ratified only by the officer or board authorized to make it in the first instance . . ." McQuillin on Municipal Corporations, Sec. 29.108.

In the strict sense of the term the contract for architectural services was not *ultra vires* as to the inhabitants of the District. Such a contract was not beyond the power of the District to authorize. The power to authorize any contract for the construction of the school building was originally in the voters of the District. They exercised that power during the month of March, 1961, by authorizing the construction of the school building and the bond issue to finance such construction as provided in Sec. 111-T. The directors were thereby, for the first time, given authority

to make contracts for the construction of the building and to borrow in anticipation of the sale of bonds by issuing temporary notes. There is nothing in the record to indicate that the vote of the inhabitants of the District was in any sense a ratification of previously unauthorized acts of the directors. We are not called upon to determine whether ratification under any circumstances could be made by the District, limited as its powers are under the legislation which created it. The contract made with the architect was not merely an irregular contract, defectively executed, or entered into by a minority of the members of a board or committee at a time when the board or committee had authority to make the contract. The directors, at the time, were devoid of authority to bind the District by contracting for architectural services. They had no authority to make the contract in the first instance, and, under the facts in this case, they cannot ratify their own unauthorized act. If the rule were otherwise, boards or committees might be tempted in some instances to ratify an ill-advised or improvident contract entered into by them. The note, being unauthorized, did not constitute an outstanding indebtedness for capital outlay purposes as defined in the statute.

There is another reason why the note cannot be considered as one given for capital outlay purposes. Assuming that parol evidence was admissible to explain any omission in the records of the meeting of the directors not properly recorded, the record, supplemented by parol testimony falls short of showing that the note given was properly authorized by the directors. The parol evidence offered may be sufficient to indicate that the note purported to be given as a temporary loan in anticipation of the sale of bonds. However, neither the record nor the supplemental testimony indicate the terms of the note to be given, nor the date of its maturity. A properly authorized and executed note for capital outlay purposes, given in anticipation of the sale of bonds, becomes an obligation of the District. The in-

habitants and property owners of the District have the right to expect that the authorization for the execution of the note will be clearly given. The fixing of the terms of the note, including the date of maturity, is the responsibility of the directors and not that of those executing the note. If the officers executing the note could arbitrarily fix the date of payment on September 1, 1962, they could make the instrument payable on any date. We find that the record, together with the oral testimony was insufficient to authorize the execution of the note given in this case. Consequently, it cannot constitute a note for capital outlay purposes, given in anticipation of the sale of bonds.

The second issue in the case is whether the vote of the special town meeting held at Brooks on March 15, 1962, was effective to initiate dissolution proceedings of School Administrative District No. 3. Sec. 111-P provides that after residents of a participating municipality have voted on a petition for dissolution, notices shall be mailed to the secretaries of the District and of the Commission.

This section provides also that if the Commission finds that 2/3 of the voters voting on said petition have voted in the affirmative, the Commission shall make a finding of fact to that effect and record it with its records. The Commission then proceeds in accordance with the steps outlined in Sec. 111-P. The record does not contain a copy of the vote taken by the Town of Brooks. The plaintiff alleged in its complaint that the directors of the District, and the Commission, received notices from the deputy clerk of the Town of Brooks on March 15 and March 19, 1962, respectively, that at a special town meeting held on March 15, 1962, the town had voted to petition for dissolution of the District. There is no claim on the part of the plaintiff that the affirmative vote at the town meeting was less than the requisite two-thirds, or that the vote was otherwise insufficient in any respect. Its only contention on this issue is that the

vote taken was ineffective because there was outstanding indebtedness of the District for capital outlay purposes at the time of the meeting. This court having decided against the plaintiff's contention in this respect, it follows as a necessary consequence that the vote of the Town of Brooks was effective to initiate proceedings to dissolve the District upon a finding by the Commission that 2/3 of the voters voting on the petition for dissolution had voted in the affirmative.

A decree will be entered adjudging that the note dated September 14, 1961 to Alonzo J. Harriman, Inc. did not constitute outstanding indebtedness of the District for capital outlay purposes as defined in Sections 111-P and 237-H, Chapter 41, R. S., 1954, as amended; that the vote of the special town meeting held at Brooks on March 15, 1962, was effective to initiate dissolution proceedings of said District, subject to a determination by the Commission that 2/3 of the voters of the Town of Brooks voting on the petition for dissolution have voted in the affirmative; that the temporary injunction be dissolved, and that the motion for a permanent injunction be denied.

The entry will be

Remanded to the justice below for a decree in accordance with this opinion.

STATE OF MAINE

vs.

LAWRENCE E. BERUBE

Androscoggin. Opinion, November 28, 1962.

Criminal Law. Aiding and Abetting. Accessory.

The correctness of a charge is to be determined from the entire charge and not from isolated extracts from it.

All persons who are either actually or constructively present aiding, abetting, and assisting a person to commit a felony are principals and may be indicted as such.

More than mere presence must be proved in order to convict as a principal a person who is not the actual perpetrator of the crime.

ON EXCEPTIONS.

This case comes to us upon exceptions to the refusal of the court to grant respondent's motion for a directed verdict and to give the requested instructions. Exceptions overruled.

Gaston M. Dumais, County Attorney, for the State.

Roscoe H. Fales, for the Defendant.

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

SIDDALL, J. On exceptions. Respondent was indicted for the crime of robbery. He entered a plea of not guilty and after trial a verdict of guilty was returned. At the conclusion of the evidence, respondent's counsel moved for a directed verdict, and the motion was denied by the court. After the charge, respondent's counsel asked for the following instruction: "Berube had no obligation to interfere even if not in fear, and even if a compatriot [companion] of Esman." The court refused to give the requested instruction.

The case comes here on exceptions to the refusal of the court to grant respondent's motion for a directed verdict and to give the requested instruction.

In the instant case the actual perpetrator of the assault and robbery was Esman. The crime took place in the presence of the respondent in an apartment of an acquaintance. He was friendly with Esman and was Esman's companion that same evening before and after the commission of the crime.

The person actually perpetrating a crime is ordinarily termed a principal in the first degree, and one present and aiding and abetting is termed a principal in the second degree. The law is well settled in this state that all persons who are either actually or constructively present, aiding, abetting, and assisting a person to commit a felony are principals and may be indicted as such. *State* v. *Burbank,* 156 Me. 269, 279, 163 A. (2nd) 639; *State* v. *Rainey,* 149 Me. 92, 97, 99 A (2nd) 78; *State* v. *Saba et al.,* 139 Me. 153, 156, 27 A. (2nd) 813; *State* v. *Flaherty,* 128 Me. 141, 145, 146 A. 7.

However, something more than mere presence must be proved in order to convict as a principal a person who is not the actual perpetrator of the crime. It is sufficient if such person aided, abetted, assisted, advised or encouraged another in the commission of the crime, or was present for such purpose to the knowledge of the perpetrator. Likewise, any concerted participation in a general felonious plan, together with actual or constructive presence, is sufficient to make a person a principal as to any crime committed in execution of the plan. Our court in the case of *State* v. *Burbank, supra,* had occasion to discuss some of the elements constituting aiding and abetting the commission of a crime. On page 279 of that case the court said:

> "If she the respondent is guilty of manslaughter, it must be because the evidence is such that she is

placed in the category of a principal to the commission of a felony as there is no proof of her physical engagement in the act which caused the injuries resulting in death.

> 'A principal of the second degree is one who is present lending his countenance, encouragement or other mental aid while another does the act.' *Bishop's Criminal Law,* Vol. 1, Sec. 648 (3).

In order for one to be a principal, it is necessary for him to be present, either actually or constructively.

Constructive presence is sufficient to satisfy the element of 'presence' in a charge of aiding and abetting in constituting one a principal. *English v. Matowitz,* 72 N.E. (2nd) 898 (Ohio).

> 'It is settled law that all who are present (either actually or constructively) at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty.' *State v. Holland,* 67 S.E. (2nd) 272-274 (N.C.).
>
> 'To constitute one an aider and abettor in the commission of a crime, he must be actually or constructively present at the time of its commission and render assistance or encouragement to the perpetrator.' *Howard v. Commonwealth,* 200 S.W. (2nd) 148-150 (Ky.)"

The general rule is that there is no duty on the part of a bystander to prevent the commission of a crime. However, if he fails to do so, and particularly when he is a friend or companion of the actual perpetrator, such failure may be considered, with all other circumstances of the case, in determining whether he aided or abetted the commission of the crime. The conduct of the respondent before and

after the commission of the crime, including companionship with the actual perpetrator, may likewise be considered by the jury as bearing on the respondent's guilt.

> "While it is true that the mere presence of a person at the scene of a crime is insufficient to constitute him a principal therein, in the absence of anything in his conduct showing a design to encourage, incite, aid, abet or assist in the crime, the trier of the facts may consider failure of such person to oppose the commission of the crime in connection with other circumstances and conclude therefrom that he assented to the commission of the crime, lent his countenance and approval thereto and thereby aided and abetted it. . . .
>
> It has also been held that the presence of one at the commission of a felony and companionship with another engaged therein, and a course of conduct before and after the offense, are circumstances which may be considered in determining whether aiding and abetting may be inferred." *Mobley et al.* v. *State* (Ind.), 85 N. E. (2nd) 489, 492, 493.
>
> "We have repeatedly held that knowledge or intent is seldom capable of direct proof. It is usually inferred from the proven surrounding circumstances. *State v. Van,* Iowa, 2 N.W. 2d. 748, 749, and citations. Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed. 22 C.J.S., Criminal Law, p. 161, Sec. 88b; *State v. King,* 198 Iowa, 325, 337, 197 N.W. 981; *State v. Brown,* 130 Iowa 57, 62, 64, 106 N.W. 379. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. 22 C.J.S., Criminal Law, p. 156, Sec. 87a; *State v. Carlson,* 203 Iowa 90, 93, 212 N.W. 312."
>
> *State* v. *Kneedy* (Iowa), 3 N. W. (2nd) 611.
>
> "The applicable rule stated in 16 C.J. 133, as quoted

> and approved in *State v. Kowertz,* 317 Mo. 426, 297 S.W. 358, 361, is as follows: 'The presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting. And it has also been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.' See also, *State v. Moulder et al.,* Mo. Sup. 57 S.W. 2d 1064."
> *State* v. *Corbin* (Mo.), 186 S. W. (2nd) 469, 471.

See also *People* v. *Mummert* (Cal), 135 P. (2nd) 665, 668; *State* v. *Bishop* (Mo.), 296 S. W. 147; *Callies* v. *State* (Neb.), 61 N. W. (2nd) 370, 374-375; *State* v. *Defalco* (N. J.), 74 A. (2nd) 338, 340: Wharton's Criminal Law, 12th Ed. Vol. 1, Sec. 246; 22 C. J. S. Criminal Law, Sec. 88 (2nd).

Having in mind these principles of law we take up first the respondent's exception to the refusal of the court to instruct the jury that "Berube had no obligation to interfere even if not in fear, and even if a compatriot [companion] of Esman." It is noted that no exceptions were taken to any part of the charge of the presiding justice.

The court is not required to give a requested instruction, even if it states the law correctly, if it is misleading or if it has already been covered in the charge. *Desmond pro ami* v. *Wilson,* 143 Me. 262, 268, 60 A. (2nd) 782.

The requested instruction did not go far enough. Without qualification, it was misleading. The jury was entitled to evaluate the testimony of the respondent, and to determine whether the failure on his part to do more than he did to prevent the crime was due to fear of Esman, or whether, taking all of the circumstances into consideration, he participated in the crime by aiding and abetting.

The respondent calls attention to certain isolated portions

of the charge which he claims conveyed to the jury the incorrect impression of the pertinent law relating to the requested instruction. The correctness of a charge is to be determined from the entire charge and not from isolated extracts from it. *Desmond pro ami* v. *Wilson, supra.*

A careful reading of the entire charge satisfies us that it contains in substance the applicable law relating to the requested instruction. The court repeatedly instructed the jury that mere presence at the time of the commission of the crime was not sufficient to justify a conviction. We are satisfied that there could be no misunderstanding on the part of the jury that it was to find from all of the circumstances, including those which followed the crime, whether the respondent was put in fear or whether he aided and abetted Esman in the commission of the crime. This exception is overruled.

We now take up respondent's exception to the refusal of the presiding justice to direct a verdict for the respondent.

This exception raises the simple question whether, in view of all the evidence, the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty of the crime charged.

The evidence discloses that the respondent and Esman were together in the late afternoon of the date of the crime. They met Fogg and drank beer with him. Fogg testified that the respondent told him they were going to their girl friend's apartment and invited him to go. On the other hand the respondent testified that Fogg asked him if he knew of a place where they could drink and that the respondent suggested the house of an acquaintance. In any event, Fogg bought a quantity of beer and they proceeded to the apartment. They were admitted and while there Fogg was assaulted and robbed by Esman. Fogg testified that before the assault and robbery he left the room for a

few moments. Upon his return Esman and the respondent were engaged in whispered conversation in the next room. The conversation continued for several minutes and immediately upon their return to the room Esman assaulted Fogg and robbed him of $64.00. The respondent denied the whispered conversation. The assault was a serious one requiring Fogg's hospitalization for a week. After the robbery the respondent and Esman left the apartment and remained together for several hours visiting some seven or eight different establishments and drinking beer together. Miss Yonuss, who occupied the apartment, testified that just before Esman and the respondent left her apartment one said to the other "Give her some money, she'll be quiet, she won't say anything." They were still together when picked up by Lewiston police officers after nine o'clock that evening. One of the police officers testified that when Esman and the respondent saw the officers they made a rapid turn away from them, the respondent "going as fast as he could without falling on his face with the crutches, really hopping along." The respondent claims that he was in fear of bodily injury at the time of the commission of the crime, and that during the evening he was obliged to accompany Esman under threats. He also testified that he was still under threats when spotted by the police.

The interpretation of disputed testimony was for the jury. The jury could have found that there was a whispered conversation between Esman and the respondent, followed immediately by the assault and robbery, and that this evidence was significant as bearing on the respondent's culpability. It could have found that the conduct of the respondent at the time of the commission of the crime, and his association with Esman thereafter, was not through fear of Esman but voluntary on the respondent's part; that he attempted to evade being picked up by the police, and that he failed to inform the police, upon being questioned, that he was in Esman's company under threats of injury if

he attempted to leave. From all of the circumstances of the case the jury could have found that the respondent was not an innocent bystander, but was lending his countenance and encouragement to the commission of the crime and thereby aiding and abetting therein. We are satisfied that there was ample evidence to justify the jury in finding beyond a reasonable doubt the guilt of the respondent.

The entry will be

Exceptions overruled.

SHIRLEY GREENLAW, ET AL.

vs.

ESTHER RODICK

Cumberland. Opinion, November 28, 1962.

Mortgage. Fraud. Equity.

Summary Judgment (M. R. C. P. 56 (b)). Contracts.

Affirmative Defenses, M. R. C. P. 8 (c). Rules.

A motion for summary judgment may be filed by a defending party without the necessity of filing an answer to the pleadings. It is advisable for a defending party who files a motion, without a previous answer, for summary judgment, if he intends to rely upon the statute of frauds, to include an allegation of this defense in the motion.

It is only after a complaint has been instituted and the contents and allegations studied and examined that a determination can be made as to whether or not it is to be heard as a legal or equitable cause.

A decision in a legal cause, correctly arrived at with the wrong reason assigned, must, nevertheless, stand.

ON APPEAL.

This case is an appeal from an order of the lower court

allowing defendants Motion for Summary Judgment. Appeal sustained.

Milliken & Milliken,
Udell Bramson, for the Plaintiff.

Harry C. Libby (Deceased),
Roger A. Putnam, for the Defendant.

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

DUBORD, J. This case is before us upon plaintiffs' appeal from an order of the justice below allowing defendant's Motion for Summary Judgment.

We are constrained to state, at the outset, that the pleadings of the plaintiffs leave much to be desired and have opened the door to the procedural confusion which has apparently attended this case.

Although the New Rules of Civil Procedure went into effect on December 1, 1959, the pleadings of the plaintiffs appear to be in the old common law form. The original pleadings allege in substance that the defendant purchased a certain building in Falmouth on March 20, 1954; that the plaintiffs had occupied said building previously as tenants of the former owner; that the defendant employed the plaintiffs to renovate and repair the building and that they expended certain sums of money for materials and labor in such repairs and renovations; that the plaintiffs at the request of the defendant paid taxes to the Town of Falmouth on the premises from March 20, 1954 to March 20, 1958, and further paid the defendant at the rate of $22.00 per month as payments on a certain mortgage then existing on the premises, said payments to be in lieu of rent. The plaintiffs then allege that the defendant agreed to transfer the property to them if the repair work was done. They also allege

that they paid the defendant the sum of $300.00 as a deposit on the premises. Further allegation is made that the defendant on August 28, 1959 conveyed the property to someone else; that the plaintiffs were ordered to vacate and did vacate the premises. The complaint or declaration ends with a statement that the defendant is indebted to the plaintiffs in the sum of $3,000.00 and there is annexed to the declaration or complaint an account totaling $3,000.00 setting forth alleged disbursements for repairs, including cost of materials, taxes and money paid to the defendant as a deposit.

Later, upon motion of the plaintiffs, the declaration or complaint was amended with allegations in substance that the defendant purchased the premises in question and promised the plaintiffs that if they would stay on the property, improve it, pay taxes, water, and insurance bills, and pay off the mortgage, the property would be conveyed to them as soon as the existing mortgage was paid up. Plaintiffs then go on to allege in their amendment that they continued to occupy the premises as tenants of the former owner, that they renovated and repaired the buildings at substantial expense; that they paid the taxes to the Town of Falmouth, and that they paid the sum of $22.00 per month as payment on the existing mortgage; that they paid the defendant an additional sum of $300.00 as a deposit towards the purchase price. Finally they allege that the defendant conveyed the property to another person on August 28, 1959 and they end up with an allegation that the plaintiff owes them the sum of $3,000.00 "for damages for the aforesaid breach of agreement" and they demand judgment in that amount.

The next step was the filing of interrogatories addressed to the plaintiffs. These interrogatories were answered by the plaintiffs and the interrogatories and answers form a part of the record.

Without filing any answer, the defendant moved for a

Summary Judgment pursuant to M. R. C. P. 56, on the ground "that there is no genuine issue as to any material fact * * * ."

In support of this motion, the defendant filed an affidavit setting forth in substance that the plaintiffs were desirous of purchasing the property in question, but could not finance the purchase; that she agreed to purchase the property in her name; that she made a down payment of $500.00 and gave a mortgage to the then owner in the amount of $2,-500.00; that there never was any written agreement, but only an oral agreement that the plaintiffs would live on the premises; that they would pay the taxes, insurance, and water bills, and pay the mortgage payment of $22.00 per month and at the end of the mortgage period when they had paid off the mortgage and paid her the sum of $500.00, she would convey the premises to the plaintiffs. The affidavit further alleges that the plaintiffs were repeatedly delinquent in the payment of the mortgage amounts to the mortgage holder, and that the taxes for the years 1958 and 1959 as well as insurance premiums had not been paid. The defendant further advances in her affidavit an allegation to the effect that the plaintiffs failed to live up to their oral agreement and that as a result of their failure she conveyed the property to someone else for the amount of $3,000.00. She further alleges that she had never authorized, directed or requested the plaintiffs to make any repairs on the premises.

The plaintiffs did not file a counter affidavit.

The opinion and order of the presiding justice granting the Motion for Summary Judgment reads in part as follows:

> "The Plaintiffs have sued for money damages resulting from the alleged breach of an oral contract to convey real estate. To the Defendant's plea that the action is barred by the provisions of the Statute of Frauds (*R. S. 1954 Me. Ch. 119, Sec 1 (IV)*), the Plaintiffs allege part performance of the con-

> tract by the Plaintiffs. The issue becomes: Does part performance of an oral contract to convey real property in consideration of payment of money and the doing of work, remove such contract from the operation of the Statute of Frauds where it is pleaded as a defense to an action for money damages for such breach?
>
> "Our Maine Court has consistently held part performance of an oral contract removes such contract from the operation of the Statute of Frauds only when the remedy is one afforded a Plaintiff only in equity. It does not so operate when the Statute of Frauds is pleaded in an action at law for money damages.
>
> "*Rule 2 of the Rules of Civil Procedure for Maine* has effected a procedural merger of law and equity only. The right to a specific kind of legal or equitable relief upon proof of certain facts is not changed."

It is to be noted that the decision of the presiding justice is based upon the theory that the action before him was for money damages resulting from an alleged breach of an oral contract to convey real estate to which, the decision says, the defendant had pleaded the statute of frauds, countered by plaintiffs' contention of part performance, thus raising an issue as to whether or not part performance removed the contract from the operation of the statute of frauds.

Based upon prior decisions of this court that part performance of an oral contract to convey real estate is removed from the operation of the statute of frauds only in equity, the motion for a summary judgment was granted.

Although the opinion states that the statute of frauds was pleaded, a careful study of the record does not indicate that any such plea was made by the defendant. Neither is there anything in the pleadings to indicate that the plaintiffs had set up part performance to remove the contract from the operation of the statute of frauds. We can only surmise

that the foregoing contentions were advanced by counsel in oral or written argument presented to the presiding justice, which arguments, if any, are not made a part of the record.

M. R. C. P. 8 (c) sets forth a list of affirmative defenses which shall be pleaded and among these affirmative defenses is to be found the statute of frauds.

M. R. C. P. 56 (b) is to the effect that "a party against whom a claim * * * is asserted * * * may, *at any time,* (emphasis supplied) move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

This rule seems to indicate that a motion for summary judgment may be filed by a defending party without the necessity of filing an answer to the pleadings. However, it would seem advisable for a defending party who files a motion, without a previous answer, for summary judgment, if he intends to rely upon the statute of frauds, to include an allegation of this defense in the motion. This, as previously pointed out, the defendant did not do.

Referring again briefly to the decision of the presiding justice, he quoted M. R. C. P. 2, to the effect that a procedural merger of law and equity has been brought about by this rule and he goes on to state correctly that the right to a specific kind of legal or equitable relief upon proof of certain facts is not changed. The rule itself merely provides that "there shall be one form of action to be known as 'civil action.' "

Since the promulgation of the new rules, both the Bench and Bar have learned that a complaint may sound either in law or in equity and if it sounds in equity it shall be heard as such, perhaps by a single justice of either the Superior or Supreme Judicial Court, or by a jury in a proper case. It is only after a complaint has been instituted and the contents and allegations studied and examined that a determi-

nation can be made as to whether or not it is to be heard as a legal or equitable cause.

In giving consideration to the present action, we can start with the premise that it arose out of an oral contract to convey real estate, with a further manifest conclusion that there is no issue of the statute of frauds before us because it was not pleaded.

It also clearly appears that the case was decided upon an issue which did not actually exist. Upon the well-known theory that a decision in a legal cause, correctly arrived at with the wrong reason assigned, must nevertheless stand, we would, at least in a proper case, find support for a decision based upon a wrongly assigned issue, if the eventual result founded upon the facts and applicable law, is one which this court should sustain.

However, a decision which does not follow the applicable rules must of necessity be reversed.

An exposition of the relevant Rules of Civil Procedure would seem to be in order, with particular attention to M. R. C. P. 56 relating to summary judgment.

M. R. C. P. 1, provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Giving consideration to this basic premise, as well as to M. R. C. P. 8 (f), which is to the effect that "all pleadings shall be so construed as to do substantial justice," we see no reason why the pleadings in this case could not be interpreted as forming the basis for an action for money had and received.

> "It should be observed at the outset that the action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of the procedure is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored of the courts.

> 'It is a familiar principle,' says the Court in *Pease v. Bamford,* 96 Me. 23, 'that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained." *Webb* v. *Brannen,* 128 Me. 287, 291, 147 A. 208.

See also *Bither* v. *Packard,* 115 Me. 306, 98 A. 929; *Holt* v. *American Woolen Company,* 129 Me. 108, 110, 150 A. 382; and *Maxwell* v. *Adams,* 130 Me. 230, 232, 154 A. 904.

It is provided in M. R. C. P. 56 (c) that "judgment (on a motion for summary judgment) shall be rendered forthwith if the pleadings, depositions, *answers to interrogatories,* (emphasis supplied) 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."

As stated in Maine Civil Practice, Field & McKusick on Page 462, "Rule 56 (c) is the heart of the rule. * * * The key words are that a summary judgment will be entered upon a showing 'that there is no genuine issue as to any material fact.' " See also Maine Civil Practice, Field & McKusick, § 56.4, Page 466 where it is stated:

> "The hearing on the motion is not in any sense a trial nor a battle of affidavits. The sole function of the court is to determine whether a genuine issue of fact exists. * * * 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."

Further consideration of the opinion of the presiding justice makes it clear that it is not based upon the finding

on his part that no genuine issue of fact was raised by the pleadings, depositions, answers to interrogatories, and the affidavit which was filed by the defendant.

M. R. C. P. 56 (e) provides in part as follows:

> "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,* (emphasis supplied) 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."

In this case, the plaintiffs chose not to file a counter affidavit and so it now becomes necessary for us to decide a point of first impression involving the Rules of Civil Procedure and that is whether or not the answers to the interrogatories are to be taken into consideration in determining the existence or non-existence of a genuine issue of fact.

For authority and information upon this issue we must necessarily seek opinions filed in federal decisions. A brief comparison of Rule 56 of the Rules of Civil Procedure for the United States District Courts with M. R. C. P. 56 is of interest. It is to be noted that the words "answers to interrogatories" appearing in our M. R. C. P. 56 (c), are not included in the Federal Rule 56 (c); and neither are the last two sentences of our M. R. C. P. 56 (e) included in Federal Rule 56 (e).

Nevertheless, in various Federal decisions it has been determined that the answers to interrogatories should be taken into consideration in determining whether or not a genuine issue of fact exists in a given cause.

See *American Airlines, Inc.* v. *Ulen,* 186 F (2nd) 529; *MacKay* v. *American Potash & Chemical Co.,* 268 F. (2nd) 512; *Champlin* v. *Oklahoma Furniture Manufacturing Com-*

pany, 269 F. (2nd) 918; and *United States* v. *Kansas Gas and Electric Company,* 287 F. (2nd) 601, which are all decisions to the effect that interrogatories and answers thereto may properly be considered when ruling on a motion for summary judgment.

See also Moore's Federal Practice, 2nd Edition, Vol. 6, § 56.11 (4) and Barron & Holtzoff, Federal Practice and Procedure, Vol. 3, § 1236.

Reviewing briefly the procedure in the case before us, the defendant posed a number of interrogatories to the plaintiffs. These interrogatories were answered. Plaintiffs failed to comply with the provisions of M. R. C. P. 33, to the effect that answers to interrogatories shall be under oath. While we do not commend this failure to follow a clear requirement of the Rules of Procedure, no point was raised by the defendant in reference to this matter so we have given consideration to the answers as if they had been under oath.

Without going into specific detail about the contents of the original pleadings, as amended, supplemented by the answers to the interrogatories, we have come to the conclusion that taking everything into consideration genuine issues of fact existed for determination as to which party was guilty of a breach of the existing oral contract. Plaintiffs' answers to the interrogatories placed in direct issue the payment of taxes, payments on the existing mortgage, payment of insurance, as well as repairs alleged to have been made by the plaintiffs under authorization of the defendant.

The decision below is, therefore, erroneous and should be reversed. The entry will be:

Appeal sustained.

STATE OF MAINE
vs.
THE FANTASTIC FAIR AND
KARMIL MERCHANDISING CORP.
(Two cases)

Cumberland. Opinion, November 30, 1961.

Sunday Sales Law (P. L. 1961, c. 362; R. S., c. 134, §§ 38, 38-A). Legislation. Constitutional Law. Local Option. Statutes.

It is not the use that determines the category of the store, but the nature and kind of merchandise available.

An exempt store is afforded no protection by the Act, if it offers for sale on Sunday commodities essentially unrelated to the principal and exempt line of business and which are ordinarily and customarily offered for sale in stores not exempted by the Act.

It is fundamental that no one will be heard to question the constitutionality of a statute unless he is adversely affected by it.

Language of the Sunday Law is sufficiently definite to enable a reasonable person in the business world to know whether his store falls within one or more of the exempt categories of restaurant, drug store, book shop, and stores selling gifts and souvenirs.

The judgment of the Legislature that the permissive sales on Sunday may reasonably be stated by description of the business or enterprise is not lightly to be judged an unreasonable method of regulation.

A department store is not forced to close on Sunday under the Sunday Closing Law due to the fact that some of its business taken alone would be non-exempt or that the store as a whole does not come within the fair meaning of any of the categories described in the statute. The department store may compete on Sunday with the exempt store, but not with the closed store.

Whether enactment of a law is wise and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court.

In passing upon the constitutionality of an act, the court assumes that the Legislature acted with knowledge of the constitutional re-

strictions and that the Legislature honestly believed that it was acting within its rights and powers.

All acts of the Legislature are presumed to be constitutional and this presumption is of great strength; the burden is upon him who claims the act to be unconstitutional to show its unconstitutionality.

The Legislature, in enacting the 1961 Sunday Closing Law, intended to retain a day of rest and recreation with enlarged bounds of permissible business activity on Sunday to meet the conditions of today; it reflects a judgment by the Legislature that with the changing times, the Sunday laws of a generation past required revision.

The prohibition of equal protection clause goes no further than invidious discrimination. U.S.C.A. Const. Amend. 14.

Local option provision of the Sunday Closing Law whereby through the exercise of such option, a town or city may extend; but not limit the places of business exempt from closing under the law does not deny due process and equal protection. U.S.C.A. Const. Amend. 14.

The Sunday Closing Law rests upon the police power of the state. The State may grant to municipalities the right to exercise the police power of the state to such an extent and with such limitations at it may decree.

The Sunday Closing Law is not invalid as a suspension of laws; nor is it an unconstitutional delegation of legislative authority because of the local option provision.

Under a Sunday Closing Law, Legislators may reasonably determine that permitted businesses meet the reasonable needs of the day and that a prohibited business not within "works of necessity or charity" would destroy the desired opportunity for rest and recreation. U.S.C.A. Const. Amend. 14.

The term "works of necessity or charity" in the Sunday Closing Law meets the test of constitutionality and hence does not violate due process clauses because of vagueness, uncertainty, and impossibility of interpretation. U.S.C.A. Const. Amend. 14.

ON REPORT.

These two cases are on report to determine the constitutionality of the Sunday Closing Law (P. L., 1961, c. 362;

R. S., c. 134, §§ 38, 38-A.). The court held in each case that the Sunday Closing Law is constitutional. Demurrer overruled. Remanded for entry of judgment for the State and sentence.

Arthur Chapman, Jr., County Atty.,
Wayne B. Hollingsworth, Asst. Atty. Gen., for the State.

Robert F. Preti, for the defendant (Fantastic Fair).
Harold J. Rubin, for the defendant
(Karmil Merchandising Corp.).

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

WILLIAMSON, C. J. On report. These cases involve the keeping open on Sunday of department stores known as "The Fantastic Fair" located in South Portland and "Brunswick Mill Outlet" located in Brunswick. The issues are the applicability and constitutionality of the Sunday Closing Law, so-called, enacted in 1961. P. L., 1961, c. 362; R. S., c. 134, §§ 38, 38-A. Each case is reported to us on special demurrer to the complaint following appeal to the Superior Court from a judgment of guilty in the appropriate Municipal Court. One opinion will serve both cases.

The respondents contend that the 1961 Act is unconstitutional on two main grounds; first, that it is discriminatory and therefore violates the equal protection clauses of the State and Federal Constitutions, and second, that it is vague, uncertain, and impossible of interpretation and therefore violates the due process clauses of both Constitutions. A third point is that local option provision is an unconstitutional delegation of legislative authority. Minor differences in the presentation of the local option issue by Fantastic Fair and Brunswick Mill Outlet will be later noticed. A fourth issue is the contention of Fantastic Fair

that if the 1961 Act is constitutional, then "it is exempt from the operation of said law by reason of the fact that it falls within the definition of a restaurant, drug stores, book stores, and/or a store selling gifts or souvenirs, and/or a 'work of necessity.'" Brunswick Mill Outlet makes the same contention without, however, including work of necessity."

Two issues which have often arisen in connection with Sunday closing legislation are eliminated by agreement. It is conceded that the Sunday Closing Law is not in violation of the constitutional restrictions against establishment of religion and also that the Legislature has the authority to enact legislation providing for a day of rest. *Lena T. Cleveland* v. *City of Bangor,* 87 Me. 259, 32 A. 892; *McGowan, et al.* v. *Maryland,* 366 U. S. 420, 81 S. Ct. 1101; *Two Guys from Harrison-Allentown* v. *McGinley,* 366 U. S. 582, 81 S. Ct. 1135; *Gallagher* v. *Crown Kosher Super Market of Mass.,* 366 U. S. 617, 81 S. Ct. 1122; *Braunfeld, et al.* v. *Brown,* 366 U. S. 599, 81 S. Ct. 1144. The constitutional issues will be tested within the framework of the exercise of the police power by reasonable regulation. *City of Mt. Vernon* v. *Julian,* 17 N. E. (2nd) 52, 119 A. L. R. 747.

We turn first to the question of whether the respondent department stores are within a category exempt from Sunday closing. We proceed under the general rule that we do not reach an issue of constitutionality unless it becomes necessary for decision. If Fantastic Fair (or Brunswick Mill Outlet) is, as it asserts, exempt under the statute, then it has no reason to object to the statute on constitutional grounds.

It is apparent that on the issue of whether either respondent is an exempt store, we must consider like problems of vagueness, uncertainty, and impossibility of interpretation

arising on the issue of due process. If it cannot be determined whether Fantastic Fair (or Brunswick Mill Outlet) in the operation conducted by it on the Sunday in question fell within or without the exemptions, then the statute must be held too vague and uncertain to meet the constitutional requirement of due process.

Fantastic Fair, in light of the complaint, pleadings, and stipulation, kept open on Sunday "a general merchandise Department Store, known as 'The Fantastic Fair.'" The stipulation agreed upon by State and Fantastic Fair reads in part:

> "That the Respondent, on the 11th day of March, 1962, a Sunday, did keep open its place of business to the public. That the Respondent's place of business in South Portland. . . on said day, was a retail store carrying as merchandise for retail sale various kinds and types of drugs and medicines, commonly sold in stores dealing only in drugs and medicines which may be known as 'drug stores'; books, magazines and writing materials, commonly sold in retail stores handling only books, magazines and writing materials, and perhaps being known as 'book stores'; food, which was kept, prepared and served upon the premises in the same manner as a place of business which might be known as a 'restaurant'; and that the Respondent's place of business on said day was a store selling gifts or souvenirs; that in addition to the aforesaid articles and items offered for sale on the premises of the Respondent on said day, the Respondent also offered for sale a general line of men's, women's and children's work clothing and work shoes and boots, as well as a general line of men's, women's and children's dress clothing and dress shoes, other types of wearing apparel, furniture, toys, hardware, including tools and supplies, electrical supplies and other miscellaneous merchandise."

In the Brunswick Mill Outlet case the demurrer reads:

> "That the Respondent, on the fifteenth day of April, 1962, a Sunday, did keep open its place of business to the public. That the Respondent's place of business in said Brunswick on said day was a retail store containing various kinds of merchandise, among the merchandise for sale in said place of business of the Respondent were drugs and medicines, commonly sold in drug stores; books, magazines, and writing materials, commonly sold in book stores; food, which was kept, prepared and served upon the premises, the same as in any restaurant; and that the Respondent's place of business on said day was a store selling gifts or souvenirs; that in addition to the aforesaid articles and items sold on the premises of the Respondent, the Respondent also sold other articles such as clothing, wearing apparel, furniture, toys, hardware, electrical supplies, and other general merchandise."

There is no substantial difference in the nature of the stores operated by the respondents.

The Sunday Closing Law, P. L., 1961, c. 362 (R. S., c. 134, §§ 38, 38-A) follows:

> "**Sec. 38. Operating business on the Lord's Day and certain holidays.** No person shall on the Lord's Day, Memorial Day, July 4th, November 11th and Thanksgiving Day, as proclaimed by the Governor, keep open his place of business to the public except for works of necessity or charity.
>
> "This section shall not apply to common, contract and private carriers; taxicabs; airplanes; radio and television stations; newspaper publishers; hotels, motels, rooming houses, tourist and trailer camps; restaurants; garages and motor vehicle service stations; retail monument dealers; automatic laundries; grocery stores; drug stores; book stores; stores selling gifts or souvenirs; greenhouses; roadside stands engaged in sale of farm produce or dairy products; public utilities; industries normally kept in continuous operation

including but not limited to pulp and paper plants and textile plants; processing plants handling agricultural produce or products of the sea; ship chandleries; marinas; sports; athletic events; motion picture theaters; musical concerts; religious, educational, scientific or philosophical lectures; scenic, historic, recreational and amusement facilities.

"It is not intended by this section that any business or facility which is exempt from closing on the Lord's Day and the aforementioned holidays shall be permitted to remain open until it has complied with any other provision of this chapter which requires a vote of the municipality.

"Any person violating this section shall be punished by a fine of not more than $100 for the first offense, nor more than $200 for any subsequent offense occurring within one year following a conviction. No complaint charging violation of this section shall issue later than 5 days after its alleged commission."

"**Sec. 38-A. Local option.** In any city or town that shall vote as hereinafter provided, it shall be lawful to keep open to the public on the Lord's Day and aforementioned holidays, other places of business not exempted under section 38. This provision shall not be effective in any municipality until a majority of the legal voters, present and voting at any regular election, so vote. The question in appropriate terms may be submitted to the voters at any such election by the municipal officers thereof, and shall by them be so submitted when thereto requested in writing by 100 legal voters therein at least 21 days before such regular election; nor shall it be effective in any town until an article in such town warrant so providing shall have been adopted at an annual town meeting. When a city or town has voted in favor of adopting the provisions hereof, said provisions shall remain in effect therein until repealed in the same manner as provided for their adoption."

The sense of the statute requires that we read "or" for "and." R. S., c. 10, § 22.

It is immaterial for our purposes that the 1961 statute covers holidays as well as Sundays. We express no opinion whatsoever upon any issues which might arise with reference to holiday closing. It remains convenient, however, to refer to the statute as the "Sunday Closing Law."

We may eliminate from discussion certain categories listed in the statute. "Works of necessity or charity" need not long detain us.

In *State* v. *Morin,* 108 Me. 303, 80 A. 751 (1911), in which a druggist was charged with keeping open his store, the court said, at p. 306:

> "The opening of his store and entering it for the purpose of furnishing a medicine then needed for sickness, would not be keeping open shop within the meaning of the statute; it would not be keeping open shop in a manner to invite trade, or to invite people to enter to transact business, or doing work therein. The opening would only be that the defendant might do an act of necessity or charity —furnish medicine to aid the sick and suffering, not to induce others to enter to trade or transact business."

Not until the 1929 Act, below, were drug stores exempted from the Sunday Closing statute.

The only categories in the statute in which the respondents claim a direct interest are: restaurants, drug stores, book stores, and stores selling gifts or souvenirs. Neither Fantastic Fair nor Brunswick Mill Outlet on the demurrer, pleadings, and stipulations come within any of the other categories, nor does it claim to do so.

A brief review of the Sunday Closing Law without, however, including statutes relating to holidays or the broad

local option provisions, may be of worth in placing the present law in proper perspective.

Sunday closing laws come from the first year of our statehood. In "An Act providing for the due observation of the Lord's day" (Laws 1821, c. IX), the preamble reads:

> "Whereas the observance of the Lord's day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labour and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian Society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian Society: to the great disturbance of well disposed persons, and to the great injury of the community, by producing dissipation of manners and immoralities of life."

Section 2 of the 1821 Law remained in substance on our statute books until the 1961 Act.

> "That no person or persons whatsoever shall keep open his, her, or their shop, warehouse, or workhouse, nor shall, upon land or water, do any manner of labour, business, or work, (works of necessity and charity only excepted) nor be present at any concert of music, dancing or any public diversion, show or entertainment, nor use any sport, game, play, or recreation, on the Lord's day, or any part thereof, upon penalty of a sum not exceeding six dollars and sixty-six cents, nor less than four dollars for each offence."

In 1929 we find exemptions added for the first time.

> "**Sec. 35. Certain business and recreation allowed on Lord's Day.** Whoever, on the Lord's

> Day, keeps open his shop, workhouse, warehouse or place of business, travels, or does any work, labor or business on that day, except works of necessity or charity; uses any sport, game or recreation; or is present at any dancing, public diversion, show or entertainment, encouraging the same, shall be punished by fine not exceeding ten dollars; provided, however, that this section shall not apply to the operation of common carriers; to the driving of taxi cabs and public carriages in attendance upon the arrival or departure of such carriers; to the driving of private automobiles or other vehicles; to the printing and selling of Sunday newspapers; to the keeping open of hotels, restaurants, garages and drug stores; to the selling of gasoline; or to the giving of scientific, philosophical, religious or educational lectures where no admission is charged." R. S., 1916, c. 126, § 35, as amended by Laws 1929, c. 303. The 1929 amendment commences with the words "provided, however,".

The only change of significance to us in the years from 1929 to 1961 was the inclusion of grocery stores in the exempted categories in 1953. R. S., 1954, c. 134, § 38, amendment by P. L., 1953, c. 337. Other Sunday Closing Laws of interest are: Sales of motor vehicles and mobile homes, R. S., c. 134, § 38-B; local option for sports, bowling and moving pictures, R. S., c. 134, §§ 39, 40, 41; sales of liquor, R. S., c. 61, §§ 12, 27.

It is important to note that the only new categories in the 1961 Act covering Fantastic Fair and Brunswick Mill Outlet, on their own pleadings, are "bookstores" and "stores selling gifts or souvenirs." The other categories in which they claim membership, namely, drug stores and restaurants, have been exempt from operation of the Sunday Closing Law since 1929.

Fantastic Fair and Brunswick Mill Outlet are department stores within the common understanding of the term.

The description of Brunswick Mill Outlet in its brief describes as well the business of Fantastic Fair. Any differences are in detail and do not serve to distinguish the one store from the other. We quote from the brief:

> "The Respondent's business can properly be classed as a 'Department Store' as it has numerous departments within the area of its place of business, selling different types of merchandise. The Respondent operates a section of the store premises for the sale of drugs and medicines; a portion of its store premises is devoted to the sale of books, magazines and writing materials; in a section of the store premises there is located an area for food which is cooked and consumed upon and within the premises of the Respondent; sections of the store premises are devoted to the selling of souvenirs and gifts, and as indicated by the pleadings, the Respondent readily admits that in addition to the foregoing items of merchandise and food offered for sale on the premises, there were also other articles offered for sale in various sections of the store premises in the category of clothing, wearing apparel, furniture, toys, hardware, electrical supplies, and other general merchandise."

A department store is in substance several stores at one location and under one name. It is well known that departments are often "leased" and are not in fact operated by the store management, although under its name. In terms of the Sunday Closing Law, a department store may well include a restaurant, a drug store, a book store, and a store selling gifts or souvenirs, or any one or more of such types of business. The several departments need not be kept open at the same hours or on the same days. Assuming a reasonable classification of business operations in the statute, there would seem to be no reason for not applying the statute category by category to the departments in the stores operated by the respondents.

The test is what store or stores, that is to say, what department or departments, did Fantastic Fair and Brunswick Mill Outlet keep open on Sunday for the transaction of business.

The bite of the cases comes from the sale of clothing, wearing apparel, furniture, toys, hardware, electrical supplies, and general merchandise. We do not associate such commodities with a store (or with a department in a department store) of the exempt categories in which Fantastic Fair and Brunswick Mill Outlet seek refuge. The difficulties inherent in the problem are not, however, thus completely solved.

Is Fantastic Fair a "drug store"? We answer in the negative. The term "drug store" obviously does not describe in black and white what is or is not sold in such a store. It is common knowledge that many goods are sold in drug stores that bear no relation to drugs or medicines. The soda fountain, the candy counter, the magazine rack are every day examples.

The modern drug store may indeed approach and sometimes is in fact a department store. It does not follow, however, that a department store selling some of the products commonly sold in a drug store thereby gains the Sunday exemption of the "drug store." There is a solid distinguishing feature about a drug store, namely, the business of compounding drugs and preparing medicines on prescription by a trained and licensed pharmacist.

On the record, it may fairly be inferred that neither Fantastic Fair nor Brunswick Mill Outlet was in the business of an apothecary. It follows for this reason alone that neither establishment was a drug store. This is not to say that a department in a department store may not qualify as a drug store. The New Jersey Supreme Court, in passing upon this issue, said:

> "The Pharmacy Act itself R.S. 45:14-32, N.J.S.A., defines the words 'pharmacy' and 'drug store' as an 'establishment or place of business which, under the provisions of this chapter, is required to be operated or managed at all times by a registered pharmacist.' This language cannot be said to preclude a separate department in a general department store from being classed in such a category and in our judgment nothing in the entire act could lead to such a determination. It is common knowledge as well as disclosed by the record that many drug stores in this State are department stores to a greater or less degree." *Packard Bamberger & Co.* v. *Board of Pharmacy,* 48 A. (2nd) 199, at 201. Aff'd, 51 A. (2nd) 239.

We find, as we would expect, legislation strictly guarding the public against the unqualified pharmacist and regulating the business of the apothecary.

R. S., c. 68,

> "**Sec. 14. Business of apothecary.** — No person shall within the limits of this state conduct the business of an apothecary or any part thereof or sell or offer for sale any drugs or medicines, or display any drugs or medicines, drug store fittings or furnishings or any sign recognized as peculiar to drug stores such as pharmacy, apothecary, drugs, drug store, druggist, druggist sundries, drug sundries, medicine, medicine store or any other word or words of similar or like import to give the appearance of an apothecary store, or claim to be or represent himself to be an apothecary, or employ or permit advertising of any character which would convey such impression, unless the same is placed and kept under the personal control and supervision of a registered apothecary; but such store may be under the charge of a qualified assistant during the temporary absence of such registered apothecary."

The hard core of the "drug store"— without which it is not entitled to the name — is the business of the apothecary.

Fantastic Fair and Brunswick Mill Outlet are then not "drug stores." It will be time enough to determine with more precision what may or may not be sold within the fair meaning of the term "drug store" when and if the respondents, or either of them, comply with the statute covering registered pharmacists. "Drug store" is a "shorthand" description of what we in our community life have with reason come to recognize as a particular type of retail store differentiated from, let us say, the grocery, the bakery, the hardware, and the clothing store. We recognize, as we have indicated, that the "drug store" in addition to its strict function as an apothecary shop sells other goods and furnishes other services.

In solving the difficulties readily understood in drawing a line to mark the bounds of a "drug store," we need not blind ourselves to that which is apparent. In brief, the clothing, hardware, and electrical appliance businesses, and of course other businesses, do not come within the reasonably established and understood limits. Like principles are applicable in consideration of other exempt categories.

The term "restaurant" requires no extended discussion. There can be no confusion upon the question whether Fantastic Fair or Brunswick Mill Outlet conducts a "restaurant." We know from our common experience that tobacco, candy, and other small articles are sometimes available at a restaurant. The character of the enterprise, however, is not thereby altered from that of restaurant. Again, we do not find, nor do we need to find, a precise line between what is and what is not a restaurant.

"Book stores" and "stores selling gifts or souvenirs" are categories first introduced in the 1961 Act. Whatever else they may sell, they do not include the sale of clothing, hardware, electrical appliances, and the like. A "book store" is a store selling books, and related articles; it is not a drug store, a restaurant, a grocery store, or a hardware store.

Much is made by the respondents of the uncertainty of the term "stores selling gifts or souvenirs." We find in every sizeable community a "gift shop" or a "souvenir shop." The type of goods included within the description is familiar to us. Any article — hardware or clothing — may of course be purchased for the purpose of a gift. In like manner, any article in a "gift shop" may be purchased for the buyer's own use. It is not the use to which the article is or may be put that determines the category of the store, but the nature and kind of merchandise available. Hardware, clothing, or electrical appliances are not the type of merchandise we associate with the gift and souvenir stores.

The respondents carry the argument with reference to "stores selling gifts or souvenirs" beyond the edge of fair meaning. They say in substance that a store selling gifts or souvenirs is by the statute unrestricted in its sales of other goods. We do not think the language compels the conclusion that a store selling souvenir post cards on Sunday may tack on a line of hardware, or clothing, or electrical appliances. Such a construction would completely destroy all reasonable meaning of the provisions exempting certain types of business.

In broad strokes by categories of stores and not by listing a myriad of commodities, our Legislature has lifted the general ban on Sunday sales in certain areas in which the respondents seek to operate. Passing for the moment the constitutional issues, in our opinion, the statutory language is sufficiently definite to enable a reasonable person in the business world to know whether his store or enterprise falls within one or more of the categories of restaurant, drug store, book store, and stores selling gifts and souvenirs. Whatever may be the difficulties in determining whether given goods may reasonably be found and sold in a "drug store," or a "book store," or in "stores selling gifts or sou-

venirs," there can plainly be no question that clothing, hardware, and other types of merchandise which the respondents sold on Sunday may not be so considered.

Our Legislature closes all businesses, except works of necessity or charity, and then permits the operation of certain businesses. An alternative control of Sunday sales may be obtained by prohibiting the sale of all except specified commodities. The difference in approach does not determine whether the one is good or the other bad. In either case, whether by categories of stores or by a list of exempted goods, a Legislature is dealing with commodities and the sale of goods. The judgment of the Legislature that permissive sales on Sunday may reasonably be stated by description of the business or enterprise is not lightly to be judged an unreasonable method of regulation.

Fantastic Fair and Brunswick Mill Outlet may fairly be said to assert that each is several stores of the named categories. The restaurant department surely qualifies as a restaurant; the book department, as a book store; and the gift and souvenir departments, as a store selling gifts or souvenirs. So likewise the drug department, if there were compliance with the statutes, *supra,* would qualify as a drug store.

Neither respondent department store on the record experiences difficulty in separating and distinguishing one line of business from another. We may well ask why should not a department store, if the owner so chooses, keep open on Sunday the departments or "stores" within the exempt categories and close the non-exempt departments.

Under the Act we look to the store as it is kept open on Sunday. Whether Fantastic Fair or Brunswick Mill Outlet is a department store with a wide variety of goods for sale on six days a week is not material. On Sunday, it must be a restaurant, drug store, book store, or a store selling

gifts or souvenirs. No other classifications under the circumstances are applicable. The department store is not limited to one class; it may qualify in two or more. It must not, however, be a hardware or a clothing store. In short, it must close the departments which another storekeeper could not operate on Sunday for such purposes.

Under this construction of the Act the department store is not penalized for its size. It is not forced to close because some of its business taken alone would be non-exempt or because the store as a whole does not come within the fair meaning of any category or categories described in the statute. The department store may thus compete on Sunday with the exempt store; but not with the closed store. Further, the kinds of commodities which may be sold on Sunday are restricted to the kinds permitted by the Legislature. In like manner the drug store, grocery store or other exempt store is afforded no protection by the Act if it offers for sale on Sunday commodities essentially unrelated to the principal and exempt line of business and which are ordinarily and customarily offered for sale in stores not exempted by the Act.

Fantastic Fair and Brunswick Mill Outlet kept open clothing and hardware stores on the Sunday in question. It is unnecessary to determine precisely what other types of business each conducted. It is enough that each did not confine itself to the exempt categories and accordingly each is guilty of violating the Sunday Closing Law.

The respondents are harmed by the application of the Sunday Closing Law as we have interpreted it. The constitutional issues raised by them must therefore be considered. We keep in mind the often quoted statement of Justice, later Chief Justice Fellows.

> "In passing upon the constitutionality of any act of the Legislature the court assumes that the Legis-

> lature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is a 'presumption of great strength.' *State v. Pooler,* 105 Me. 224, 238; *Laughlin v. City of Portland,* 111 Me. 486; *Village Corporation v. Libby,* 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *Warren v. Norwood,* 138 Me. 180. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. *Kelley v. School District,* 134 Me. 414; *Hamilton v. District,* 120 Me. 15, 20." *Baxter* v. *Waterville Sewerage District,* 146 Me. 211, 214, 79 A. (2nd) 585.

The pertinent constitutional provisions 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." Fourteenth Amendment Federal Constitution.

Maine Constitution, Art. I (equal protection and due process), and Sec. 13 ("The laws shall not be suspended but by the legislature or its authority.")

The respondents strongly urge that the Sunday Closing Law is unconstitutional, in the words of the Brunswick Mill Outlet brief, ". . . for the reason that the same is vague, uncertain and ambiguous, and that ordinary businessmen could not interpret the plain meaning of the law from a reading thereof." We have seen that the respondents are not within the exempt categories in at least part of their operations. In reaching this conclusion we necessarily have been satisfied that the statutory classes in which the respondents assert they are included meet the test of constitutionality.

The Legislature in enacting the 1961 Sunday Closing Law clearly intended to retain a day of rest and recreation with enlarged bounds of permissible business activity on Sunday to meet the conditions of today. The Act reflects a judgment by the Legislature that with the changing times the Sunday laws of a generation past required revision. We are here concerned only with the Sunday provisions of the statute.

The governing rules were stated and applied in the recent case of *Swed, et al. v. Bar Harbor,* 158 Me. 220, 182 A. (2nd) 664, in which we held an ordinance invalid insofar as the regulation of "bric-a-brac, linen stores" were concerned. The court said, at p. 226:

> "The highest court ruled in *United States v. Harris* (1954), 347 U.S. 612, 617, as follows:
>
> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.
>
> 'On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statutes will not be struck down as vague, even though marginal cases could be put where doubts might arise - - - And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute this Court is under a duty to give the statute that construction. - - ' "

and again, at p. 227:

> "The perplexity of the instant case will be seen as plainly distinguishable from the predicament accorded such a tolerant construction in *McGowan v.*

> *Maryland* (1961), 366 U.S. 420, 428, where the court commented:
>
> 'Another question presented by appellants is whether Art. 27, § 509, which exempts the Sunday retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks, et cetera in Anne Arundel County, is unnecessarily vague. We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. - - - Under these circumstances, there is no necessity to guess at the statute's meaning in order to determine what conduct it makes criminal. - - - ' "

See also *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *State of Maine* v. *Munsey,* 114 Me. 408, 410, 96 A. 729; *State* v. *Seaburg,* 154 Me. 210, 145 A. (2nd) 559.

In the instant case the categories of interest meet the constitutional test of *Swed, et al.* v. *Bar Harbor, supra.* They are general in nature with a possibility of marginal cases which, in our view, do not destroy the usefulness of the definitions. In any event the hardware and clothing businesses, to name only two as examples conducted by the respondents, are plainly beyond the bounds of such categories.

In *State* v. *Hill* (Kan.), 369 P. (2nd) 365 (1962), cited by the respondents, the Kansas Court held a statute exempting from a Sunday ban "the sale of any drugs or medicines, provisions, or other articles of immediate necessity" void under the due process clause. The decision was based on uncertainty in the meaning of "other articles of immediate necessity." The court had no trouble with "drugs or medicines," and said with reference to "provisions" that the stat-

ute might be sustained notwithstanding there might be marginal cases. In *State v. Katz Drug Co.* (Mo.), 352 S. W. (2nd) 678 (1961), the Missouri Court, in reaching the contrary result and upholding a like statute, had no difficulty with either "drugs or medicines," or "provisions."

In our view of the term "works of necessity or charity" meet the test of constitutionality. The words have been in our statute since 1821. See *State* v. *Morin, supra* (the drug store case). The real interest for us of both the Kansas and the Missouri cases lies in the application of the vagueness rule to "drugs or medicines" and "provisions."

In *G. I. Surplus Store, Inc.* v. *Hunter* (N. C.), 125 S. E. (2nd) 764, 769 (1962) cited by Brunswick Mill Outlet, the Act prohibited the selling at retail of specified commodities "excluding novelties, toys, souvenirs, and articles necessary for making repairs and performing services." The court, in holding the Act was unconstitutionally vague, uncertain and indefinite, said:

> "Since the 1961 Act imposes no general ban on business activities or upon the sale or offering for sale of articles of property other than those in the specified categories, the exceptive provisions necessarily refer to articles within the specified categories. Under what circumstances may articles within the specified categories be considered novelties or toys or souvenirs? . . . Neither the nature of the repairs to be made nor the character of the services to be rendered is defined. Nor is there any reference to the time when such repairs are to be made or services performed."

Our problem is quite different from that before the North Carolina court. The question is not whether a particular item banned for Sunday sale is a toy, or whether particular goods may be sold for particular uses of making repairs, or in the performance of services. It is whether a given store (or department) comes within an exempt category.

We are convinced that reasonable men in the business world will understand from the Act whether they are running a drug store, a restaurant, a book store, or a store selling gifts or souvenirs. The possibility of marginal cases does not destroy the scheme for controlling business on Sunday established by the Legislature. We need not hold the statute violates due process for lack of a provision spelling out that such stores shall not sell hardware, for example. Fantastic Fair and Brunswick Mill Outlet fail in their attempt to have the Act held unconstitutional in its application to them for lack of due process.

The second constitutional issue is whether the statute violates the "equal protection" clause. The judgment of the Legislature upon restrictions placed on Sunday business controls, unless the restrictions are plainly discriminatory or plainly arbitrary.

Without question the Legislature could have banned all business activity on Sunday, excepting "works of necessity or charity." That the issue here in view of the general ban is in terms of exemptions and not restrictions does not make inapplicable the general principle. Is the closed business discriminated against by the exemption? Is the exempt classification of the particular business plainly arbitrary and without reason when matched against the closed business? *State* v. *Mitchell,* 97 Me. 66, 53 A. 887; *State* v. *Dodge,* 117 Me. 269, 104 A. 5; *In re Milo Water Co.,* 128 Me. 531, 149 A. 299; *State* v. *King,* 135 Me. 5, 188 A. 775; *Boothby, et al* v. *City of Westbrook, et al.,* 138 Me. 117, 123, 23 A. (2nd) 316.

To avoid confusion we must at all times keep before us the exemptions from the Sunday closing in which the respondents have a legitimate interest and set aside those not touching the present issues. Fantastic Fair and Brunswick Mill Outlet are concerned with "restaurants," "drug stores," "book stores," "stores selling gifts or souvenirs," and, on

the constitutional issues only, with "retail monument dealers," "automatic laundries," "grocery stores," "greenhouses," "roadside stands engaged in sale of farm produce or dairy products," "ship chandleries," and "marinas."

It is apparent that the remaining exemptions do not affect the business of the respondents. In any event, such exemptions cannot be said to result in discrimination against them or a denial of the equal protection of the laws.

> "It is fundamental that no one will be heard to question the constitutionality of a statute unless he is adversely affected by it." *State* v. *Hurliman* (Conn.), 123 A. (2nd) 767 (1956).

What Fantastic Fair and Brunswick Mill Outlet are saying in substance is that there is no reasonable ground for permitting stores in exempted categories in which they are interested to keep open and for denying a like privilege to their department stores. We have chosen to "break down" the department store into its several departments and to treat each department as a store for purposes of the Sunday Closing Law. The issue may then be put in these words: Does a statute which permits a drug store, a book store, or a store selling gifts or souvenirs discriminate in violation of the equal protection clause against, for example, a clothing, a hardware, or a furniture store? In short, may a line between Sunday opening and Sunday closing be reasonably drawn between such types of business enterprise?

In our view such a classification is not unreasonable. The purpose of the Sunday Closing Law is to preserve a day of rest and recreation with business and other activities limited to meeting the objective. Obviously the test of "works of necessity or charity" is not the measure adopted by the Legislature. Legislators may, however, reasonably determine that the permitted businesses meet the reasonable needs of the day and that the prohibited businesses, namely, other businesses not within "works of necessity or

charity" would serve no useful purpose and would destroy or tend to destroy the desired opportunity for rest and recreation.

The Legislature in making the exemptions may properly have considered not only the needs of our citizens but as well the needs of the thousands who make Maine their vacationland. There is no reason for judges to blind their eyes to the importance of the tourist to the economy of the State and to his particular Sunday needs.

On the charge of discrimination in favor of "retail monument dealers" and "automatic laundries," it is sufficient to say that in no way are the respondents harmed by the exemptions. There is not the slightest suggestion that any business in which the respondents have engaged on Sunday is competitive with or is reasonably to be classified with these exemptions. If the two exemptions, or either of them, were held in a proper case to be unconstitutional, we do not doubt that the remainder of the Sunday Closing Law would be unaffected by such a ruling. See *Swed, et al.* v. *Bar Harbor, supra.*

"Ship chandleries" in a degree may, it is true, compete with hardware stores. We cannot say, however, that the Legislature may not reasonably permit "ship chandleries" to keep open for the benefit of those who seek recreation on our lakes and coast. The incident of possible competition does not necessarily outweigh the need served by the exemption. The exemption of "marinas" is analogous with the exemption of the garage and service station. Again, in these exemptions relating to boating, the respondents have shown no harm other than, as we have said, the possibility of competition from "ship chandleries."

We conclude, therefore, that the exemptions under the Sunday Closing Law do not in a constitutional sense discriminate against the respondents. The classifications are

reasonably established to accomplish the desired objectives and apply equally to all members of the class. The respondents fail to establish a denial of equal protection of the law. *Kotch* v. *Board of River Port Pilot Com'rs,* 330 U. S. 552, 67 S. Ct. 910, 912 (1947); *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483, 75 S. Ct. 461, 464 (1955), "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Annot. 46 A. L. R. 290, 119 A. L. R. 752, 57 A. L. R. (2nd) 969 — Sunday Law — Discrimination; 50 Am. Jur., *Sundays and Holidays,* § 11; 83 C. J. S., *Sunday,* § 7.

We recognize that in several cases cited by the respondents Sunday Closing Laws have been held invalid under the equal protection clause in situations not unlike in general that existing here. A like conclusion is not, however, in our judgment required on a fair interpretation of our 1961 Act. We comment upon some of the cases so cited.

In *City of Mt. Vernon* v. *Julian* (Ill), 17 N. E. (2nd) 52, 119 A. L. R. 747 (1938), the Illinois Court held invalid an ordinance "where a community grocery store which sold groceries, tobacco and other articles was required to close, but a tobacco store and a confectionary store selling the same products were permitted to open." (Quoted from *Humphrey Chevrolet* v. *City of Evanston, ante.*) The court found these and other instances in the exemptions "to be entirely arbitrary, without relation to the public, health, safety, morals or welfare." With this we may agree, but it is not the case before us. Here, for example, the drug store is classified apart from the furniture store and the store selling gifts or souvenirs, from the clothing store.

In *Humphrey Chevrolet* v. *City of Evanston* (Ill.), 131 N. E. (2nd) 70, 57 A. L. R. (2nd) 969 (1956), a Sunday closing ordinance prohibiting all retail and wholesale business activities on Sunday, but exempting the sale of certain commodities from the operation of the law, was held not un-

reasonably discriminatory as against an automobile dealer, where no one was permitted to sell automobiles on Sunday. The exempt commodities included drugs and medicines and other articles which the court considered could "certainly be distinguished from the sale of new and used automobiles." A like distinction exists in the instant cases between the exempt and the restricted businesses.

In *Elliott* v. *State* (Ariz.), 242 P. 340, 46 A. L. R. 284 (1926), the Arizona Court, in holding an ordinance invalid, said at p. 342:

> "Let us apply this test to the ordinance in question. It is evident from its language that it is not a case of a general cessation from labor with special exemption for reasons of necessity or charity, but rather a special inhibition placed upon certain otherwise praiseworthy and legitimate businesses with a general exemption to all other classes."
>
> * * * * * * * * *
>
> "For the same reasons we cannot see why it is a legitimate discrimination to close groceries, shoe stores, and hardware stores, while allowing jewelers, dealers in secondhand goods, and tailoring establishments to remain open without restriction; nor does it appear on any theory we can conceive that pawnbrokers and photographers are engaged in works of necessity and charity when butchers and dealers in fruit or vegetables are not.
>
> "We are of the opinion that the ordinance in question shows on its face it is not a general 'Sunday closing" ordinance with reasonable exceptions, but a special one, aimed without any apparent legitimate reason at certain named businesses, and it does, therefore, in effect, grant special privileges and immunities to certain classes of citizens of the state, while, without legal excuse denying them to others."

In our cases we have a general ban on Sunday business with exemptions in categories meeting not strictly "neces-

sity or charity" as suggested by the Arizona Court, but the reasonable needs of the day.

In *Henderson* v. *Antonacci* (Fla.), 62 So. (2nd) 5 (1952); *Kelly* v. *Blackburn* (Fla.), 95 So. (2nd) 260 (1957), and *Courtesy Motor Sales* v. *Ward* (Ill.), 179 N. E. (2nd) 692 (1962), statutes were held void under the equal protection clause on attack by automobile dealers who were prohibited from selling on Sunday by general restriction in Florida and a special statute in Illinois. In *Henderson* v. *Antonacci, supra,* Justice Drew of the Florida Court, in a concurring opinion also considered the statute was invalid for vagueness. We reach the contrary conclusions on the statute before us.

In *Broadbent* v. *Gibson* (Utah), 140 P. (2nd) 939 (1943) and *Gronlund* v. *Salt Lake City* (Utah), 194 P. (2nd) 464 (1948), the Utah Court in *Broadbent* held unconstitutional a statute with a general closing provision exempting certain businesses or occupations, as in our Act, and in *Gronlund* a general closing Act with exemptions of named commodities. In *Broadbent* the court found the statute permitted the sale by persons of articles which others similarly situated were prohibited from selling. Under the statute, for example, the confectionary store could remain open to sell confections while a grocery store selling the same articles must close. This situation does not exist under the classifications in our Act.

Lastly, the respondents contend that the local option provision renders the 1961 Sunday Closing Law unconstitutional. In Brunswick the voters did not approve any additional exemptions. In South Portland the time for a local option vote had not arrived when the case was commenced.

Through the exercise of local option a town or city may extend but not limit the places of business exempt from

closing under the 1961 Act. In brief, a given business may be closed on Sunday in Town A under the Act and may be open in the neighboring Town B.

The creation of additional exemptions by a municipality obviously may raise constitutional issues of due process and equal protection. That these may flow from the exercise of local option does not destroy or render invalid this portion of the 1961 Act. We need not anticipate unlawful or unconstitutional action under the local option section.

It is entirely possible that the merchant in Town A whose store must close may find his competitor in Town B lawfully doing business on Sunday. This competition seemingly unfair is not, however, a sufficient reason to deny the people of either Town A or Town B the privilege of deciding under the 1961 Act what restrictions on Sunday business they desire.

The Sunday Closing Laws rest upon the police power of the State. In turn the State may grant to municipalities the right to exercise the police power of the State to such an extent and with such limitations as it may decree.

Conditions with reference to the Sunday closing problem may well differ from town to town. Limitations appropriate to an inland community may be unsuited, let us say, to a sea coast town in a resort area. The analogy with local option for Sunday motion pictures and bowling is apt. Town X may permit and its neighboring town prohibit the sale of liquor.

There is no suspension of the laws in violation of our Constitution. Maine Const., Art. I, § 13, *supra.* Nor is there an unconstitutional delegation of legislative authority. See *State* v. *Prescott,* 129 Me. 239, 242, 151 A. 426; *Searsport Water Co.* v. *Lincoln Water Co.,* 118 Me. 382, 389, 108 A. 452. The merchants of the town with *prohibitions*

against the activity in question have no complaint on the score of constitutionality.

Fantastic Fair makes the further point that the neighboring town of Scarborough under the Act was able to vote under the local option provision at a date earlier than the date available to the City of South Portland with the result that a competitor is enabled to keep open on Sunday. This is not a point of constitutional significance. There is no compelling reason advanced why the election must be held on a given date throughout the State or in contiguous towns. At most, the merchants and others in South Portland will be delayed a relatively brief period before having an opportunity of voting upon the issue. They have not been deprived of the benefits of local option by the fact that the election comes at a later date than that in Scarborough.

In revising the Sunday Closing Law to meet conditions of contemporary life, the 1961 Legislature sought to retain Sunday as a day of rest and recreation. This purpose, in our view, was accomplished in language which, fairly construed, meets the test of due process and equal protection of the laws and the test raised by the local option provision.

As we said at the outset, we have considered the 1961 Act with reference to Sunday only and not at all with reference to holidays.

Fantastic Fair and Brunswick Mill Outlet on the records were not stores within the exempt categories. Their attack on the constitutionality of the 1961 Sunday Closing Law fails.

The entry will be in each case

Demurrer overruled.

Remanded for entry of judgment for the State and sentence.

WEBBER, J. (CONCURRING)

I concur in the result. I am, however, unable to agree that the exemption afforded to "stores selling gifts or souvenirs" meets constitutional requirements. I find as much difficulty in ascertaining what is embraced within the classification as an unanimous court had in *Swed, et al.* v. *Bar Harbor,* 158 Me. 220. In that case the disputed classification was "bric-a-brac, linen stores." We held that "bric-a-brac as a category is too conducive to arbitrary abuse and unlimited cannot be utilized as a norm in a penal law. A person of ordinary intelligence would be habitually nonplused as to whether a store inventory included or was innocent of bric-a-brac." In my view the category "stores selling gifts or souvenirs" suffers from the same fatal weakness. In a broad sense whether an item of merchandise is or is not a gift depends entirely on the subjective purpose of the giver. In a more narrow sense, if we attempt to relate the exempt line of business to that which we ordinarily associate with the so-called "gift shop," we are still confronted by the fact that there are no accepted definitions of or understood limitations on the type of merchandise which may be properly considered as within the scope of the business. The court says in effect that "stores selling gifts or souvenirs" do not in any event sell "clothing, hardware, electrical appliances and the like." Common knowledge would suggest the contrary, unless we refer only to full and complete lines of such commodities. Who has not seen in the well stocked "gift shop," so-called, offering of women's and children's clothing, waffle irons, coffee percolators and the like? The variety of merchandise appears to vary with the imagination of the proprietor and his capital available for inventory. The objectionable statutory language does not even enjoy whatever descriptive limitation might have been afforded by use of the conjunctive "stores selling gifts *and* souvenirs" since it is couched

in the more sweeping disjunctive "gifts *or* souvenirs." I conclude that reasonable business men could not determine with reasonable certainty whether or not they were keeping their places open on Sunday to conduct in whole or in part an exempt or a prohibited business activity.

The respondents contend that if this be so, the entire statute must fall. It is therefore necessary to determine whether or not the offensive exemption is properly separable. On this question the cases are in conflict. In *Swed* we held the unconstitutional portion of the statute separable. The basic test is the intention of the Legislature and whether or not it may be fairly presumed that the Legislature would have enacted the statute, absent the objectionable portion. *State* v. *Webber,* 125 Me. 319, 323; *Fairley* v. *City of Duluth* (1921), 185 N. W. (Minn.) 390, 394; *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, 49 S. Ct. 235, 239; *Eslin* v. *Collins* (1959), 108 So. (2nd) (Fla.) 889; 11 Am. Jur. 855, Sec. 161. A review of the history of the statute now before us discloses that we have long had a Sunday closing law, so-called, in effect. From time to time certain exempt categories have been added and that afforded to "stores selling gifts or souvenirs" is of most recent origin. I find here no intention of the Legislature to depart from its main objective of providing one day of rest in seven but exempting certain types of business out of consideration for the public necessity and convenience or the economic welfare of the state and its people. It is inconceivable to me that the Legislature would not have enacted the present statute, omitting only the objectionable exemption, had it deemed that its description of that particular exempt category would not meet constitutional requirements. I conclude that the offensive exemption is separable and the remainder of the statute continues in full force and effect. That being so, the respondents neither gain nor lose since they are admittedly guilty of

keeping open "departments" for the sale of full lines of clothing, hardware, electrical appliances and the like in violation of law.

STATE TRAILER SALES, INC.
vs.
FIRST NATIONAL BANK OF PITTSFIELD

Somerset. Opinion, December 11, 1962.

Real Estate. Mortgage. Liens. Equity. Legislative Intent. Promissory Notes. Contracts. Banking.

A national bank is governed in its ordinary banking business by state laws which apply to other banks.

The provisions of statutes relating to redemption or mortgages cannot be read into statutes relating to assignment of mortgages.

National banks are limited in their mortgage security to principal amount as states in mortgage.

ON REPORT.

This is an action by a second mortgagee against a first mortgagee to recover the amount paid and a lessor amount which the second mortgagee alleged as the amount due on the first mortgage. Held, that contractual consideration between the first and the second mortgagee was valid and precluded recovery. Judgment for the defendant.

Harry R. Coolidge, for the defendant.

Myer Marcus,
Leonard M. Nelson, for the plaintiff.

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

TAPLEY, J. On report. The case is reported to this court by authority of Rule 72 of Maine Rules of Civil Procedure. The action is presented upon the complaint, answers and agreed statement of facts. The pre-trial order is considered to be the agreed statement of facts. Leroy W. Lander, Sr. and Elmira Louise Lander borrowed the principal sum of $4,000.00 from the First National Bank of Pittsfield, Maine (hereinafter referred to as the "Bank"). The Landers on November 1, 1955 executed a mortgage deed conveying two parcels of land, with the buildings thereon, to the Bank to secure their promissory note. The mortgage deed recited consideration of $4,000.00 and was to remain in full force and effect unless the Landers, "their heirs, executors or administrators pay to the said Bank, its successors or assigns, the sum of Four thousand dollars payable Two hundred fifty dollars each three months, the first payment to be April 1, 1956 and shall pay all other indebtedness owing by the mortgagors, and either of them, to said bank, now and hereafter contracted - - - -."

On May 28, 1958 the Landers borrowed the principal sum of $2,000.00 from the plaintiff, State Trailer Sales, Inc., and delivered to the plaintiff their promissory note for $2,000.00 and a mortgage deed conveying the second parcel of land, with buildings thereon, described in the mortgage to the Bank. Plaintiff's mortgage was subject to that of the Bank. At this point the plaintiff stood in relation of second mortgagee to the Bank.

Subsequent to the creation of these two mortgages, the Landers became involved with the Bank in other financial transactions. On May 28, 1958 Roger Guptill and Priscilla Guptill borrowed $137.00 from the Bank, executing a chattel mortgage as security for the indebtedness. Leroy W. Lander, Sr. guaranteed payment of the obligation. The same situation applies where one Eugene Cowan on No-

vember 24, 1958 executed, in favor of the Bank, a chattel mortgage wherein the Landers guaranteed payment.

On December 1, 1958 the Landers borrowed the principal sum of $4,739.62 from the Bank and delivered to the Bank their promissory note for the amount of $4,739.62 purporting on its face to be a renewal of note #76518, the $4,000.00 note which was secured by the mortgage. On April 23, 1959 the Landers guaranteed the payment of an obligation of one Charlotte Hamilton to the Bank in the amount of $210.00.

Again in August of 1959 the Landers borrowed the principal sum of $810.00 and gave the Bank their promissory note for $810.00. Later, in the month of August, being the 26th, they borrowed the sum of $305.00 and gave the Bank their promissory note for this amount.

On January 19, 1960 the Bank gave the Landers notice of foreclosure of the mortgage.

The plaintiff, holder of the second mortgage, on January 18, 1961, through counsel, offered the Bank the sum of $5,000.00 to pay the amount due on the mortgage held by the Bank, expecting a refund from the Bank for any amount of the $5,000.00 which was in excess of the debt. The check was refused because the Bank claimed the sum was insufficient to pay the amount due, whereupon plaintiff again offered the check for $5,000.00 and a personal check of plaintiff's counsel in the sum of $839.03 which made up the total sum claimed to be due by the Bank under the terms of the mortgage. The Bank then gave the plaintiff an assignment of the mortgage with its subsisting rights of foreclosure and indorsed all notes which the Bank held given by Leroy and Elmira Lander as primary or secondary obligors.

The sum of $5,839.03 is claimed by the Bank to be due and secured by the mortgage which covers the indebtedness

of the Landers to the Bank, plus the amounts due on the various notes guaranteed by the Landers. The plaintiff takes the position that the Bank is entitled to $4,586.73 as being the amount stated in the mortgage from Landers to the Bank, plus interest, insurance premiums and cost of foreclosure, and it seeks by this action to recover the sum of $1,255.30, being the difference between the amount the bank was paid, over protest, and what it was entitled to under provisions of P. L., 1955, Chap. 380, as amended.

According to the pre-trial conference order, which is made a part of these proceedings as statement of facts, the parties have defined the issues as:

(1) The applicability of Chap. 380, Sec. 19-H I (F) of P. L., 1955.

(2) The amount due the defendant bank under the real estate mortgage of November 1, 1955.

Defense counsel, in his brief, raises another issue which was also argued. He contends that irrespective of whether the statute applies or not, plaintiff offered to pay the Bank $5,839.03 if it would execute and deliver an assignment of its mortgage with its rights of foreclosure; that the offer was accepted and the assignment, with rights of foreclosure, was executed and delivered to the plaintiff for a valuable consideration. He says these acts constituted a valid contract and that the plaintiff must be held to the contractual terms.

If the provisions of Chap. 380, Sec. 19-H I (F) of the P. L. of Maine of 1955 apply to a national bank as well as to a state bank, then the plaintiff is entitled to a judgment insofar as the statutory aspects of this case are concerned.

> "F. Any interest in real property which may now be mortgaged to a savings bank under the provisions of paragraphs A to E, inclusive, of this subsection may be mortgaged to secure existing

> debts or obligations, to secure debts or obligations created simultaneously with the execution of the mortgage, to secure future advances necessary to protect the security and to secure future advances to be made at the option of the parties up to a total amount stated in the mortgage, and all such debts, obligations, and future advances shall, from the time the mortgage is filed for record as provided by law, be secured by such mortgage equally with, and have the same priority over the rights of all persons who subsequent to the recording of such mortgage acquire any rights in or liens upon the mortgaged real estate, as the debts and obligations secured thereby at the time of the filing of the mortgage for record; except that:
>
> "The provisions of this paragraph shall apply to all banks and trust companies." P. L. of Maine of 1955, Chap. 380, at page 331.

National banks are subject to State regulations under some circumstances.

> "The doctrine of noninterference by a state with the operations of a national bank protects the bank only from such legislation as tends to impair its utility as an instrumentality of the Federal government. A national bank is subject to the laws of the state in which it is located in respect of its affairs if such laws do not interfere with the purpose of its creation, tend to impair or destroy its efficiency as a Federal agency, conflict with the paramount laws of the United States, or discriminate against such national bank." 7 Am. Jur., Banks — Sec. 13, page 33.
>
> "National banks are brought into existence under Federal Legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their

> efficiency as federal agencies or conflict with the paramount law of the United States." *First National Bank in St. Louis* v. *State of Missouri,* 263 U. S. 640 at 656.

A national bank is governed in its ordinary banking business by State laws which apply to other banks. *Prudden & Co.* v. *First Nat. Bank of Secaucus,* 170 A. 860 (N. J.).

Sec. 19-H I (F) of Chap. 380, P. L., 1955 specifies what banking institutions are subject to the act by providing "the provisions of this paragraph shall apply to all banks and trust companies." The provisions of the paragraph are regulatory in their nature and when applied to the operation of a national bank they do not impair or destroy the efficiency of the bank or are they in conflict with the laws of the United States affecting national banks.

If the Legislature intended that the statutory limitations should not apply to national banks, then it has passed discriminating legislation against State banks. We are of the opinion that the enactors of the statute never meant that it should be so interpreted that the national banks remain free of the restrictions, while the State banks are subject to them. The language used that the provisions "shall apply to all banks and trust companies" is plain, clear and unambiguous.

We hold that Sec. 19-H I (F), Chap. 380, P. L., 1955 applies to national banks and that the defendant bank statutewise is limited in its mortgage security to the principal amount of $4,000.00 as stated in the mortgage.

Counsel for the defendant bank contends, and so argues, that irrespective of whether the statute applies to a national bank, the plaintiff cannot recover because the assignment was made under such circumstances as to constitute a contract between the plaintiff and the Bank; that for the consideration of $5,839.03, paid by the plaintiff to the defend-

ant, the plaintiff received an assignment of the mortgage with subsisting rights of foreclosure. The Bank, in addition to assigning the mortgage, indorsed all notes which it held given to it by the Landers as primary or secondary obligors and delivered them to the plaintiff. The plaintiff, on the other hand, says that the amount over and above the $4,000.00, plus interest and costs of foreclosure, was paid under protest; that the overpayment was necessary to obtain the assignment of the mortgage which was needed to protect plaintiff's interest as subsequent mortgagee.

Counsel for the plaintiff bases his protest upon the applicability of Sec. 19-H I (F), Chap. 380, P. L., 1955.

> "In an action at common law for money had and received, protest alone does not preserve the right to recover if the circumstances show that there was no compulsion or coercion. In other words, there is no magic in the act of paying under protest and that fact alone, unaccompanied by other circumstances, is insufficient to convert a voluntary payment into an involuntary one so as to authorize recovery." *Baker* v. *Allen, et al.,* 66 S. E. (2nd) 618 at 622 (N. C.)
>
> "The mere fact that payment was made under express protest, is not sufficient to prevent the payment from being a voluntary one which cannot be recovered back. As stated in Pure Oil Co. vs. Tucker, 8 Cir., 164 F2d 945, 947: 'It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance. This is true even though the payor makes the payment * * * under protest * * *.'" *Richfield Oil Corporation* v. *United States,* 248 F (2nd) 223.

The facts in the case of *Hess* v. *Cohen,* 45 N. Y. S. 934, concern the assignment of a mortgage. The defendant

Cohen was foreclosing a mortgage on plaintiff's premises. Plaintiff had arranged for a loan from a third person to pay the mortgage debt. An assignment of the mortgage was to be taken as security for the loan. The defendant agreed to assign the mortgage but when the parties met to conclude the agreement, defendant's attorney demanded that in addition to the mortgage debt plaintiff must pay defendant the sum of $20.00 alleged to have been loaned by the defendant to the plaintiff and that the assignment would not be made unless the amount was paid. Under protest the plaintiff paid it and then brought the action to seek its recovery, claiming that the $20.00 was paid under compulsion. The court said, on page 935:

> "- - - - -, the party acted with full knowledge of all the facts, *and with the option either to refuse to yield to the exaction, and rest upon his legal remedies, or to submit for the sake of present advantage.* The payment was therefore as voluntary as any agreement for a price for what is desired or must be had. The necessities of one of the parties to a contract do not make the contract invalid." (Emphasis supplied.)
>
> "As a general rule, in the absence of a statutory provision otherwise, a payment cannot be recovered back as being compulsory or involuntary by reason of the mere facts that it is paid unwillingly and that the payor at the time of payment makes a protest against the payment." 70 C. J. S., Payment, Sec. 153.
>
> "Where a dispute arises and the debtor, who pays under protest, has at hand reasonable means of immediate and adequate relief other than by making the payment, his act is not one done under coercion. Therefore, where a person has time and opportunity to relieve himself from his predicament without making such a payment, by resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary,

and he cannot recover it." 40 Am. Jur. Payment, Sec. 183.

The plaintiff voluntarily placed himself in the position of a subsequent mortgagee. The mortgage is dated May 28, 1958 and describes a certain lot or parcel of land with the buildings thereon. The Bank's mortgage is dated November 1, 1955 and describes the same lot or parcel of land, with the buildings thereon, as does the subsequent mortgage and, in addition thereto, another lot or parcel of land, with the buildings thereon. On January 19, 1960 the Bank gave notice of foreclosure of its mortgage and previous to the expiration of period of redemption plaintiff sought assignment of the mortgage from the Bank.

Plaintiff, as a subsequent mortgagee, has only those rights to an assignment of the Bank's mortgage as are prescribed by the provisions of Sec. 24, Chap. 177, R. S., 1954, as amended:

> "When proceedings for the foreclosure of any prior mortgage of real estate have been instituted by any method provided by law, the owner of any subsequent mortgage of the same real estate or of any part of the same real estate may, at any time before the right of redemption from such prior mortgage has expired, in writing, request the owner of such prior mortgage to assign the same and the debt thereby secured to him, upon his paying to the owner of such prior mortgage, the full amount, including all interest, costs of foreclosure and such other sums as the mortgagor or person redeeming would be required to pay in order to redeem. If the owner of such prior mortgage neglects or refuses to make such assignment within a reasonable time after such written request, the owner of such subsequent mortgage may bring a civil action in the superior court for the purpose of compelling the owner of such prior mortgage to assign the same and the debt thereby secured, to him, the owner of such subsequent mortgage, upon

> making payment. If the court, upon hearing, shall be of the opinion that the owner of such prior mortgage will not be injured or damaged in his property matters and rights by such assignment, and that such assignment will better protect the rights and interests of the owner of such subsequent mortgage, and that the rights and interests of any other person in and to the same real estate, or any part thereof, will not be prejudiced or endangered thereby, the court, in its discretion, may order and decree that such prior mortgage and the debt thereby secured, shall be assigned by the owner thereof to the owner of such subsequent mortgage upon his making payment as aforesaid. The time within which and the place where such payment shall be made shall be fixed by the court, *and if the parties are unable to agree upon the amount of such payment, the court shall fix and determine the amount.*" (Emphasis supplied.)

Because of the divergent views of the applicability of the statute, Sec. 19-H I (F), Chap. 380, P. L., 1955, the parties could not agree on the amount due the Bank. Under these circumstances, the plaintiff had available the procedure prescribed by Sec. 24 of Chap. 177, as amended. The court would hear the contending parties and if the presiding justice was of the opinion (1) "that the owner of such prior mortgage will not be injured or damaged in his property matters and rights by such assignment;" (2) that such assignment will better protect the rights and interests of the owner of such subsequent mortgage;" (3) that the rights and interests of any person in and to the same real estate, or any part thereof, will not be prejudiced or endangered thereby," he then could, in his discretion, order the assignment. Should he find that an assignment was in order a determination of the amount due under the mortgage would be made and upon payment of the amount to the prior mortgagee order the assignment of the mortgage to the subsequent mortgagee.

The Bank was under no legal duty to assign the mortgage. It had the right to make its own terms of assignment unless plaintiff sought relief under Sec. 24. At this point the plaintiff had a choice, either to meet the financial requirements of the Bank, or to invoke the provisions of Sec. 24. A hearing on a complaint based on Sec. 24 would bring in issue the applicability of Sec. 19-H I (F) as well as a determination of the amount to be paid the Bank if the justice, in his discretion, decided the equities of the parties warranted an assignment.

Counsel for the plaintiff cites *Whitcomb* v. *Harris,* 90 Me. 206 in support of his contention that the plaintiff is entitled to recover what it claims to be an excessive payment. We distinguish the *Whitcomb* case from the case at bar. The *Whitcomb* case involves an action to recover an alleged overpayment in the redemption of a mortgage on real estate. The right to recover was statutory (R. S., 1883, Chap. 90, Sec. 22). The same statutory right of refund of an excess payment is now available under R. S., 1954, Chap. 177, Sec. 23. The circumstances of the case at bar are obviously not analogous to those in the *Whitcomb* case. In the *Whitcomb* case the *redemption* of mortgaged property was involved, while in the instant case an *assignment* is concerned. They are two separate and distinct types of transactions, both being regulated by statute.

In the instant case the plaintiff apparently was not content with a *redemption* and discharge of the Bank's first mortgage but rather aspired to secure by an *assignment* a lien upon the additional parcel of real estate securing the Bank's first mortgage. Redemption by the plaintiff obviously would have destroyed the mortgage lien upon the other additional parcel. Plaintiff by its contract with the Bank was relieved of any recourse to court under R. S., Chap. 177, Sec. 24 and received an assignment with a mortgage lien upon an additional parcel of real estate. The Bank

without obligation gave an assignment. There was contractual benefit to the plaintiff. *Congregation Beth Abraham* v. *People's Savings Bank,* 120 Me. 178.

Sec. 23 provides for an accounting in a suit for redemption of mortgaged premises and if the amount tendered to redeem is a larger sum than the person to whom it is tendered is entitled, then he must refund the excess. If he refuses so to do then an action at law is in order to recover the excess.

Under Sec. 24 a different situation obtains. The Legislature has made available a procedure in equity for one to seek an assignment with the equity court determining the amount to be paid the mortgagee if the assignment is allowed.

The remedies and procedures provided in Secs. 23 and 24 must be strictly adhered to and those applying to redemption of mortgages cannot be applied to assignments and the same, of course, is true where an assignment of a mortgage is concerned. The provisions of Sec. 23 cannot be read into those of Sec. 24. See *Bragg* v. *Pierce,* 53 Me. 65 and *Wilcox* v. *Cheviott,* 92 Me. 239.

Our decision is based not on our interpretation of Sec. 19-H I (F) but rather on the contractual relationship established by the parties, wherein for a good and sufficient consideration the plaintiff received from the Bank an assignment of a first mortgage affecting two parcels of property, together with all indorsed notes which the Bank possessed, given to it by Leroy and Elmira Louise Lander as primary or secondary obligors.

The entry will be,

Judgment for the Defendant.

ANN CASWELL
vs.
NEWELL E. KENT

Penobscot. December 17, 1962

Wills. Implied Revocation. Inheritance. Statutes. Divorce.

If situations exist to which a statute should properly apply, it should be given its reasonable and intended force and effect and not be repealed by judicial fiat or left to operate in a vacuum.

The ordinary testator, after a divorce accompanied by a property settlement, no longer owes or recognizes any legal obligations to his former spouse.

ON REPORT.

This is reported upon an agreed statement on the issue of whether a divorce accompanied by a property settlement will produce an absolute and irrebuttable statutory revocation of a will as to the divorced spouse. Affirmative decision of the Probate Court upheld. Appeal denied.

Thomas E. Needham, for the Plaintiff.

Morris G. Pilot, for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., was present at the argument but retired before rendition of decision.

WEBBER, J. On report. The late James G. Kent married Ann Caswell in 1946. In 1947 Mr. Kent executed a will devising an interest in his real estate in these terms: " * * * and one-third part in common and undivided thereof to my wife, Ann Kent, * * * ." The remainder of his estate was left to Newell E. Kent, son of the testator by a former marriage. About a year later Mrs. Kent divorced

her husband and resumed her maiden name. The divorce was accompanied by a voluntary and complete property settlement involving a transfer by Mrs. Kent to the testator of all her interest in his real estate and a lump sum payment of cash to her. Mr. Kent died ten years later without having changed the terms of his will.

These facts raise the issue, of novel impression in Maine, as to whether the provision in the will for the benefit of the former spouse was revoked by operation of law as the result of the divorce accompanied by a property settlement. The Probate Court determined that revocation did result and an appeal from the decree of that court was reported for our determination upon an agreed statement of facts.

R. S., Chap. 169, Sec. 3 provides: "A will executed under the provisions of section 1 is valid until it is destroyed, altered or revoked by being intentionally burnt, canceled, torn or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil or writing executed as a will is required to be; *or revoked by operation of law from subsequent changes in the condition and circumstances of the maker.*" (Emphasis supplied.)

The precise issue raised in the instant case has been passed upon in a number of jurisdictions. Decisions have usually rested upon the form of the applicable revocation statute. A number of courts have felt constrained to decide against implied revocation because of the total absence of the statutory authority found in the italicized portion of our statute as above set forth. Of particular interest is an examination of the case law in those jurisdictions which have a statute which in substance and effect is like our own.

At the outset it may be noted that courts have held with almost complete uniformity that divorce alone, unaccompanied by a property settlement, will not produce a revoca-

tion by operation of law. When, however, the divorce is accompanied by a property settlement, a great majority of cases hold that there arises under a statute similar to ours a conclusive presumption that the testator intended a revocation of the testamentary provision for the divorced spouse. *Lansing* v. *Haynes* (1893), 95 Mich. 16, 54 N. W. 699; *Wirth* v. *Wirth* (1907), 149 Mich. 687, 113 N. W. 306; *In Re Bartlett's Estate* (1922), 190 N. W. (Neb.) 869 (reversing prior decision in 189 N. W. (Neb.) 390); *In Re Martin's Estate* (1922), 190 N. W. (Neb.) 872; *Pardee* v. *Grubiss* (1929), 34 Ohio App. 474, 171 N. E. 375; (cf. *Sutton* v. *Bethell* (1953), 116 N. E. (2nd) (Ohio App.) 594); *Younker* v. *Johnson* (1954), 160 Ohio St. 409, 116 N. E. (2nd) 715; *In Re Battis* (1910), 143 Wis. 234, 126 N. W. 9; *In Re Kort's Estate* (1952), 260 Wis. 621, 51 N. W. (2nd) 501; *Johnston* v. *Laird* (1935), 52 P. (2nd) (Wyo.) 1219. In Illinois it has been held that even in the absence of statutory authority for implied revocation, a divorce accompanied by the payment of lump sum alimony will revoke a will naming the divorced spouse as sole beneficiary. *Gartin* v. *Gartin* (1938), 296 Ill. App. 330, 16 N. E. (2nd) 184. Without doubt, as already noted, the result in most states depends on the form of the statute. 52 Harv. L. Rev. 332. However, in *Rankin* v. *McDearmon* (1953), 270 S. W. (2nd) (Tenn.) 660, the court held in the absence of statutory authority that under the common law of Tennessee a divorce and property settlement would raise a conclusive presumption of revocation. See Anno. 18 A. L. R. (2nd) 699, 705.

Some of the reasons underlying the rule of conclusive presumption are to be found in the cases cited above. In the leading case of *Lansing* v. *Haynes, supra,* at page 701 of 54 N. W. the court said: "To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which law is based. I do not

think the common law is so unbending as to lead to this result. 'The reason of the law is the essence and soul of the law.' * * * The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation. The question is not to be controlled by a possible presumption, but by the reasonable presumption. * * * Such disposition of his property (by testamentary provision for former spouse continued unchanged after divorce and property settlement) would be unusual, and contrary to common experience." In a divided opinion, the Ohio court in *Younker* v. *Johnson* (1954), 160 Ohio St. 409, 116 N. E. (2nd) 715, was satisfied that a divorce and property settlement operated to produce a complete destruction of the legal relations of the parties and their consequent obligations and duties to each other, that the changed circumstances are pregnant with a very strong intent to annul provisions of the will benefiting the divorced spouse, that the testator might justly conclude that any claim of the divorced spouse upon his estate and bounty had been fully discharged, and that the changed conditions are of a nature which naturally implies a different intent respecting the former spouse as the object of his bounty. The opinion in *Johnston* v. *Laird, supra,* states at page 1222 of 52 P. (2nd): "The things which naturally prompt a man to make a will in favor of his wife are his regard and affection for her and the obligation which he may feel to provide for her comfort and support after he has gone. These elements cease to exist when the parties separate." The majority rule clearly rests on the assumption based upon common knowledge and experience that it is so rare and so unusual for a testator under these circumstances to desire or intend that his divorced spouse should benefit further under his will, that it is not improper or unreasonable to require that such a testator make that extraordinary desire and intention manifest by a formal republication of his will or by the execution of a new will.

Only one case has been called to our attention which reaches a contrary result even though the statutory authority for revocation by operation of law is substantially like our own. In *Hertrais* v. *Moore* (1949), 325 Mass. 57, 88 N. E. (2nd) 909, the court had for consideration facts essentially like those in the instant case. Mass. Gen. Laws, Chap. 191, Sec. 8 provides the methods by which a will may be expressly revoked and concludes with the following language: "or by subsequent changes in the condition or circumstances of the testator from which a revocation is implied by law." In seeking to determine what the legislature may have intended by its use of the quoted language, the court deemed itself restricted by the legislative history of the act. In connection with a revision of the statutes in 1834, the commissioners had reported that they contemplated that implied revocation could occur only as at common law, upon the marriage of a woman or upon the marriage of a man and the subsequent birth of a child. The court concluded that the legislature must have intended that no other changes in condition and circumstances would produce revocation by operation of law within the meaning of Sec. 8. The opinion frankly admits that in so saying it has rendered the quoted portion of the statute meaningless surplusage since another section, Chap. 191, Sec. 9, fully and completely provides for the two situations which under the English common law resulted in an implied revocation. At page 912 of 88 N. E. (2nd), the court stated the argument which is advanced in support of the minority rule: "Persons who have drawn wills or who are to draw wills are not now to be exposed to the risk that, in the present circumstances and perhaps others, the courts might decree revocation notwithstanding that such persons do not avail themselves of the easy means afforded by statute for accomplishing revocation by their own intentional acts."

If we were to attempt to apply the Massachusetts rule in this state, we would at once be faced with the practical im-

plications resulting from two decisions of our court interpreting the provisions of R. S., Chap. 169, Sec. 3. In 1889 our court held in *Emery, Applt.*, 81 Me. 275, that the statute did *not* produce a revocation by operation of law in the case of the subsequent marriage of a testatrix. The court reasoned that the basis for the common law rule, that is that after marriage a woman could neither make, alter or revoke a will, no longer exists. At page 277 of 81 Me. the court said: "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." In 1945 the Maine court in reliance upon the same principle held in *Clarissa D. DeMendoza, Applt.*, 141 Me. 299, that the marriage of a man followed by the birth of a child would *not* revoke a prior will. Here again the court was satisfied that since statutes now provide for the widow and children who may be omitted from the will, the reason for the common law rule no longer exists. These two decisions had the same practical effect that Sec. 9 of Chap. 191 of the Mass. Gen. Laws had upon Sec. 8 as to the remaining significance and operation of Sec. 8. In both cases the two ancient common law bases for implied revocation were removed and eliminated from the operation of the statute. This leads directly to the question as to when and under what circumstances the statute will have any remaining efficacy.

We deem it significant that the legislature has allowed the language of R. S., Chap. 169, Sec. 3 to stand unchanged for many years after this judicial interpretation. We are not disposed, as was the Massachusetts court, to treat the statutory language as mere surplusage if meaning can be given to it. If there exist situations to which the statute should properly apply, it should be given its reasonable and intended force and effect and not be repealed by judicial fiat or left to operate in a vacuum. See comment on *Hertrais* v. *Moore* (1949), 325 Mass. 57, 88 N. E. (2nd)

909, in 30 B.U. L. Rev. 270. If there is any "subsequent change(s) in the condition and circumstances of the maker" of a will which should properly and realistically produce a revocation by operation of law, the change wrought by divorce and a complete property settlement is such a one.

Although, as we have noted, the majority rule treats the statute as giving rise to a *conclusive presumption* of revocation, there has been some suggestion that the presumption should be *rebuttable* in order to afford opportunity to present evidence of the continued desire and intention of the testator to retain the divorced spouse as a beneficiary. The writers of several articles in legal periodicals have supported the concept of the rebuttable presumption. 34 B.U. L. Rev. 395; 50 Colum. L. Rev. 531; 5 Wis. L. Rev. 387; 40 Mich. L. Rev. 406. In the case of *In Re Hall's Estate* (1909) 119 N. W. (Minn.) 219, the court, interpreting a statute essentially like our own in its application to facts similar to those in the instant case, concluded that to limit the application of the statute to the (a) marriage of a woman and (b) the marriage of a man and the subsequent birth of issue would be unrealistic. The court said at page 220 of 119 N. W.: "To restrict the rule to such cases would narrow and unduly circumscribe its purpose." The court concluded that the rule of implied revocation "appears to us more in accord with the reason and basis of the law, in harmony with the elementary rule of right and wrong, conflicts with no equitable or substantial right of the woman in such case, and is opposed only by a strict adherence to some of the older views on the subject, based, however, upon the commendable purpose of sustaining the directions of a person respecting the disposition of his property, left in the form of a solemnly executed will, who by reason of his death is no longer able to speak for himself or give further orders or directions in that behalf." The court elected on balance to declare a revocation on these facts but gave no

positive affirmation that it deemed the presumption *conclusive*. There is at least an intimation that circumstances could arise in which the court would permit the introduction of rebutting evidence.

Although we recognize the force of the arguments which have been made in support of a rebuttable presumption, we are satisfied that the majority rule has much to commend it. Even though a conclusive presumption has the force and effect of an absolute rule of law, it may be that unnecessary confusion has been created by dealing with the subject matter in terms of presumptions. What is really involved is the legal consequence of the existence of certain facts. When these facts are present, the statute automatically produces certain results and revocation occurs, not presumptively, but by operation of law. This seems to us to have been the concept in the mind of the court in *In Re Martin's Estate* (1922), 190 N. W. (Neb.) 872, cited *supra*. The distinction was noted in *In Re Battis* (1910), 143 Wis. 234, 126 N. W. 9, cited *supra*. See discussion of origins of rule in 5 Wis. L. Rev. 387. On balance we think the adoption of a rule that divorce and property settlement produce an absolute and irrebuttable statutory revocation as to the divorced spouse will eliminate uncertainty and unnecessary litigation and will put the divorced testator on notice that affirmative action must be taken on his part if he desires to continue the divorced spouse as a beneficiary. We are convinced that incidents of such desire and intention will be rare indeed.

We note with interest that the compilers of the Model Probate Code believed that divorce should be made the *sole* producing cause of a testamentary revocation implied from a change of condition and circumstances. See 34 B.U. L. Rev. 395 cited *supra;* 34 Conn. Bar Journal 413.

We distinguish the following cases which appear to have been governed by the particular form of the controlling rev-

ocation statute, in no case like our own: *In Re Brown's Estate* (1908), 139 Iowa 219, 117 N. W. 260; *Succession of Cunningham* (1918), 142 La. 701, 77 So. 506; *In Re Nenaber's Estate* (1929), 55 S. D. 257, 225 N. W. 719; *Ireland v. Terwilliger* (1951), 54 So. (2nd) (Fla.) 52; *Moseley* v. *Moseley* (1950), 231 S. W. (2nd) (Ark.) 99; *In Re Patterson's Estate* (1924), 64 Cal. App. 643, 222 P. 374; *Pacetti* v. *Rowlinski* (1929), 169 Ga. 602, 150 S. E. 910; *In Re Darrow's Estate* (1949), 164 Pa. Super. 25, 63 A. (2nd) 458; *Robertson* v. *Jones* (1940), 345 Mo. 828, 136 S. W. (2nd) 278; see *In Re Crane's Estate* (1936), 6 Cal. (2nd) 218, 57 P. (2nd) 476. We note that in *Nutt* v. *Norton* (1886), 142 Mass. 242, 7 N. E. 720, where revocation was implied from the marriage of a testator and subsequent birth of his child, the presumption was deemed conclusive.

In summation, the rule we announce will, we believe, afford requisite protection to the ordinary testator who after divorce accompanied by a property settlement no longer owes or recognizes any legal obligation to his former spouse. He will be safeguarded against illness and incapacity or that oversight or lapse of memory which may prevent or delay his attention to the revision of his will. He will have reasonable time and opportunity to reform and replan the testamentary disposition of his estate in the light of the changed circumstances. On the other hand, in the rare and unusual situation in which he desires to continue the divorced spouse as an object of his bounty and a beneficiary under his will, he can readily employ the relatively easy methods of republication of his former will or the execution of a new will. Even though we deplore the apparent increase in marriage failures, we think this rule more nearly accords with the realities of life in our time and gives meaning and effectiveness to the applicable statute.

The Probate Court having determined correctly that the will in the instant case was revoked as to the provisions made for the benefit of the appellant, the entry will be

Appeal denied.

Decree of Probate Court affirmed.

MELVIN W. BECK, SIMEAR SAWYER & FRED HAIGHT
vs.
RICHARD SAMPSON AND MARY SAMPSON

Kennebec. December 26, 1962.

Architects. Compensation. Evidence. Testimony. Fraud. Instructions. Pre-trials. Rules.

Fraud is an affirmative defense with strict burden of proof.

In pleading of fraud, the circumstances constituting fraud must be stated with particularity.

A pre-trial order supersedes the pleadings.

ON APPEAL.

In this case, the defendants appeal verdict awarding payment for engineering and architectural designs to plaintiffs. Appeal denied. Judgment for plaintiffs.

Jerome G. Daviau, for the Plaintiffs.

Richard J. Dubord,
Donald E. Eames, for the Defendants.

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

SULLIVAN, J. Plaintiffs, Beck and Haight, are registered, professional engineers. R. S. (1954), c. 83, as amended. Plaintiff, Sawyer, is a registered architect. R. S., c. 81, as amended. The plaintiffs sued these defendants to obtain payment for the engineering and architectural design of a new residence for the latter. At a trial by jury plaintiffs were awarded a verdict and the defendants appealed.

Defendants' points of appeal include exceptions to the admission of certain testimony, to the denial of a motion for severance of the claims of the plaintiffs, to the refusal of requested jury instructions and to the denial of motions for a new trial and for judgment notwithstanding the verdict.

The plaintiffs' short and plain statement of their claim for relief reads essentially as follows:

> "Melvin W. Beck and Fred Haight - - - - - both being registered engineers under the Laws of Maine and Simear Sawyer - - - - - being a registered architect under the Laws of Maine, the three said plaintiffs doing business under the name and style of Melvin W. Beck & Associates claim that the defendants owe them the sum of $37,133.12. For engineering and architectural design on proposed residence of defendants: - - -"

There is contained in the record of this case acceptable and believable evidence to furnish and warrant this subjoined narration. Beck, an engineer, was in early January of 1960 employed by the defendants to plan and design a pretentious residence for them upon their vacant land. Beck engaged both Sawyer (January 30, 1960) and Haight (late 1960) to collaborate with him because of the magnitude, distinctiveness and complication of the task. Beck and his employees did some preliminary work which was corrected by Sawyer. The commission was an overlapping of engineering and architecture. Neither Haight nor Saw-

yer had been associated with Beck as partner. Neither Haight nor Sawyer at any time entered into direct communication or confrontation with either defendant. Haight contributed some 200 hours (@ $7.50 — $1500) of personal services applied to plumbing, ventilating and heating aspects. The defendants were advised by Beck of the latter's enlistment of Haight's professional aid and approved. Sawyer at the invitation of Beck participated as architect and in conjunction with Haight and Beck devoted some 373 hours of his professional efforts to the undertaking over a span of some 10 months. Beck several times told Richard Sampson of Sawyer's professional association with Beck. Mary Sampson was once informed by Beck that the latter purposed to take the plans to Sawyer at Bangor. The work done by Beck in connection with the plans was not architectural. Sawyer scrutinized, developed and revised the preliminary plans and approved so much of the sustained work as had attained accuracy and completion. The architectural features of the enterprise were under Sawyer's supervision. He stamped his professional seal upon drawings he adjudged to be in a finished state, to certify that such had been prepared by or under his direct supervision. R. S., c. 81, § 14. Beck took 3 separate sets of plans and designs to the defendants through a period of several months. Some of the sheets bore the seal of Sawyer and all drawings and the photo copies thereof carried the legend, *"Melvin W. Beck and Associates, Engineers and Architects, Waterville, Maine."* The defendants in 3 instalments paid Beck a total of $11,000 on account. Upon receipt of the 3rd set of plans in February or March, 1961 the defendants elected to discontinue the transaction. Plaintiffs thereupon sued. The planning and designing had been some 75% to 85% completed at the termination of the employment and there had been no occasion to supervise any building construction. 7% of an estimated cost of construction was a fair rate of compensation and had been set by agree-

ment of Beck with Richard Sampson. The projected dwelling bade fair to cost some $1,200,000. With allowances for the obviated supervisory building charges and for unfinished planning together with due credit for $11,000 paid to Beck, Plaintiffs demanded $37,133.12. The jury assessed the damages as $30,562.10.

Defendants had unsuccessfully moved that the court drop Haight and Sawyer as parties plaintiff or that the court in the alternative sever the claim of each plaintiff from those of the other plaintiffs for the reasons that no plaintiff claim was common with the claim of either of the other plaintiffs, that no privity of contract existed between either Haight or Sawyer and the defendants and that with the other plaintiffs neither Haight nor Sawyer enjoyed any legal relation justifying a joinder as party plaintiff. The presiding justice was within sound discretionary bounds in denying such motions, Rule 20, M. R. C. P. 155 Me. 510.

Defendants with adverse results filed a motion for a directed verdict at the close of all the evidence, a later motion for judgment notwithstanding the verdict and a motion for a new trial. The reasons asserted for all such motions cumulatively are aggregated as follows:

> "1. The evidence is insufficient to warrant a verdict for the plaintiffs;
>
> 2. The evidence shows that plaintiff Melvin W. Beck was the only plaintiff having contractual relations with defendants; that said Beck was not a duly licensed architect; that the services rendered by said Beck were architectural; and that the contract was therefore illegal and void; and said Beck is not entitled to recover for services rendered;
>
> 3. That the services rendered by plaintiffs Simear Sawyer and Fred Haight were without contractual relations, express or implied, with defendants, and they are therefore not entitled to recover herein;

4. The evidence shows that any consideration paid by defendants to plaintiff Melvin W. Beck was in pursuance of an illegal and void contract and defendants are therefore entitled to recover the same as prayed for in their counterclaim;

5. The damages are excessive;

6. The verdict is contrary to the evidence;

7. The verdict is contrary to the weight of the evidence;

8. The evidence is insufficient to warrant a verdict for the plaintiffs; and

9. The damages are not supported by the evidence and are clearly the result of a compromise on the part of the jury."

Upon the defendants' motions the defendants must sustain the onus.

> "In the instant case the burden of proving to the satisfaction of the court that the verdict was manifestly wrong is upon the one seeking to set it aside - - - - The credit of the testimony of the witnesses of the plaintiff was for the jury and not for the court to decide - - - - "
>
> *Witham* v. *Quigg,* 146 Me. 98, 103.

There was sufficient evidence to justify the jury in concluding that plaintiff Beck contracted with the defendants either at a fixed rate of compensation or for the fair worth of his services. There was testimony that all plaintiffs became actively associated in the transaction and that the defendants knew or ought to have understood that truth. *Gordon* v. *Keene,* 118 Me. 269, 270; *Wadleigh* v. *Pulp & Paper Co.,* 116 Me. 107, 113.

Sawyer alone of the plaintiffs was a registered architect. Whether the commission to the plaintiffs was preponderantly or incidentally architectural, nevertheless the

jury were possessed of credible evidence that Sawyer accepted responsibility and did supervise the architectural features of the work. R. S., c. 81, as amended, an exercise of police power, regulates the practice of architecture in the interest of public life, health and property and requires that precedent to practicing such an accomplished profession one schooled in architecture first vindicate his competency in an official test. The act proscribes the practice of the architectural skills by an unregistered practitioner.

> " - - - - in person or as the directing head of an office or organization performing them" R. S. c. 81, § 8.

The jury were sufficiently fortified by credible evidence in deciding that the mischief which the legislative enactment, R. S., c. 81, as amended, sought to remedy had in the instant case been allayed by the participation of the plaintiff Sawyer, registered architect, as the supervisor of the architectural features in the planning and designing of the projected Sampson residence. There was evidence to sustain a finding that Sawyer functioned as an autonomous professional associate and not as an employee or subaltern of Beck and that Beck's services upon the plans were not architectural. There was testimony that the work done was by classification and inextricably both architectural and engineering. R. S., c. 81, as amended, does not prohibit a full allocation of architectural features of a building to a registered architect and the assignment contemporaneously of engineering details as such to a registered engineer in collaboration.

As for reasons 1 and 4 through 9 assigned by these defendants in support of their 3 motions, *supra,* our review of evidenced facts earlier in this opinion will serve to establish the jury verdict as unassailable and manifestly within the jury province.

> " ' - - - - To grant the motion would be to substitute the judgment of the court for that of the jury, as

> to pure questions of fact about which intelligent and conscientious men might have different views. This the court will not do.' "
>
> *Somerville* v. *Smithfield,* 126 Me. 511, 520.
>
> " - - - - No citation of authorities is needed to establish the proposition that when two arguable theories are presented, both sustained by evidence, and one is reflected in a jury verdict, the Court is without authority to act. It is only when a verdict is plainly without support that a new trial on general motion may be ordered."
>
> *Mizula* v. *Sawyer,* 130 Me. 428, 430.
> *Jenness* v. *Park,* 145 Me. 402, 403.

Plaintiffs' exhibits 24 and 25 are artistic photographs of a modernized Pompeian bathroom and appear to have been cut from a magazine. The exhibits were admitted over defendants' objection. Defendants contend that these exhibits were "irrelevant and immaterial and not connected to previous testimony." Beck testified that the pictures had been given to him by Mary Sampson "as her general idea, general thinking and we didn't get it exactly but as near as we could incorporate." Beck related that Mrs. Sampson specified marble "and a recessed tub with a niche behind the tub - - - - As the finished drawing will show you, the bath tub is more or less but not exactly, duplicated in every detail, but nearly the same. We have a supporting column and an 18 inch niche or shelf which corresponds. The floor plan is circular but we have a more or less octagon effect. The idea is much the same. We have a tub and shower, lavatory, and the same number of fixtures, etc. have been incorporated in the plan. - - - - The plan which has been in existence six months specifies marble." Beck's testimony was that the plans had been made at the request of the defendants and according to their wishes and instructions. Much of Mrs. Sampson's testimony asserted that Beck re-

fused or failed to heed her desires or tastes. The exhibits were properly admitted in evidence.

Plaintiffs' exhibits 28 and 29, each a glazed photograph of a different nude bronze fountain statue, were admitted over defendants' objection. On the back of both of the exhibits was typewriting - - - - on one, "Bronze Figure by HARRIET FRISHMUTH 'PLAYDAYS' PRICE $3,000.00 54" tall Base - - 16" - - - on the other, " 'SWEET GRAPES' Bronze figure by Harriet Frishmuth $3,000.00 Height— 4'7" Base - - 12" diameter." Defendants maintain that these exhibits were not material, do not appear to be part of the subject matter of the case and each bore on its reverse side extraneous writing which was hearsay. Beck stated that the exhibits with the typewriting had been in the possession of the defendants for 2 or 3 weeks and that the typewriting was data placed upon the pictures by the dealer. Beck drew such a statue on the elevation for a fountain and incorporated his drawing in the plans which he gave to the defendants who made no consequential objection. The price information contained upon these 2 exhibits is doubtlessly the occasion of the protest from the defendants. We do not believe that the exhibits were of a seriously prejudicial nature.

Plaintiff Beck had testified under cross examination that the firm of Stewart and Williams had, at Richard Sampsons's request, sent its representative to Beck's office sometime in March, 1960 to examine the building plans. Plaintiffs' counsel in redirect examination inquired of Beck if March was the correct month. Over defendants' objection that plaintiffs' counsel was thus endeavoring to impeach his own witness Beck was permitted by the court to state that Beck had mistakenly named the month. There was no reversible error.

" - - - - The rule restated in *State v. Sanborn*, 120 Maine, 170, is applicable in the instant case, 'that

> he who calls a witness may not by general evidence impeach his competency or credibility, if his testimony be disappointing. But this rule never contemplated that the truth should be shut out and justice prevented. *It does not prevent the showing* by other witnesses, or *by the direct or redirect examination, that the facts are otherwise than the witness testified to.* There is no principle of law or of justice which prevents one from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached'- - - -" (Italics supplied.)
>
> *Hartford Ins. Co.* v. *Stevens,* 123 Me. 368, 375.

The presiding justice declined the request of the defendants to instruct the jury as follows:

> "The jury is instructed that if you find from the evidence that the plaintiffs or any of them misrepresented the anticipated cost of construction of the proposed dwelling, whether through fraud, carelessness, ignorance or gross inattention, plaintiffs are not entitled to recover any fees."

The refusal of the instruction was not error. Fraud is an affirmative defense with a strict burden of proof. *Maxwell* v. *Adams,* 130 Me. 230, 233, M. R. C. P. Rule 8c, 155 Me. 495, Maine Civil Practice, Field and McKusick, P. 135, § 8.15. In a pleading of fraud the circumstances constituting fraud must be stated with particularity. M. R. C. P., Rule 9b; Field and McKusick, P. 145, § 9.2. Defendants here did not plead fraud and the pre-trial order does not mention such a defense. Nor was the pre-trial order modified at the trial and it supersedes pleadings. M. R. C. P., Rule 16, 155 Me. 507, Field and McKusick, P. 203, § 16.2. As for fraud, carelessness, ignorance and gross inattention the necessary element of reliance upon them or any of them by the defendants is not contained in the instruction asked. *Lane* v. *Harmony,* 112 Me. 25, 32.

Defendants were also denied two instructions worded as follows:

> "The jury is instructed that if you find that the services rendered by plaintiff Beck were architectural services not merely incidental to engineering services, and were rendered by Beck without his having the license required by law, plaintiffs are not entitled to recover any fees."
>
> "Defendants request that the jury be instructed that if they find from the evidence presented in this case that the plaintiff Beck planned and presented sketches and complete details for the erection of a building for the use of the contractor or builder when expert knowledge and skill were required in such preparation, then he was primarily performing architectural services."

These two requested instructions are not more favorable to the defendants than the instruction delivered to the jury by the court. The jury were informed:

> "If, - - - - -, you find that the principal, primary service rendered was architecture and that engineering was incidental, under the statute the plaintiff is not permitted to recover under any type of contract. I repeat again, to this point the rights of Mr. Haight and Mr. Sawyer will be governed by Mr. Beck's rights."

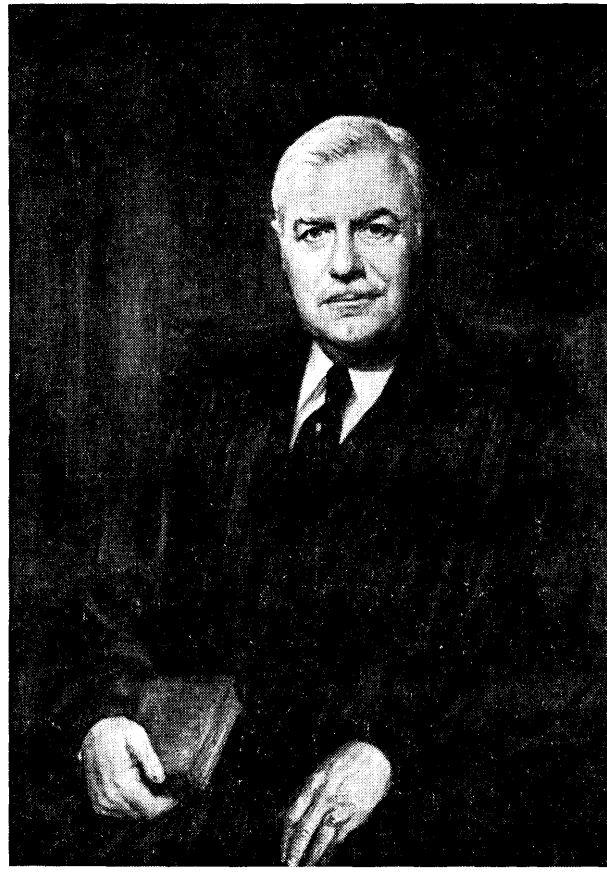
There was no error in the refusal of the two instructions sought and negatived.

The mandate shall be:

Appeal denied.

Judgment for plaintiffs.

In Memoriam



HON. EDWARD F. MERRILL

IN MEMORIAM

Services and Exercises
Before the Supreme Judicial Court
at Augusta, September 4, 1962
In Memory of
HONORABLE EDWARD F. MERRILL
Late Chief Justice of the Supreme Judicial Court

Born April 11, 1883 Died January 31, 1962

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

MR. JOHN L. MERRILL:

MAY IT PLEASE THE COURT:

For and in behalf of the Somerset County Bar Association I rise to ask this Honorable Court to pause from its solemn deliberations, that both Bench and Bar may present resolutions and heartfelt remarks in honor of and out of gratitude for the abilities, achievements, character, and life of the late Edward F. Merrill, a former Chief Justice of this Court. In the radiance of his life's light our State and we have all shared. In his memory, therefore, our several resolutions and remarks have been prepared and we request that they, like unto his opinions, may be entered upon and become a part of the permanent records of this Court.

JOHN L. MERRILL, *President*
Somerset County Bar Association

At this time I present the Hon. Clayton E. Eames to speak for and in behalf of the Somerset County Bar Association.

HON. CLAYTON E. EAMES:

MAY IT PLEASE THE COURT:

It is with a deep feeling of sorrow and of personal loss that I, speaking for the Bar Association of Somerset County, join in the Memorial exercises of Edward Folsom Merrill, a former Chief Justice of the Supreme Court of the State of Maine.

He was born in Skowhegan on the 11th day of April, 1883, son of Edward N. Merrill and Anna Folsom Merrill. He attended the grade schools and high school in Skowhegan. He received his collegiate education at Bowdoin College graduating therefrom in 1903.

It was a matter of due course that he should become a member of the Bar as both his maternal grandfather and father had been highly successful members of that profession. Many times did he relate incidents of happenings occurring at court proceedings while he was still in his early teen years. In those young years he evidenced that marvelous memory that aided him in his legal work in later life. After finishing his college education at Bowdoin he entered the law school connected with Harvard College, graduating in 1906 with high honors. That same year he was admitted to the practice of law in the State and Federal courts, becoming a member of the firm, at that time composed of his father, Edward N. Merrill, and himself. He immediately began a distinguished career, taking part in many important trials and becoming a diligent student of the law. In fact, he never ceased to study. After his retirement in 1954, he continued his legal research in a greater degree than ever before. He loved the law and

read decisions in a purely academic sense to increase his store of legal knowledge.

In 1906, following his admission to the Bar, he married Daisy Ina Day, a lifelong, devoted helpmate, who still survives. Born to that marriage were four children: Miss Mary Merrill of New York City, Edward N. Merrill II, an attorney of Skowhegan, Stephen E. Merrill of Brunswick, and Mrs. Anna Merrill Hearne of Salisbury, Maryland.

Following his entering the practice of law, his brother, William Folsom Merrill, in August 1914, became a member of the firm and later still Edward N. Merrill II also became a member.

In 1945 he was appointed a member of the Superior Court and served in that capacity until 1948; at which time he was elevated to the Supreme Judicial Court; and in 1953 he became the Chief Justice of this court, serving until his retirement in 1954.

He was a careful practitioner while in active practice; his declarations were painstakingly done; his pleadings set forth the issue and he showed then, as it developed later, that he felt there should be no flaws in the papers pertaining to the case. He believed in exactness and not carelessness. He was helpful as a member of the Superior Court. He wanted neatness in the proceedings but no one could say he was prevented from a full presentation of his case. There, as in all other places, he left his mark. As a member of the Supreme Judicial Court, both as an associate and Chief Justice, he followed the same course he travelled in all his life. Painstaking work was his forte; all issues pertaining were seriously considered to the end that no one should interpret the decision in any other way than was intended. His classical education broadened his approach to all problems and gave him ample means to their solution.

Besides the law he had many and varied activities; he was a member of all the York Rite Masonic Bodies at Skowhegan and for a time served as the head of all of them. He was also a member of the Scottish Rite Masonic Bodies and reached the peak, that of being a thirty-third degree Mason.

He served in a legislative capacity for many years for the Central Maine Power Company and while so doing made many acquaintances and friends from all parts of the state.

He loved the out doors; he had fished in nearly every brook and pond in all of Maine; he loved the sport, not for the sake of getting the fish but to be a part of the natural scene; to see nature at its finest and to ease the tensions raised up by his arduous, busy life.

His memory was astonishing; he could visualize and put into vivid word pictures the streets of Skowhegan as they were when he was a little boy, telling who owned and operated the stores all the length of Skowhegan's business street; one hearing could see the scene as he related. His memory of his reading was equally compelling. A legal opinion read long ago could be raised up in his memory and the sense of the opinion explained in all its detail. He was entrusted with many important things. At the time of his death he was the chairman of the committee appointed for the purpose of evaluating the worth of applicants for appointment as Judges of the District Court. In that capacity again his statewide knowledge of people aided in great measure his appraisal of the applicants. He had known them all, seen them all, weighed them all and was qualified to state if they were worthy. His judgments were fair but just; his was not the disposition to tear down but to delve and find the merit in us all.

His opinions will rate as solid, well reasoned, well expressed legal decisions setting a straight trail for others

coming that way to follow, and as these are fixed on paper, they will be long remembered. But to those of us who saw him every day, who lunched with him, who went to his office to ask him questions, who sought his advice when we were bewildered, he will live in our memory as long as we have memory. He was particularly gracious to the young attorney who was full of legal lore but short of experience. It was no imposition to him to be sought out for answers that one ought to know, but a delight, for he lived to bridge the way for others travelling in that path. The young, those approaching full maturity, and the old, all mourn his passing. We miss him for the lack of his companionship, his help on basic and involved matters and for the loss of a genuine, kindly friend.

And so, on the thirty-first day of January, A. D. 1962, he died at Skowhegan where he had always lived. He died in the community where he was acquainted with all and where he always wanted to be. He left his imprint on the town, the county, and the state, and it was good.

For and in behalf of the Somerset County Bar Association, I now present the following resolutions:

RESOLVED: That the members of the Somerset County Bar Association desire, humbly but unashameably, to acknowledge their everlasting gratitude for the honorable life and unbounded service of one of their very own, the late Chief Justice Edward F. Merrill, whom they all knew and loved.

RESOLVED: That to him his family was a mutual working trust, founded and nurtured with love cemented with Christian virtues to the end that he and all those in that unit could face life unafraid and enjoy it to its fullest measure.

RESOLVED: That the many high offices which he held in the business world, clubs, social and charitable organizations, and the secret orders to which he belonged evi-

dence that the scope of his life was broad. Proudly and unselfishly we acknowledge that he was a "chief" in whatever circle he chose to sit, and they were many.

RESOLVED: That while we acknowledge his greatness as a lawyer, legislative tillerman, and Justice, we wish to call attention to a few of the unmistakable marks of greatness: his keen and searching intellect, preciseness won from self-discipline, the knowledge that there is no substitute for hard, honest work, his abounding love for and understanding of people, his devotion to the great out-of-doors, his pursuit of relaxing and purposeful hobbies, his love and understanding of the arts, his absolute unwillingness to settle for second best, his almost unbelievable memory and hearty sense of humor so oft combined in the waft of his native yarns. There was about him much of the "old school", and would that we might be able to keep that lamp trimmed and its light ever burning!

RESOLVED: That we present these resolutions to this Court respectfully requesting that they be entered upon its permanent records as our tribute to an astute lawyer, a great Judge and a dear friend whom we'll always miss because our lives are so much the richer for his having passed our way.

CLAYTON E. EAMES *for the*
Somerset County Bar Association

MR. JOHN L. MERRILL: At this time the Hon. Frank Harding will speak for and in behalf of the Maine State Bar Association.

MR. FRANK HARDING:

MAY IT PLEASE THE COURT:

In behalf of the Maine State Bar Association it is a privilege to be permitted to join in these memorial exercises for our late former Chief Justice, Edward F. Merrill.

It seems highly appropriate that the present officers of the State Bar Association should participate in these exercises for one, whose long membership and interest in, and service to, that Association, covers a period of more than half a century.

Judge Merrill became a member of the Maine State Bar Association on January 14, 1909. He served as its President from 1933 to 1935. After serving as president, his interest in the association continued at a high and active level and he will be long remembered as one of its outstanding personalities. His concern for its welfare led him to give generously of his time and intellect in guidance and counselling; to the benefit of the Bar Association, and the Bar as a whole.

As great as his interest in, and service to this Association, however, his services to his State and to his fellows was even greater, and I would like to mention some of them; for I would like to feel that I am participating here, not only in my official capacity, but as one who has enjoyed his friendship, his kindness and his generosity.

It is not a part of my duties today to attempt a complete resumé of his life and all of his many activities, yet I would feel remiss not to mention some of them.

He was a man of great and recognized ability who served his State in many ways and in many capacities, and exceedingly well. The members of the Somerset County Bar Association have outlined the details of his life and practice in his home community. His service to the Legislature of Maine and to many individual legislators, in his capacity as a Legislative Agent for one of our largest and most important Public Utilities, is well known. For many years he enjoyed the confidence of the legislators and, without betraying the interest and confidence of his employers,

assisted many legislators with information and advice and in the drafting of many items of legislation. His conduct and activities in this position were such as to maintain and strengthen the respect for those who, in this State, act in the capacity of legislative agents, and his conduct and example have helped materially to make of it an honorable and reputable occupation.

Judge Merrill was appointed to the Superior Court in 1945. He was elevated to the Supreme Judicial Court in 1948, and in 1953 became Chief Justice. The Justice who responds for the Court can, far better than I, tell you of Judge Merrill's judicial career and the additions he has made to the progress of judicial procedures and decisions in our State. I would like to speak, however, as one who practiced before him.

My first acquaintance with him was after his appointment to the Superior Court, when he came to my home County preceded by a formidable reputation as a stickler for formalities. The actuality, however, proved far different. He asked only that things be done properly, and was willing to give of his time, experience and knowledge to assist the younger attorneys to do things properly. He was, in fact, a kindly man, although he was probably more noted for his intellectual ability and achievement. To be privileged to associate with him, however, and to observe his association with others, particularly his family, was to learn the warmth of his personality; the knowledge and memory of which could not be obliterated by his professional achievement.

Judge Merrill will be remembered for the distinction with which he held high office, for his keenness of mind and intellectual ability, for the impression he left upon the legislative halls, the Bar, the Bar Association, the Bench and, not least, as a man who earned, deserved and held the esteem and respect of all.

MR. JOHN L. MERRILL: May it please the Court: At this time it gives me great pleasure to present former-Governor Horace A. Hildreth who in 1945 appointed the late Edward F. Merrill to the Bench of the State of Maine.

Mr. Chief Justice Williamson; Honorable Justices; Gentlemen of the Bar; Members of the Family and Friends of the Late Chief Justice Merrill:

As the Governor who first appointed the late Chief Justice Merrill to the bench, I am honored and privileged to join here with the Bench and Bar of the State of Maine in this tribute to one whom we all loved and respected.

All of us, as indeed the citizenry of Maine, are poorer for his departure but we are richer for his having been so long with us and of us.

Chief Justice Merrill first influenced me as a student at Bowdoin College where he kept up a life-long affection and influence. First pointed out to me as one of Maine's brilliant and learned lawyers, I came to know him as a friend and fraternity brother of my own lawyer father who died when I was eight years old.

Ned Merrill's wit, humor, and sound solid judgment influenced me and generations of my college mates far more than he realized.

For years Ned Merrill served wisely and helpfully on the Board of Bar Examiners for the State of Maine where his judgment, kindness, and high intellectual and moral standards did much to maintain the high calibre of the Maine Bar.

My next contact with Ned Merrill came when I was serving in the Maine Legislature and he was already the most respected and liked of all the Maine lobbyists. It was during these years that Ned and Mrs. Merrill introduced my

wife and me to the joys of Atlantic salmon fishing. There are hundreds of young men who, through the rare talent of the late Chief Justice as raconteur, have vicariously enjoyed Ned's love of fishing and his many delightful fishing experiences. But, to be under the guidance of him and Mrs. Merrill on our introduction to Atlantic salmon fishing is an experience Mrs. Hildreth and I have always cherished.

And then came the time when as Governor I was privileged to make my first appointment to the Maine Bench. There was never any doubt in my own mind as to whom I wanted to appoint. I could, with propriety here, at great length dwell upon the many characteristics which made me so certain, but others will speak of these characteristics today in full. And so, because the passage of time has dulled the memory of the circumstances existing at that time in the minds of some who can remember while others are too young to remember, I briefly recall at this moment the circumstances.

For a decade, or perhaps more, prior to the time when I asked Chief Justice Merrill if he would accept an appointment to the Bench, he had been retained, for obvious reasons, by one of Maine's largest and most successful industrial concerns as counsel, and spent much time at legislative sessions. During this period there had been much feeling stirred up against his client, in no small part for purely political purposes.

Consequently there were those among my friends and advisors who said my proposed nomination was at least unwise. But I knew from my own experience in the Legislature that even those who were violently and bitterly opposed to Ned's client had come to learn that Chief Justice Merrill never practiced any deception. The opponents would always accept his word, and were utterly incapable of contesting with him in the field of knowledge.

Actually Chief Justice Merrill had become the dean of the lobbyists who was loved and respected by his most violent opponents. And these very opponents sought his help and wisdom on many other Legislative subjects. The question was, would the public accept the nomination not having the personal knowledge that his most active Legislative opponents had of his integrity.

The appointment was made. I am sure that all governors of all states sometimes have the feeling when making an appointment to the Bench that they are honoring the individual while much more rarely they have the feeling when making an appointment they are honoring the Bench.

When I appointed the late Chief Justice Merrill to the Bench I felt I was honoring the Bench, and I still feel so here today. In view of the high calibre of the Maine Bench over many years, this is a compliment not paid lightly but I believe deservedly.

MR. JOHN L. MERRILL: May it please the Court, for and in behalf of the Superior Court and the Judicial system of Maine, it gives me pleasure to introduce Justice Harold C. Marden of the Superior Court.

JUSTICE HAROLD C. MARDEN: May it please the Court and Mrs. Merrill: The privilege of representing the trial court of Maine here today is a combination, I think, of the bitter and the sweet: bitter in the sense it may arouse memories which are better assuaged with the silent passage of time and sweet to stand once again on this side of the Bench and represent the trial court of Maine in paying tribute and recording, as we are doing, something of the life of our late Chief Justice, Edward F. Merrill, as we salute him formally; "Uncle Ned," as some of us liked to call him behind his back—not that he would not have permitted and even welcomed that salutation by us—but im-

pelled by that ingrained deference which some of us had to seniority—"Ned" as he was known by his colleagues.

To realize the impact which Judge Merrill had upon the trial court of Maine it is well to remember that from March 3, 1953 to October 4, 1956 there was an entirely new trial court and during Judge Merrill's lifetime there were eleven new judges upon the trial court, many of whom, of course, passed through Skowhegan upon the trial circuit.

Strange as it may seem, and yet not strange, without collaboration, the speakers who have already addressed the Court and I, in characterizing Judge Merrill, if we were to do it in one word it would be that of Scholar; not the student emeritus but the persistent, consistent, abiding scholar of the law, which was his second love. I say second love not that he cared for the law less but that he cared for his family more.

While Judge Merrill was active on the Bench he was invariably around the courthouse in Skowhegan as our circuit duties took us there and he always exhibited an avid interest in the proceedings and problems of the trial court, and I am sure I can speak for many of our court when I say that in moments of distress when faced with some unexpected problem of procedure or law if the question could be properly asked without prejudice to later review Judge Merrill was more than willing and anxious to be of help, and yet with that finesse, which was characteristic of the man, when the time came for a new trial judge to address the jury Judge Merrill quietly absented himself, feeling sure that the peace of mind of the judge talking to the jury was greater without the Supreme Court looking over his shoulder. In retirement Judge Merrill was also around the courthouse a great deal and at times almost to the point of embarrassment, for only a hint of a problem would send Judge Merrill scurrying off to his office or the library to return with a case in point or law sufficiently parallel to answer

the problem at hand. It was as natural for him to look up and search out a point of law as it was for the inhabitants of the Miramichi, which he from time to time pursued, to swim, to which reference has already been made by others. And in chamber conferences, at which Judge Merrill was always welcomed, and to the extent to which he was present after the adoption of the pre-trial system, Judge Merrill would not infrequently sit down with the rest of us and engage silently in the problem under discussion; and I am sure that those of us who had occasion to come to Skowhegan more than once shortly became aware that if a questionable legal position was taken by counsel or specious arguments were being advanced we would discover from the corner of our eye an uneasiness on the part of Judge Merrill and without risk of error it was very easy for the judge to rule against the squirm-producing argument.

As an aside, Judge Merrill has been accused, and I use the word advisedly, of being a schoolmaster. Judge Merrill believed in doing things by the book, not in a blind adherence to the printed page but fully aware that the answer to all legal problems could be found by necessary research or sufficiently parallel precedents could be found to be of aid, and the lawyer who went before Judge Merrill with the desire, intentionally or through ignorance, to shortcut the law left the office frustrated, but to the man who wanted to do things by the book Judge Merrill was most helpful, and both of these men were better lawyers after the experience.

The characteristics to which I refer were obviously carried forward in Judge Merrill's opinions. He came to your court I believe in June of 1948 and in October only the second opinion which Judge Merrill wrote was that of *Public Utilities Commission* vs. *Gallop* (143 Maine), which had to do with the prosecution of exceptions to a ruling of the Public Utilities Commission, and Judge Merrill said this:

"Before considering the respondent's several exceptions, the general question of exception to rulings of the Public Utilities Commission and their determination by this court should be examined."

And while the next few paragraphs could properly be considered gratuitous so far as the decision was involved it was not only a guide-book but a road-map for those who were to subsequently follow, affected only by the onset of the Civil Rules December 1, 1959.

In *Wade* vs. *Warden of State Prison* (145 Me.) a long opinion having to do with juvenile court procedure, after a dissent to the majority opinion, Judge Merrill, with his characteristic desire to be helpful and to clarify, and recognizing what to him was a duty to set forth at length the reasons for some of the conclusions "tersely—stated in the majority opinion," wrote one of his longest opinions, twenty-one pages, in which he amplified the reasoning back of the majority opinion which, as I recall, was written by Chief Justice Murchie.

Another facet can be found in *Cram* vs. *Cumberland County,* 148 Me., on interpretation of conflicting statutes. It is obvious that a counsel had not presented to the court all of the law of Maine on the subject and that Judge Merrill had written the majority opinion based upon that law and such research as he had done himself, but after the opinion was released a footnote was added, and I am sure hastily added, by Judge Merrill, in which he cited an early Maine case in point and in which he said: "This note is filed in the interests of accuracy as to the state of the decisions in this jurisdiction."

These are but examples of the characteristics to which I have referred and which can be borne out in many other instances.

Wholly outside of his official duties, we all recall an address which he gave to the Cumberland County Bar Association in 1951 which was later reproduced for the benefit of the Maine Bar: "Suggestions on taking a case to the Maine Law Court," which is again a route-map for proceedings under Maine practice.

If I have correctly counted, Judge Merrill wrote 76 opinions while on the bench, beginning with *Jones* vs. *Silsby* some two months after coming to the bench and ending with *Verreault* vs. *City of Lewiston.* Among those I find only three dissents to his opinions, one in *Strout* vs. *Burgess,* 144 Maine involving joint tenancies in stock-holding, in which the conclusion was concurred in but with some dissent as to the reasoning in support of it; and again in *Mac Motor Sales* vs. *Pate,* 148 Maine, I find the same dissent. In *Talberth* vs. *Gannett Publishing Co.,* 149 Maine, I believe is the only dissent to Judge Merrill's conclusion.

So, with these very homely remarks, may I on behalf of the eleven judges of our Court who have crossed Judge Merrill's path either at nisi prius or through his writings endorse the resolutions previously offered and enter this tribute to the late Chief Justice Merrill, "Uncle Ned," lawyers' lawyer and legal scholar of his time.

HON. ROBERT B. WILLIAMSON, C.J.: Mrs. Merrill, members of the Bench and Bar:

We meet this summer afternoon to honor the memory of our beloved Chief Justice, Edward Folsom Merrill. We meet bound by the bonds of friendship. There is no one here this afternoon, unless he has become a member of the Bar in recent months, who did not know the Judge and count him as a friend.

In speaking on behalf of the Court, I shall not attempt to reach into the detail of his life. Those who have spoken

from his home town—the beloved Skowhegan—and from the Bar of which he was so proud, and Governor Hildreth—have told of his life and accomplishments far better and more precisely than could I. We have heard as well a scholarly presentation of the high value to the trial court of the opinions drawn by him.

I will pass over his work as the writer of opinions with brief comment. In 77 opinions, from *Public Utilities Comm.* v. *Gallop,* 143 Me. 290, to *Verreault* v. *City of Lewiston,* 150 Me. 67, in nearly 6 years of service he touched, it seems, every field of law—criminal, civil, equity, common law questions, statutory issues, procedure, contracts, torts, probate, habeas corpus—constitutional law—the list is not complete.

There is no important subject on which he has not, in words written by him, in words which were the product of his mind and adopted by the Court, added to the Law. His skills were not limited, but encompassed the broad reach of Justice and the Law.

His fame as a Judge and as a craftsman in the law rests secure in the history of the State upon the printed record of the opinions of the full Bench bearing the mark of "Merrill, J." or "Merrill, C.J."

The full flavor of our friend is not found within the covers of the books; he was a man who lived life to the fullest.

No man ever loved his work as a Judge more than Chief Justice Merrill. He was supremely happy, as I saw him, in carrying out the exacting duties of his office.

A student and scholar—he loved the study of the Law with the reading of the cases from all America and the English authorities as well. He had the instinct and ability of the scholar in sifting and weighing the ore quarried by

him from the mines created by Judges and authorities of the past, and in measuring Justice for today—and into tomorrow—aided by the learning of the past.

A teacher—He would have made a great teacher of the Law, and in all fairness it may be said he did by his precept and example and by his thoroughness teach unnumbered lawyers and judges of Maine in carrying out the obligations of the profession.

Let me give you his approach.

"There is no easy way to practice law," he told the State Bar Association. "No one can effectively tell you what the law is. You must learn for yourselves. What you look up for yourselves you absorb and more or less retain. The first requirement in a lawyer is character. The second is a sound knowledge of the law. Neither of these can be acquired save by your own individual efforts. Even as the price of liberty is eternal vigilance, the price of even a working knowledge of the law is hard work and a constant search for the right answer."

I call him then a student, scholar and teacher—great qualities, but not alone enough to make a judge—or at any rate a judge of his stature.

Chief Justice Merrill came to the Bench of the Superior Court in 1945, superbly equipped. He was a lawyer of deservedly high standing throughout Maine and beyond. As a lobbyist—in the best sense of the word—for nearly 25 years at the Legislature he had gained an unequalled skill and ability in drafting legislation. We who observed him in those days know how helpful he was to members of the Legislature in this respect. With the increase in cases involving statutory construction, the experience and ability of the Chief Justice were of great value to the Court and thus to the Bar and public.

He had the fierce love for Justice under Law that marks the just judge. In reaching judgment he kept before him his deep regard for the stability of the Law. He found no panacea in mere overruling of the past, but he was not blindly tied to the past. When convinced of the need of change in our procedural rules, for example, he gave freely of his time and ability to the end that the new civil rules would be useful and serviceable. This effort came during the years following his retirement from the Bench.

In combination with qualities of student, scholar, teacher, trained lawyer, judge and jurist, there was an inexhaustible supply of common sense and mercy—so valuable and so essential in the well-rounded man.

We may talk of his wit and wisdom, of his companionship on and off the Bench, of his life in Skowhegan. Opinion after opinion may with profit be analyzed and compared and studied by every judge and lawyer. The Chief Justice was justly proud that his father was a lawyer and that his son followed in the profession.

In every corner of our great State Chief Justice Merrill was known and respected. He added to the stature of every Judge. In his life and accomplishments we of the Bench, of the Bar, and of the State have benefited beyond measure. Above all, he belonged to us in Maine; and he was a product of which we are proud. He led us far along the path of Justice. We shall long cherish his memory.

The resolutions submitted by the Committee of the Somerset Bar, of which he was a member, are gratefully received by the Court and ordered spread upon the records.

We wish that Governor Reed and Judge Gignoux of the United States District Court could have been with us today. I read letters from them:

September 4, 1962

The Honorable Robert B. Williamson
Chief Justice of the Supreme Judicial Court
Augusta, Maine

Dear Judge Williamson:

It is with deep regret that I am unable to personally attend the Memorial Services of the Court, in honor of the late Retired Chief Justice Edward F. Merrill. I would be extremely pleased if you would kindly record the following comments in your formal proceedings.

It is a distinct and personal honor to record, on behalf of the State, Maine's tribute to the memory of former Chief Justice Edward F. Merrill.

The propriety of the Court, pausing to formally record for posterity his character, attainment of eminent success in his chosen profession, his distinguished service to the Court, is wholly fitting and proper.

As a member of the laity, I shall not attempt to record his accomplishments in the field of jurisprudence, but rather leave this privilege to his fellow attorneys who were so well aware of his sagacity, tempered by his love of man and his ability to view all matters of decision with the perspicuous faculty that he possessed.

It was my good fortune on all too rare an occasion, to sit and chat with "The Chief", as he was affectionately known to his host of friends. His astute observations and advice in an aura of congeniality, will long be remembered.

A keen sense of humor made this venerable Justice welcome company and the pleasure of his visits was looked

forward to with much anticipation, by his friends and associates at the State House. The void created by his passing cannot be filled, but the enjoyment of sharing his company will be an ever pleasant memory.

A young attorney once stated, "he was knowledgeable in all matters, kind and agreeable to the younger attorneys." His many hours of studied consultant advice to his junior brethren, rendered without remuneration other than the reward of sharing unstintingly his great knowledge of law, will always be remembered by the younger members of his profession.

The State of Maine has been the beneficiary, through the dedicated public service of this great jurist, of wisdom, honor and integrity. His dedicated sense of responsibility and adherence to the principles of democracy were in evidence in his scholarly opinions.

Justice Merrill's valuable contribution in maintaining the high ideals of the Court which he served with great distinction and honor, has provided in great measure toward perpetuation of this government of people.

Your consideration in presenting these remarks to the Court is greatly appreciated.

Sincerely yours,

JOHN H. REED
Governor

JHR:am

August 27, 1962

The Honorable Robert B. Williamson
Chief Justice, Supreme Judicial Court of Maine
Augusta, Maine

My dear Mr. Chief Justice:

I regret that because of a previously scheduled naturalization proceeding in Portland, I shall be unable to accept your courteous invitation to attend the exercises to be held in Augusta next Tuesday afternoon in memory of the Honorable Edward F. Merrill, late Chief Justice of the Supreme Judicial Court of Maine.

As a member of the Bar, I was privileged to appear before Chief Justice Merrill on a number of occasions, and since my appointment to the Bench I was honored to be associated with him in various activities. Chief Justice Merrill exemplified the best of those qualities of humanity, character and intellect which are to be found in a truly great jurist. I am most happy personally to endorse the respect and affection with which he was regarded by all of us who knew him.

Since I shall be unable personally to be present, may I through the medium of this letter join with the Bench and the Bar of the State of Maine in this splendid tribute to the memory of a distinguished public servant.

Sincerely yours,

EDWARD T. GIGNOUX
Judge, United States District Court

In closing may I read a letter from Mr. Justice Frankfurter:

August 22, 1962

Hon. Robert B. Williamson
Supreme Court of Maine
Augusta, Maine

My dear Chief Justice Williamson:

I am grateful to you for advising me that my brethren of the Maine bar are shortly to memorialize their late Chief Justice, my lifelong friend, Ned Merrill. I would not forego the opportunity to join in a final salute of farewell to his memory and to put on record why I have always held him in esteem as an ornament to our profession.

Our friendship began in our student days at the Harvard Law School. The cementing bond between us was the ardent devotion of both of us to the high purposes and the glorious history of our profession. With the possible exception of Mr. Justice Cardozo, I do not think I ever knew a lawyer who was more deeply soaked in the traditions of the common law or cared more for its continuing potential values for Western civilization. As I have indicated, our friendship had an early origin, but it was kept in active repair through our continuing deep interest in the law. We saw each other from time to time throughout our lives and our friendship was further nourished by a very active correspondence between us.

I am not qualified to speak of Ned's services as Chief Justice of your State, but I have no doubt that a lawyer of his learning and his ethical standards in the historic traditions of our profession could not fail to set a high-minded example to the bar in the discharge of the high office of Chief Justice of a great State with distinction. I profoundly esteem

his memory as a lawyer and as a friend and companion. He has a warm place in my heart, for he was a generous friend who appreciated the other fellow's efforts whenever the occasion warranted appreciation and he never failed to give that word of encouragement which all of us need from time to time. And so I salute the memory of a lifetime friend and I esteem him professionally.

You must permit me to say that I cherish the pleasure I had in sitting with you on a court even though, or perhaps because, it was the Supreme Court of Ames, that important institution in the educational life of the Law School that bred us.

Very sincerely yours,

FELIX FRANKFURTER

As a further mark of honor for Chief Justice Merrill, and of our affection for him, the Court will now adjourn until tomorrow morning at 9:30 o'clock.

FOREWORD
to
Maine District Court Civil Rules

By
ROBERT B. WILLIAMSON *

It is not necessary, nor is this the proper place, to comment upon the sweeping change in the administration of Justice in Maine with the establishment of a District Court replacing in time the many municipal courts and trial justices. On October first at Bangor the Court left the planning stage and entered into action.

In April 1962, following the appointment of Chief Judge Richard S. Chapman and Judge Robert L. Browne, the Supreme Judicial Court appointed a District Court Rules Committee consisting of the following members of the Bar: Frank E. Southard, Jr., Chairman, Augusta, Edward I. Gross, Bangor, Harris M. Isaacson, Lewiston, Edward N. Merrill II, Skowhegan, Sidney W. Wernick, Portland.

The Committee, aided by the District Court Judges, undertook to draft civil and criminal rules adapted insofar as practicable to the existing practice in the municipal courts, and with respect to divorce and related matters in the Superior and Probate Courts. In May the Committee circulated a draft of proposed rules for examination and suggestions.

On June 8 Chief Judge Chapman, Judge Browne, and Brothers Richard H. Field, Vincent L. McKusick, and Frederick A. Johnson met with the Justices of the Supreme Judicial Court. With minor changes resulting from the discussion at the meeting and further study, the rules were adopted and promulgated by the Supreme Judicial Court on July 17, 1962.

On behalf of the Court I wish to express our appreciation to Chief Judge Chapman and Judge Browne and to the members of the District Court Rules Committee for their services to the Court, to Professor Field, who continues to give invaluable aid as a consultant, and to our Brothers McKusick and Johnson, who bring to the effort the experience and skills derived in substantial measure from the development and operation of the Maine Rules of Civil Procedure.

Full and complete responsibility for the Rules rests, of course, upon the Supreme Judicial Court.

October 9, 1962.

* Chief Justice, Supreme Judicial Court of Maine.

INTRODUCTORY COMMENT
on
Maine District Court Rules

By
FRANK E. SOUTHARD, JR.[1]

The Committee charged with drafting the District Court Rules for submission to the Supreme Judicial Court did their work with certain general policies in mind.

Obviously the first policy was to adopt a procedure as nearly like Superior Court procedure as practicable. On the civil side, this meant following the Maine Rules of Civil Procedure in use in the Superior Court, even to using the same numbering system. On the criminal side, this meant preserving the time-honored practices which have served the State so well so long.[2]

At the same time, important differences between the District Court and the Superior Court demanded recognition. The District Court has no jury. It is not provided with Court Reporters. Not infrequently it hears parties who are unrepresented by counsel. It has both criminal and civil jurisdiction of very small cases, as well as jurisdiction of important ones. What seems a good rule when a seriously contested $1200 case or a divorce is contemplated often seems a poor rule when a $20 case is involved. Therefore, the Committee adopted a policy of modification of the Superior Court practice where the differences just mentioned, or others, indicated the desirability of modification.

1. Of the Kennebec Bar; Judge, Augusta Municipal Court; Chairman, District Court Rules Committee.
2. Author's note: The Maine District Court Criminal Rules are beyond the scope of this Supplement to "Maine Civil Practice" and therefore are not included herein. They are published in the Maine Reports.

Much the same considerations led to the adoption of a policy of simplicity in practice, illustrated by the omission of cross-claims and third-party complaints, by making counterclaims permissive and by placing the use of interrogatories and depositions under the control of the court.

A fourth policy required considerable modification of the present practice on appeals to the Superior Court from a municipal court. This policy was that factual decisions of the District Court, on the civil side, should be final unless clearly erroneous. Such finality seems in keeping with the dignity and standing of the newly created system. Removal of cases to the Superior Court, as well as appealing them, was preserved and made easy. The period for appealing was extended to 10 days. Provision was made to keep the whole of a single domestic relations case in one court, at least so far as appeal affected it.

The District Court Criminal Rules do not attempt to cover the whole field of procedure as do the Civil Rules. That would have violated the first principle of uniformity. They hopefully contain provisions adapting criminal process to the machinery of the District Court, and again hopefully achieve simplicity. In addition, they attempt to observe a rule, not always recognizable in criminal practice, of making procedure convenient for the respondent.

At this writing, no one is more certain of shortcomings in these new rules than the members of the Committee. As the District Court's operations gain impetus our certainty will no doubt be exceeded by that of the District Court judges, the appellate judges who review their work, and the practicing lawyers who find the Rules failing to meet the situations presented by their causes of action. There then remains the possibility of amendment; change can sometimes produce progress. The Committee hopes that the many changes of practice effected by the new rules will afford some progress toward just, speedy, inexpensive justice.

October 9, 1962.

TABLE OF RULES

Rule

Rule

Rule

APPENDIX OF FORMS

Introductory Statement.

Form

1. Summons.
2. Writ of Attachment.

2A. Summons to Defendant and Trustee.

2B. Return of Service of Summons and Complaint.
(Maine Rules of Civil Procedure Forms 3-11.)

12. Reserved.
13. Reserved.
14. Writ of Replevin and Bond.
15. Reserved.
16. Reserved.
17. Reserved.
18. Reserved.
19. Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction Under Rule 12(b).
20. Answer Presenting Defenses Under Rule 12(b).
21. Reserved.

21A. Trustee's Disclosure Under Rule 4B(d).

22. Reserved.
23. Motion to Intervene as a Defendant Under Rule 24.
24. Motion for Production of Documents, etc., Under Rule 34.
25. Request for Admission Under Rule 36.
26. Allegation of Reason for Omitting Party.
27. Notice of Appeal to the Superior Court Under Rule 73(a).

27A. Notice of Removal to the Superior Court Under Rule 73(b).

28. Reserved.
29. Judgment on Trial to the Court.
30. Writ of Execution.
31. Reserved.
32. Reserved.
33. Reserved.
34. Reserved.
35. Complaint for Divorce.

RULE 1. SCOPE OF RULES

These rules govern the procedure in all suits of a civil nature in the District Courts of the State of Maine with the exceptions stated in Rule 81. They shall be construed to secure just, speedy and inexpensive determination of every action.

Notes to Rule 1

These rules cover civil suits in the District Courts with the exceptions stated in Rule 81. They are authorized by Revised Statutes C. 108A, sec. 7 II. (P. L. 1961, C. 386, sec. 1.)

These rules are designed to make practice in the District Courts conform with that in the Superior Court where practicable. The time prescribed in these rules, the method of commencing an action and the service of process are as in the Maine Rules of Civil Procedure (hereafter referred to as "M.R.C.P."). In many instances these rules incorporate the M.R.C.P. by reference rather than setting them out verbatim. However, the District Courts are of limited jurisdiction and are designed to replace the municipal court's functions. For that and other reasons, these rules do not conform in all instances with the M.R.C.P. For example, in Discovery, Compulsory Counterclaim, Pre-Trial, the practice is different.

For convenience of reference the rules bear the same numbers as those of the comparable M.R.C.P.

RULE 2. ONE FORM OF ACTION

There shall be one form of action known as "civil action."

Notes to Rule 2

This rule is the same as M.R.C.P. 2. Common law forms of actions are abolished. Equitable relief cannot be demanded in District Courts. See R.S., C. 108A, sec. 2 for jurisdiction of District Courts.

RULE 3. COMMENCEMENT OF ACTION

A civil action is commenced (1) by the service of a summons and complaint or (2) by filing a complaint with the

court. When method (1) is used, the complaint must be filed with the court within 10 days after completion of service; but in any case where attachment of real or personal property or attachment on trustee process has been made, the complaint shall be filed not later than 30 days after the first such attachment. If the complaint is not timely filed, the action may be dismissed on motion and notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of the plaintiff or his attorney.

Notes to Rule 3

This rule is the same as M.R.C.P. 3. It represents a change from the Municipal Court Civil Rules. Since the District Court has no terms, the rule follows Superior Court practice. Most attorneys will commence actions by serving the complaint and summons as they are accustomed to do in the Municipal and Superior Courts, but method (2) of filing the complaint with the court for order of notice for service is often both desirable and necessary, as, for example, in divorce.

RULE 4. PROCESS

Rule 4 of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 4

Since there are no civil terms or return days in the District Court, this rule follows M.R.C.P. 4.

RULE 4A. ATTACHMENT

Rule 4A of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 4B. TRUSTEE PROCESS

Rule 4B of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 4B

For venue of trustee process, see R.S. C. 114, sec. 5A, a new section added by P. L. 1961, C. 395, sec. 47.

RULE 4C. ARREST

Rule 4C of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 4C

Ne exeat might apply in divorce action where failure to comply with alimony order is punishable as a contempt. Russell v. Russell, 69 Me. 336.

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

Rule 5 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 5

This rule incorporates M.R.C.P. 5 by reference as it is desirable to make the mechanics of service and filing of papers subsequent to the complaint uniform in both Superior and District Courts. (The reference to cross-claims in M.R.C.P. 5(c) is not applicable. In M.R.C.P. 5(e), "justice" means "judge.")

RULE 6. TIME

Rule 6 of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 6

To avoid confusion, the mechanics of computing time and enlarging time are the same in both the District and Superior Courts. Since return days are of no importance in computing time, this rule is a departure from the Municipal Court Civil Rules.

RULE 7. PLEADINGS ALLOWED: FORM OF MOTIONS

(a) Pleadings. There shall be a complaint and an answer, and a disclosure under oath, if trustee process is used; and there shall be a reply to a counterclaim denominated as such. No other pleading shall be allowed, except that the court may order a reply to an answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

Notes to Rule 7

This rule follows M.R.C.P. 7 except that references to cross-claims, third-party complaints and probate appeals are omitted.

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, or counterclaim, 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. Relief in the alternative or of several different types may be demanded.

Rules 8(b) through (g) inclusive of the Maine Rules of Civil Procedure govern procedure in the District Court.

Notes to Rule 8

This rule follows M.R.C.P. 8 except that reference to cross-claims and third-party claims are omitted. No provision is made for defendant's defending without answer, as under the present Municipal Court Civil Rule 8, as amended effective January 1, 1961.

RULE 9. PLEADING SPECIAL MATTERS

Rule 9 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 10. FORM OF PLEADINGS

Rule 10 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 11. SIGNING OF PLEADINGS

Rule 11 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 12. DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED BY PLEADING OR MOTION —MOTION FOR JUDGMENT ON PLEADINGS.

(a) When presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to an order of court under Rule 4(d) or 4(g), and provided that a defendant served pursuant to Rules 4(e) and 4(f) outside the Continental United States or Canada may serve his answer at any time within 50 days after such service. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of

the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim or counterclaim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rules 12(c) through (h) inclusive of the Maine Rules of Civil Procedure govern procedure in the District Court.

Notes to Rule 12

Under Rules 80 and 80D, Rule 12(a) will not apply to divorce or to forcible entry and detainer.

RULE 13. COUNTERCLAIM

(a) Permissive Counterclaims. A pleading may state as a counterclaim any claim which at the time of serving the pleading the pleader has against an opposing party which is within the jurisdiction of the District Court. The failure to assert any such counterclaim shall not preclude the pleader from bringing a later action for the same claim, whether or not it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(b) Other Provisions Concerning Counterclaims. The provisions of Rules 13(c), (d), (e) and (f) of the Maine Rules of Civil Procedure govern procedure in the District Court.

Notes to Rule 13

This is a departure from M.R.C.P. 13 under which some counterclaims arising out of the same transaction or occurrence as the plaintiff's claim are made compulsory.

No counterclaim shall be filed which seeks equitable relief or demands an amount in excess of that for which judgment may be given in the District Court. A party desiring to state such a counterclaim can do so only after removal to the Superior Court as provided in Rule 73 or on appeal to the Superior Court as provided in Rule 73. After such removal or appeal, any counterclaim made compulsory by Rule 13 of the Maine Rules of Civil Procedure must be stated in the Superior Court as provided in that rule. Keep in mind that factual findings by the District Court, unless clearly erroneous, are binding on appeal, under Rule 52.

Caution. A defendant who has a claim arising out of the same transaction or occurrence as the plaintiff's claim might be well advised to assert it in District Court, if it is within

the court's jurisdiction, or remove the case to Superior Court and assert his counterclaim in that court. Otherwise a judgment against the defendant in District Court might in some instances defeat that defendant's later claim against that plaintiff on the principles of res adjudicata. (Cf. Bray v. Spencer, 146 Me. 416, 82 A. 2d 794.)

Upon removal or appeal to Superior Court some counterclaims become compulsory under M.R.C.P. 13(k), added by amendment of August 1, 1962.

RULE 14. Reserved

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Rule 15 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 16. Reserved

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

Rule 17 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 18. JOINDER OF CLAIMS

The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims as he may have against an opposing party which come within the jurisdiction of the District Court and do not in the aggregate exceed $1,200 in amount and do not seek equitable relief. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19 and 20 are satisfied.

Notes to Rule 18

This rule follows M.R.C.P. 18 except that it excludes equitable claims and reference to interpleader, and confines counterclaims to those within District Court jurisdiction.

Alternate claims, neither of which exceeds District Court jurisdiction, may be joined, although their cumulative total exceeds $1,200.

RULE 19. NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder. Subject to the provisions of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to Be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Notes to Rule 19

This rule follows M.R.C.P. 19 except that reference to Rule 23 is omitted because class actions are not applicable.

RULE 20. PERMISSIVE JOINDER OF PARTIES

Rule 20 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES

Rule 21 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 22. Reserved

RULE 23. Reserved

RULE 24. INTERVENTION

Rule 24 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 25. SUBSTITUTION OF PARTIES

Rule 25 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 26. DEPOSITIONS PENDING ACTION

Depositions shall be taken only by agreement of the parties or by order of the court on motion for good cause shown. Rule 26 of the Maine Rules of Civil Procedure governs procedure in depositions pending action when taken by order or agreement.

Notes to Rule 26

In the interests of preserving simplicity of procedure and yet affording the advantages of the use of depositions in appropriate cases, the taking of depositions is kept under the control of the court. If the court orders a deposition, or the parties agree to take one, M.R.C.P. 26 is applicable.

RULE 27. Reserved

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

Rule 28 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 28

M.R.C.P. 28(d) is not applicable. The rule of course applies only to a deposition taken by agreement or order under Rule 26.

RULE 29. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS

Rule 29 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 29

This rule not only permits the deposition to be taken by stipulation without first securing the order of court required under Rule 26, but permits the other rules regulating depositions to be waived by agreement.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

Rule 30 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable except that only District Court Judges, whether or not the judge for the division where the action is pending, shall have the authority conferred upon justices of the Superior Court under that Rule.

Notes to Rule 30

The rule applies only to a deposition taken by agreement or order under Rule 26.

RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES

Rule 31 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 31

The rule applies only to a deposition taken by agreement or order under Rule 26.

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

Rule 32 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 32

The rule applies only to a deposition taken by agreement or order under Rule 26.

RULE 33. INTERROGATORIES TO PARTIES

By order of court on motion for good cause shown, or by agreement of the parties, any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered,

but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. A party shall not file more than one set of interrogatories to an adverse party nor shall the number of interrogatories exceed 30 unless the court otherwise orders for good cause shown. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Notes to Rule 33

In the relatively small cases before the District Court, routine use of interrogatories seems undesirable, particularly in view of the fact that often defendants may not be represented by attorneys. On the other hand, on occasion, in view of the generality of pleadings allowed, interrogatories may be useful. This rule places the matter under control of the court. When interrogatories are permitted, Superior Court procedure follows.

RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS

Rule 34 of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 34

This embodies M.R.C.P. 34 which requires a motion and a showing of cause.

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Rule 35 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

Rule 36 of the Maine Rules of Civil Procedure governs procedure in the District Court.

Notes to Rule 36

This rule follows M.R.C.P. 36 and in cases where there is no defense, the admission procedure may speed up the disposition of cases and simplify trial.

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

Rule 37 of the Maine Rules of Civil Procedure governs procedure in the District Court, substituting District Court Judge for Justice of the Superior Court wherever it appears.

RULE 38. Reserved

RULE 39. TRIAL BY THE COURT

Any hearings may be held at such place in any division as the court may appoint; and the clerk in the division in which the action is pending shall transmit the papers in the action to the judge to hear the same, who shall return them after hearing.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCES

(a) Assignment of Cases for Trial. The Judges of the District Court may by order provide for the setting of cases for trial upon the calendar, the order in which they shall be heard and the resetting thereof. All actions, except actions for divorce and forcible entry and detainer, shall be in order for trial at a time set by the court on such notice as it deems reasonable, but not less than 10 days after service of the last required pleading.

(b) Continuances. A motion for continuance of an action shall be made as soon as practicable after the moving party receives notice of assignment for trial, but if the cause or ground of the motion is not then known, the motion

shall be made as soon as practicable after the cause or ground becomes known.

Notes to Rule 40

Rule 40(a) permits any party through the court, or the court on its own motion, to set a case for trial. This cannot be related to terms, hence the requirement for reasonable notice. Since there are no terms it is difficult to set specific trial days in any division. The same applies to motion days.

In practice there should be a motion day in each division at least once a month at which cases can be set for actual trial.

Divorce hearings are delayed for sixty days, see Rule 80(g); and forcible entry and detainer actions are in order for trial on the return day, see Rule 80D(e).

RULE 41. DISMISSAL OF ACTION

Rule 41 of the Maine Rules of Civil Procedure governs dismissal of actions so far as applicable, except that Rule 41(b) (1) shall not apply, but the following shall govern in place thereof:

"(1) *On Court's Own Motion:* The court, on its own motion after notice to the parties, may dismiss an action for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance."

Notes to Rule 41

Rule 41 has to differ from Municipal Court Rules as there are no terms. There should be a rule for dismissal on Court's own motion as in M.R.C.P. 41(b) (1).

Reference to third-party claims and cross-claims in M.R.C.P. 41(c) is inapplicable.

RULE 42. CONSOLIDATION; SEPARATE TRIALS

(a) Consolidation. When actions involving a common question of law or fact are pending, either in the same di-

vision or any different division, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial in the division where the action is pending or any different division of any claim, or counterclaim, or of any separate issue or of any number of claims, counterclaims, or issues.

(c) Convenience and Justice. In making any order under this rule, the court shall give due regard to the convenience of parties and witnesses and the interests of justice.

RULE 43. EVIDENCE

Rule 43 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 43

References to a jury are inapplicable.

RULE 44. PROOF OF OFFICIAL RECORD

Rule 44 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 45. SUBPOENAS

Rule 45 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 46. EXCEPTIONS UNNECESSARY

Rule 46 of the Maine Rules of Civil Procedure governs procedure in the District Court.

RULE 47. Reserved

RULE 48. Reserved

RULE 49. Reserved

RULE 50. MOTION FOR JUDGMENT

A motion for judgment 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 judgment 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 judgment shall state the specific grounds therefor.

Committee's Notes

See Rule 41(b) (2) and (3) as to judgment on dismissal.
Specific findings of fact can be requested under Rule 52(a).

RULE 51. ARGUMENT OF COUNSEL

Counsel for each party shall be allowed such time for argument as the court shall order. Counsel for the moving party shall argue first. Opposing counsel shall then argue. Counsel for the moving party shall be allowed time for rebuttal. When multiple claims or multiple parties are involved in an action, the order and division of the arguments shall be subject to the direction of the court.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts the court shall, upon request of a party made as a motion within 5 days after notice of the decision, or may upon its own motion, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Requests for findings are not necessary

for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear thereon. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. The court may, upon motion of a party made not later than 10 days after notice of findings made by the court, amend its findings or make additional findings and, if judgment has been entered, may amend the judgment accordingly. The motion may be made with the motion for a new trial pursuant to Rule 59. When findings of fact are made by the court, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such finding or has made a motion to amend them or a motion for judgment.

(c) Record of Evidence. If any party requests a record of the evidence in writing, he may at his own expense, cause a record of the evidence to be made; transcripts thereof may be secured by any party at the expense of that party. Hearings shall be set or reset for such times as will reasonably enable parties desirous of so doing to take advantage of this rule. The reporter, if not an Official Court Reporter, must be approved by the court and shall be sworn to the faithful and impartial discharge of his duty.

Notes to Rule 52

Rules 52(a) and (b) are largely taken from M.R.C.P. 52. It is thought necessary to stop the parties from having "two bites at the apple" and that if a matter is submitted to the District Court for decision, the findings of the District Court should certainly be binding as to the facts unless clearly erroneous.

Rule 52, making findings of facts final except where clearly erroneous, indicates the desirability of making a record of the evidence. Since reporters are not a part of the court staff, responsibility for securing one is placed upon the party desiring the record. Since reporters may be difficult to secure, and a party should be entitled to a record as of right, the court is to fix hearing dates at a time enabling him to take advantage of his right, provided he uses reasonable diligence. The burden of expense is placed wholly upon the party desiring the reporter.

Under Rule 73, either party may remove the cause before actual trial has begun or judgment entered; appeal will not lie until judgment. Therefore action must be taken before actual trial begins if factual findings are not to be binding.

RULE 53. Reserved

RULE 54. JUDGMENTS; COSTS

Rules 54(a) to (e) inclusive and Rule 54(g) of the Maine Rules of Civil Procedure shall apply to the District Courts. The schedule of fees shall be those now in effect for Municipal Courts.

RULE 55. DEFAULT

Rule 55 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 55

References to third-party claims and cross-claims are not applicable.

RULE 56. SUMMARY JUDGMENT

Rule 56 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 56

References to cross-claims are not applicable.

RULE 57. DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to 1954 Revised Statutes, Chapter 107, sections 38 to 50 inclusive, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Notes to Rule 57

This rule does not extend District Court jurisdiction to issue declaratory judgments beyond its jurisdictional amount nor in equitable matters. See Maine Broadcasting v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. 2d 224.

RULE 58. ENTRY OF JUDGMENT

Judgment after hearing shall be entered forthwith upon rendition of the decision. The notation of a judgment on the docket constitutes the entry of the judgment, and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Notes to Rule 58

This rule follows Municipal Court Civil Rule 20. It is anticipated that normal court administration will provide for notice to the parties of entries made other than on default.

RULE 59. NEW TRIALS: AMENDMENTS OF JUDGMENTS

Rule 59 of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 59

References to jury trials and suits in equity are not applicable. The word "justice" means "judge."

RULE 60. RELIEF FROM JUDGMENT OR ORDER

Rules 60(a) and (b) of the Maine Rules of Civil Procedure govern procedure in the District Court so far as applicable.

(c) Appeals from Denial of Relief. A party aggrieved by a denial of a motion for relief from a judgment may, within 10 days from such denial, appeal to the Superior Court and obtain a hearing de novo on the motion.

Notes to Rule 60

Same as present Municipal Court Civil Rule 22, except for insertion of the words, "within 10 days from such denial." It is thought advisable to set forth the time in which such appeal may be taken.

RULE 61. HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) Automatic Stay. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry or until the time for appeal from the judgment as extended by Rule 73(a) has expired. Unless otherwise ordered by the court, an order relating to the care, custody and support of minor children or to the separate

support or personal liberty of the wife shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.

(b) Stay of Execution on Default Judgment. Execution in a personal action shall not issue upon a judgment by default against an absent defendant who has no actual notice thereof until one year after entry of the judgment except as provided by law.

(c) Order for Immediate Execution. In its discretion, the court on motion may, for cause shown and subject to such conditions as it deems proper, order execution to issue at any time after the entry of judgment and before an appeal from the judgment has been taken or a motion made pursuant to Rules 52(b), 59, or 60; but no such order shall issue if a representation, subject to the obligations set forth in Rule 11, is made that a party intends to appeal or to make such motion. When an order for immediate execution under this subdivision is denied, the court may, upon a showing of good cause, at any time prior to appeal or during the pendency of an appeal order the party against whom execution was sought to give bond in an amount fixed by the court conditioned upon satisfaction of the damages for delay, interest, and costs if for any reason the appeal is not taken or is dismissed, or if the judgment is affirmed.

(d) Reserved.

(e) Stay upon Appeal. Except as provided in subdivision (c) of this rule, the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal, and no supersedeas bond or other security shall be required as a condition of such stay.

(f) Continuance of Attachment. Rule 62(f) of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

(g) Power of Law Court Not Limited. The provisions in this rule do not limit any power of the Superior Court or the Law Court during the pendency of an appeal to suspend, modify, restore, or grant an injunction or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment upon Multiple Claims. Rule 62(h) of the Maine Rules of Civil Procedure governs procedure in the District Court so far as applicable.

Notes to Rule 62

The continuance of real and personal property attachments beyond the time for issuance of execution has adequately been cared for by P. L. 1959, C. 93, sec. 1 and P. L. 1959, C. 317, sec. 135. The corresponding statutory provision applicable to trustee process, R. S., C. 114, sec. 73, has not been amended to conform to M.R.C.P. 62(f).

Note special treatment of forcible entry and detainer under Rule 80D(j) and of divorce under Rule 80A.

RULE 63. DISABILITY OF A JUDGE

If by reason of death, resignation, removal, sickness, or other disability, a judge before whom an action has been tried is unable to perform his duties under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

RULE 64. REPLEVIN

(a) Availability of Replevin. A plaintiff claiming the possession of goods wrongfully taken or detained may replevy the goods on writ of replevin as provided by this rule or by law, which shall be returnable in the division in which the goods involved are located.

(b) Writ of Replevin: Form. The writ of replevin shall bear the signature or facsimile signature of the clerk, be under seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriff or his deputies of the county within which the goods are located, and command them to replevy the goods, which shall be described with reasonable particularity and their respective values stated.

(c) Same; Service. The writ of replevin may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The plaintiff's attorney shall deliver to the officer replevying the goods the original writ of replevin upon which to make his return, and attached thereto the bond required by law, and a copy of the writ of replevin and bond for service on the defendant. The officer shall forthwith cause the goods to be replevied and delivered to the plaintiff. Thereupon the defendant shall be served, in the manner prescribed by Rule 4, with a copy of the writ of replevin and bond, with the officer's endorsement thereon of the date of execution of the writ, and with the summons and complaint.

(d) Allegations of Demand and Refusal; Title. If the action is for a wrongful detention only, a demand and refusal of possession before beginning the action shall be alleged by the plaintiff in replevin. Where the title to the goods of the plaintiff in replevin rests upon the title of a third person or upon a special property, the facts shall be alleged.

(e) Defenses; Counterclaim. All defenses shall be made by answer. If the defendant in replevin claims title to the goods or relies upon the title of a third person or upon a special property, the answer shall so state. All claims by the defendant in replevin for a return of the goods shall be made by counterclaim or answer.

(f) Replevin on Counterclaim. Goods may be replevied on writ of replevin by a party bringing a counterclaim in the same manner as upon an original claim, provided that the goods are located within the division where the action is pending.

Notes to Rule 64

These rules follow M.R.C.P. 64, except that venue is laid in the division in which the property is located, and counterclaims for a return of goods (but not for damages or for a lien claim) are compulsory. However, as under M.R.C.P. 64(e) as amended, the counterclaim may be stated in the answer without being formally designated as a counterclaim.

Query whether or not counterclaims for lien claims should be compulsory. If so, provision must be made for removal of the case if the claim exceeds District Court jurisdiction. The Committee felt that the complications involved in making lien counterclaims compulsory exceeded those in keeping them permissive.

RULE 65. Reserved

RULE 66. Reserved

RULE 67. DEPOSIT IN COURT

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or part of such sum or thing. Money paid into court under this rule shall be deposited in such depository as the court having custody shall designate (which designation shall be minuted on the docket) and shall be withdrawn therefrom upon order of the clerk, countersigned by any judge.

RULE 68. OFFER OF JUDGMENT

Rule 68 of the Maine Rules of Civil Procedure shall govern procedure in the District Court.

RULE 69. EXECUTION

Rule 69 of the Maine Rules of Civil Procedure shall govern procedure in the District Court so far as applicable.

RULE 70. Reserved

RULE 71. Reserved

RULE 72. Reserved

RULE 73. APPEAL AND REMOVAL TO SUPERIOR COURT

(a) Appeal. An aggrieved party may appeal from a judgment of the District Court to the Superior Court in the county in which the division of the District Court entering judgment is located. The time within which an appeal may be taken shall be 10 days from the entry of the judgment appealed from, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the court may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is computed from the entry of any of the following orders made upon a timely motion under such rules: making findings of fact or conclusions of law as requested under Rule 52(a); or granting or denying a motion under Rule 52(b); or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59. The appeal shall be taken by filing a notice of appeal with the clerk. Rule 73(b) of the Maine Rules of Civil Procedure shall govern the form of the notice of appeal and notification of other parties.

The appeal shall be on questions of law only and shall be determined by the Superior Court without jury on the record on appeal specified in Rule 75. Any findings of fact of the District Court shall not be set aside unless clearly erroneous. Notwithstanding the foregoing, upon appeal from a default judgment, trial in the Superior Court shall be de novo.

Within the time for filing the notice of appeal the appellant shall pay to the clerk of the District Court the entry fee in and the cost of forwarding to the Superior Court the record on appeal specified in Rule 75. The clerk shall enter the appeal promptly in the Superior Court. If by accident or mistake the required payment is not made within the time prescribed, the court may, on motion of either party, allow the late payment of the required fees and direct the clerk to enter the appeal in the Superior Court; but attachment or bail shall not thereby be revived or continued.

An appeal may be dismissed by stipulation filed with the clerk, or, after entry in the Superior Court, with the clerk of the Superior Court.

(b) Removal. At any time before the trial of any action is begun, and before judgment, either party may remove the action to the Superior Court for the county in which the division of the District Court is located. Removal shall be effected by filing notice thereof, serving a copy thereof upon all other parties, and paying to the clerk the required fees, including the entry fee in and the cost of forwarding the action to the Superior Court as in the case of appeals. The clerk shall thereupon file a copy of the record and all papers in the action in the Superior Court. If the defendant has not filed an answer in the District Court, he shall forthwith file his answer in the Superior Court. Thereafter the action shall be prosecuted in the Superior Court as if originally commenced therein. If the party giving notice of removal does not comply with the requirements of this sub-

division, the action shall be heard and determined in the District Court as if no notice of removal had been given.

If it appears by the pleadings that the title to real estate is in question, such removal shall be effected and subsequent proceedings taken in the action as provided in this subdivision.

(c) Appeals in Domestic Relations Actions. In actions or proceedings for divorce, separation, annulment of marriage or for support which are appealed to the Superior Court, the Superior Court may reverse or affirm, in whole or in part, the judgment appealed from, pass such decree thereon as the District Court ought to have passed, and shall thereupon remit the case to the District Court from which it originated for the entry of appropriate judgment, decree or order and for any further proceedings.

Notes to Rule 73

See Revised Statutes, C. 111, sec. 6.

Rule 73(a) extends the time of appeal to 10 days, and makes District Court factual findings after trial conclusive unless clearly erroneous. See also Rule 52. Notification of the filing of the notice of appeal is given by the clerk rather than by the parties. This is consistent with M.R.C.P. 73.

Rule (b) preserves removal (present Municipal Court Civil Rule 27) and makes it easy if resorted to before actual trial or judgment. Removal may not be had in actions in which the Superior Court has no original jurisdiction.

The statutes are murky as to what jurisdiction exists in the District Court in family matters, and what effect, if any, it has upon Superior Court jurisdiction. E. g., support jurisdiction in the Municipal Courts is different than in the Superior Court. The Superior Court has no original jurisdiction of separations, but C. 108, sec. 5 III authorizes removal of such actions.

The Committee has assumed that the section empowering the Supreme Judicial Court to make rules for appeals authorizes remand. The provision of Rule 73(c) follows the pattern of R. S., C. 153, sec. 37, on appeals from the Probate Court.

RULE 74. JOINT OR SEVERAL APPEALS AND REMOVAL

(a) Appeals. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately or any two or more of them may join in an appeal.

(b) Removal. Parties interested jointly, severally, or otherwise, in any action, may join in removal thereof; or any one or more of them may remove separately or any two or more of them may join in removal.

RULE 75. RECORD ON APPEAL

(a) Papers to Be Filed in Superior Court. When an appeal is completed, the clerk of the division shall file with the Superior Court the original of all depositions and other written evidence or documents and a copy of the record and all other papers on file in the action, together with any transcript which, at the election and expense of one or more of the parties, may be made of the proceeding and of the evidence before the court.

(b) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the District Court judge but, if any difference arises as to whether the record truly discloses what occurred, the difference shall be submitted to and settled by the District Court judge and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the court, either before or after the record is transmitted to the Superior Court, or the Superior Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk.

(c) Appeals When No Stenographic Report Was Made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee within 10 days after an appeal is taken to the Superior Court, and the appellee may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the court for settlement and approval and as settled and approved shall be included in the record on appeal filed with the Superior Court.

RULE 76. Reserved

RULE 77. DISTRICT COURTS AND CLERKS

(a) District Courts Always Open. The District Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the division where the action is pending.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or an assistant clerk in attendance shall be open at the place for holding court for each division during such hours for such days as the chief judge shall designate. All motions and applications in the clerk's office for

issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Reserved.

(e) Facsimile Signature of the Clerk. A facsimile of the signature of the clerk imprinted at his direction upon any summons, writ, subpoena, order or notice, except executions and criminal process, shall have the same validity as his signature.

RULE 78. MOTION DAY

Unless local conditions make it impracticable, the Chief Judge of the District Court shall establish for each division regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the court at any time or place and on such notice, if any, as it considers reasonable may make orders for the advancement, conduct and hearing of actions.

To expedite its business for the convenience of the parties, the court may make provision for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Notes to Rule 78

This rule is a departure from Municipal Court Civil Rules but necessary since there are no terms in the District Court. It follows M.R.C.P. 78.

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) Civil Docket. The clerk shall keep the civil docket, and shall enter therein each civil action to which these rules

are applicable. Actions shall be assigned docket numbers. Upon the filing of a complaint with the court, the Christian and surname of each party and each trustee, and the name and address of the plaintiff's attorney shall be entered upon the docket. Thereafter the name and address of the attorney appearing or answering for any defendant or trustee shall similarly be entered. All papers filed with the clerk, all appearances, orders, and judgments shall be noted chronologically upon the docket and shall be marked with the docket number. These notations shall briefly show the nature of each paper filed or writ issued and the substances of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. No extended record need be kept or made.

(b) Reserved.

(c) Custody of Papers by Clerk. The clerk shall be answerable for all records and papers filed with the court, and they shall not be taken from his custody without special order of the court; but the parties may at all times have copies.

(d) Other Books and Records. The clerk shall keep such other books and records as may be required from time to time by the Chief Judge.

RULE 80. DIVORCE AND ANNULMENT

Rules 80(a) to (j) inclusive of the Maine Rules of Civil Procedure govern actions for divorce or annulment so far as applicable providing, however, that such actions may be brought in the division where either the plaintiff or defendant resides.

(k) Removal. Rule 73(b) applies to the removal of divorce actions.

Notes to Rule 80

For venue provision above, see District Court Act, Section 5, III.

Rule 80(k) is added to make it clear that the removal of divorce actions is according to the rule and not according to C. 108A, Sec. 5 (III).

Rule 73(c) applies to appeals in divorce actions.

RULE 80A. Reserved

RULE 80B. Reserved

RULE 80C. JUDICIAL SEPARATION

(a) Applicability. These Maine District Court Civil Rules shall apply to actions of separation, except as otherwise provided in this rule.

(b) Commencement of Proceedings. The action shall be initiated by complaint brought in the division where either the plaintiff or defendant resides.

Notes to Rule 80C

Removal is covered by Rule 73(b); appeal by Rule 73(c).

RULE 80D. FORCIBLE ENTRY AND DETAINER

(a) Applicability to Forcible Entry and Detainer. These rules shall govern the procedure in forcible entry and detainer actions therein except as otherwise provided in this rule.

(b) Summons. The summons in forcible entry and detainer actions shall bear the signature or facsimile signature of the judge or the clerk, contain the name and address of the court and the names of the parties, be directed to the defendant, state the day when the action is returnable, which shall be not less than 7 days from the date of service of the summons; and shall notify the defendant that in case

of his failure to appear and state his defense on the return day, judgment by default will be rendered against him for possession of the premises. The summons shall also notify the defendant that if the return day is on a holiday, he shall appear and state his defense on the day following the holiday.

(c) Defendant's Pleading. If the defendant claims title in himself or in another person under whom he claims the premises, he shall assert such claim by answer filed on or before the return day, and further proceedings in the action shall be as provided by law. Otherwise he may appear and defend without filing a responsive pleading.

(d) Frivolous Claim of Title. On the return day the plaintiff may file a written allegation that the defendant's claim of title is frivolous and intended for delay, in which event further proceedings in the action shall be as provided by law.

(e) Time of Trial. All forcible entry and detainer actions shall be in order for trial on the return day.

(f) Appeal and Recognizance. Either party may appeal as in other civil actions, except that the appeal shall be within five days after judgment, and the appellant shall furnish the recognizance required by law.

(g) No Joinder of Other Actions. Forcible entry and detainer actions shall not be joined with any other action, nor shall a defendant in such action file any counterclaim.

(h) Venue. An action for forcible entry and detainer shall be brought in the division in which the property is located.

(i) Removal. There shall be no removal of forcible entry and detainer actions.

(j) Issue of Writ of Possession. A writ of possession shall issue five days after entry of judgment therefor.

Notes to Rule 80D

This rule is the same as Municipal Court Rule 26, except the venue as set forth in the District Court Act is repeated in subdivision (h) hereof. In order to permit prompt execution Rule 80D(f) limits appeals to 5 days, Rule 80D(i) bars removal (but not appeal), and Rule 80D(j) authorizes issuance of the writ of possession upon expiration of the appeal period.

Rule 12(a) does not fix the time for answering.

RULE 81. APPLICABILITY IN GENERAL

(a) To What Proceedings Inapplicable. These rules do not apply:

(1) To actions under the statutory small claims procedure except as to proceedings subsequent to the rendition of judgment.

(2) To any ex parte proceedings.

(3) To any proceedings to compel support of a wife or a minor child or children.

(4) To any proceedings for the care, custody, support, and education of neglected children.

(5) To any proceedings for commitment or recommitment of insane persons or persons mentally ill.

(6) To actions under Chapter 167 of the Revised Statutes entitled "Uniform Reciprocal Enforcement of Support Act."

(7) To proceedings in the Juvenile Court.

(b) Other Applicable Rules. Rules 81(c), (d), (e), and (f) of the Maine Rules of Civil Procedure govern procedure in the District Court.

Notes to Rule 81

Municipal Court Civil Rule 28(a) (1) is changed by adding the words "except as to proceedings subsequent to the rendi-

tion of judgment." Subdivision (a) (5) is changed by adding words "or persons mentally ill." See R. S., C. 27, secs. 124 and 174. Rule 81(a) (6) is added to comply with Section 2 of District Court Act.

RULE 82. JURISDICTION AND VENUE UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the District Court or the venue of actions therein.

RULE 83. DEFINITIONS

(1) The word "court" shall include the Chief Judge, any judge at large and any judge of the District Court.

(2) The word "clerk" shall mean the clerk of the court in and for the division in which the action is pending.

(3) The term "plaintiff's attorney" or "defendant's attorney" or any like term shall include the party appearing without counsel.

(4) Whenever any of the Maine Rules of Civil Procedure is incorporated by reference, any amendment thereof, whether prior or subsequent hereto, shall be incorporated herein, unless the order promulgating any subsequent amendment expressly states the contrary.

RULE 84. FORMS

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 85. TITLE

These rules may be known and cited as the Maine District Court Civil Rules.

RULE 86. EFFECTIVE DATE

These rules may be known and cited as the Maine District Court Civil Rules.

RULE 86. EFFECTIVE DATE

These rules will take effect on August 1, 1962.

RULE 87. Reserved

APPENDIX OF FORMS

(See Rule 84)

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only, but they are expressly declared by Rule 84 to be sufficient under the rules. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each pleading, motion and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons." In the caption of the summons and of the complaint all parties must be named and their residence stated; but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. The seal traditionally has been affixed at the upper left of writs and other court papers. It can under the rules be placed at the lower left as shown here or at the traditional upper left or at any other convenient place on the document.

3. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address.

4. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

FORM 1. SUMMONS

(For use in an Action in any Division)

STATE OF MAINE DISTRICT COURT

....., SS District .....

Division of .....

Civil Action, Docket Number .....

OF

v. } SUMMONS

OF

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to defend an action brought in the District Court for District ....., Division of ....., to be held at ....., County of....., and required to serve upon ....., Plaintiff's attorney, whose address is, ..., an answer to the complaint which is herewith served upon you, within 20..... days after service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer also must be filed with the court to be held at ....., County of .....

.....
Clerk.

(Seal of the Court)
Dated .....

Served on .....
Date

.....
Deputy Sheriff.

FORM 1D

STATE OF MAINE DISTRICT COURT

....., SS District .....

Division of .....

Civil Action, Docket Number .....

OF

v. } DIVORCE SUMMONS

OF

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to defend an action brought in the District Court for District ....., Division of ....., to be held at ....., County of ....., and required to serve upon ....., Plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20..... days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, the said Plaintiff will thereupon be allowed by the Court to proceed ex parte to secure a divorce judgment and the relief demanded in the complaint. Your answer must also be filed with the Court to be held at ....., County of .....

.....
Clerk.

(Seal of the Court)
Dated .....

Served on .....
Date

.....
Deputy Sheriff.

FORM 1F

STATE OF MAINE
....., SS

DISTRICT COURT
District .....
Division of .....
Civil Action, Docket Number .....

OF
v.
OF

SUMMONS, FORCIBLE ENTRY AND DETAINER

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to appear in the District Court for District ....., Division of ....., to be held at ....., in the County of ....., on ....., 19...., the day on which this summons is returnable, at 9 o'clock in the forenoon, and then and there state your defense to the complaint of forcible entry and detainer which is herewith served upon you. If you fail to do so, judgment by default will be rendered against you for possession of the premises. If you claim title to said premises in yourself or in another person under whom you claim the premises, you shall assert such claim by answer filed in said District Court to be held at ....., County of ....., on or before said ....., 19.... at 9 o'clock in the forenoon. If the return day is on a holiday, you shall appear and state your defense as aforesaid on the following day.

.....
Clerk

(Seal of the Court)
Dated: .....

FORM 1S

STATE OF MAINE DISTRICT COURT

....., SS District .....

Division of .....

Civil Action, Docket Number .....

OF

v. } SUMMONS, JUDICIAL SEPARATION

OF

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to defend an action brought in the District Court for District ....., Division of ....., to be held at ....., County of ....., and required to serve upon ....., Plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20..... days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, the said Plaintiff will thereupon be allowed by the Court to proceed ex parte to secure a judicial separation. Your answer must also be filed with the Court to be held at ....., County of .....

.....
Clerk.

(Seal of the Court)
Dated .....

Served on .....
Date

.....
Deputy Sheriff.

FORM 2. WRIT OF ATTACHMENT

(For use in an Action in any Division)

To the sheriffs of our several counties or either of their deputies:

We command you to attach the goods or estate of ...., of ....., to the value of ..... as prayed for by ....., of ..... in an action brought by said ..... against ..... on ....., 19... in the District Court, District ....., Division of ....., to be held at ....., County of ....., and make due return of this writ with your doings thereon.

.....
Clerk.

(Seal of the Court)
Dated .....

FORM 2A. SUMMONS TO DEFENDANT AND TRUSTEE

(For use in an Action in any Division)

STATE OF MAINE
....., SS

DISTRICT COURT
District .....
Division of .....

Civil Action, Docket Number .....

OF		SUMMONS TO DEFENDANT AND TRUSTEE
	v.	
OF		
	Trustee	

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to defend an action brought in the District Court for District ....., Division of

....., to be held at ....., County of ....., and required to serve upon ....., plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20..... days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer must also be filed with the court in said ....., County of .....

AND TO THE ABOVE-NAMED TRUSTEE:

You are hereby summoned as trustee in an action brought in the District Court for District ....., Division of ....., to be held at ....., County of ....., and required to serve upon plaintiff's attorney, whose name and address is given above, within 20.... days after service of this summons upon you, exclusive of the day of service, a disclosure under oath of what cause, if any you have, why execution issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his ..... goods, effects or credits in your hands and possession as trustee of said defendant to the value of ..... as prayed for by the said plaintiff. If you fail to do so, you will be defaulted and adjudged trustee as alleged. Your disclosure must also be filed with the court in said ....., County of .....

.....
Clerk.

(Seal of the Court)
Dated .....

Served on .....
Date

.....
Deputy Sheriff.

FORM 2B. RETURN OF SERVICE OF SUMMONS AND COMPLAINT

STATE OF MAINE

....., SS

On the ..... day of ....., 19...., I made service of the complaint and within summons upon the defendant (name of defendant) by delivering a copy of the summons and of the complaint to (name of defendant) (name of person to whom delivery is made and address of place of delivery).

Service

Attachment

Travel,
..... miles one way

.....
Deputy Sheriff

Postage

Amount $

FORMS 3-11

Forms 3-11, inclusive, of the Maine Rules of Civil Procedure govern procedure in the District Court subject to the jurisdictional limit of the District Court.

FORM 12. Reserved

FORM 13. Reserved

FORM 14. WRIT OF REPLEVIN AND BOND

To the sheriff of our County of ....., or either of his deputies .....:

We command you to replevy the goods and chattels following, viz.: (description of the goods and chattels with reasonable particularity and a statement of their respective values) which goods and chattels belong to (name of plaintiff) of (plaintiff's place of residence, including town and county) and are now taken and detained by (name of defendant) of (defendant's place of residence, including town and county) at (location of goods) in this Division; and them deliver unto said (name of plaintiff) provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution as the property of said plaintiff; all as prayed for by said (name of plaintiff) in an action brought by said plaintiff against said (name of defendant) on (date of complaint) in this Division, and make due return of this writ with your doings thereon;

Provided that the said plaintiff shall give bond to said defendant with sufficient sureties in the sum of ..... dollars, being twice the value of said goods and chattels, conditioned as required by law.

.....
Clerk

(Seal of the Court)
Dated .....

KNOW ALL MEN BY THESE PRESENTS, that we (names and places of residence of plaintiff and of sureties) are holden and stand firmly bound and obliged unto (name and place of residence of defendant) in the full sum of (twice value of goods and chattels to be replevied), to be paid to said defendant or his executors, administrators or assigns. To which payment, well and truly to be made, we hereby bind ourselves, and our respective heirs, executors and administrators, jointly and severally, in the whole and for the whole, firmly by these presents.

The condition of the above obligation is such that whereas said (plaintiff's name) has this day commenced against said (defendant's name) an action for replevin for goods and chattels as described in writ of replevin which said plaintiff says defendant has unlawfully taken and detained. Now therefore, if said plaintiff shall prosecute said action for replevin to the final judgment, and pay such damages and costs as said defendant shall recover against said plaintiff and also return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void; otherwise to remain in full force.

Sealed with our seals and dated .....

Signed, Sealed and Delivered
in presence of

....

....

....

FORMS 15 TO 18. Reserved

FORM 19. MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Maine, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong division because (here state the reasons why the venue is improper).

4. To dismiss the action on the ground that the court lacks jurisdiction because (here state the reasons why the court lacks jurisdiction).

Signed: .....
Attorney for Defendant

Address: .....

NOTICE OF MOTION

To: .....
Attorney for Plaintiff

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at ..... on the ..... day of ..... 19..., at 10 o'clock in the forenoon of that day (or as soon thereafter as counsel can be heard.)*

Signed: .....
Attorney for Defendant

Address: .....

* Delete in Domestic Relations Motions.

FORM 20. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is subject to the jurisdiction of this court; can be made a party but has not been made one.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the com-

plaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

FORM 21. Reserved

FORM 21A. TRUSTEE'S DISCLOSURE UNDER RULE 4B(d)

Form 21A of the Maine Rules of Civil Procedure shall govern procedure in the District Court.

FORM 22. Reserved

FORM 23. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

Form 23 of the Maine Rules of Civil Procedure governs procedure in the District Court.

FORM 24. MOTION FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

Form 24 of the Maine Rules of Civil Procedure governs procedure in the District Court.

FORM 25. REQUEST FOR ADMISSION UNDER RULE 36

Form 25 of the Maine Rules of Civil Procedure shall govern procedure in the District Court.

FORM 26. ALLEGATION OF REASON FOR OMITTING PARTY

Form 26 of the Maine Rules of Civil Procedure shall govern procedure in the District Court.

FORM 27. NOTICE OF APPEAL TO THE SUPERIOR COURT UNDER RULE 73(a)

Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the Superior Court (from the Order (describing it)) (from the final judgment) entered in this action on ....., 19.....

Signed .....
Attorney for Appellants
C. D. and E. F.

Address .....

FORM 27A. NOTICE OF REMOVAL TO THE SUPERIOR COURT UNDER RULE 73(b)

Notice is hereby given that (A. B., Plaintiff) (C. D., Defendant) hereby removes the within action to the Superior Court under the provisions of Rule 73(b).

Signed .....
Attorney for Plaintiff, Defendant

Address .....

FORM 28. Reserved

FORM 29. JUDGMENT ON TRIAL TO THE COURT

STATE OF MAINE
....., SS

DISTRICT COURT
District .....
Division of .....
Civil Action, Docket Number .....

OF
v.
OF

JUDGMENT

This action came on for (trial) (hearing) before the District Court, Honorable William Blackstone presiding, and the said District Court on June 2, 1960, having ordered that judgment be entered for the (plaintiff to recover of the defendant damages in the amount of $1000,) (defendant,)

It is ORDERED and ADJUDGED that the (plaintiff recover of the defendant damages in the amount of $1,000 and his costs of action) (plaintiff take nothing, that the action is dismissed on the merits, and that the defendant recover of the plaintiff his costs of action).

Dated at ....., Maine, this ..... day of....., 19.....

.....
Clerk

FORM 30. WRIT OF EXECUTION

STATE OF MAINE
....., SS

DISTRICT COURT
District .....
Division of .....

OF
v.
OF

EXECUTION

To the sheriffs of our several counties or any of their deputies or .....:

Whereas said plaintiff on (date) recovered judgment in the District Court at ....., County of ....., against said defendant in this action for the sum of $..... in debt or damage and $..... in costs of suit, as appears of record, whereof execution remains to be done,

We command you that of the goods, chattels, or lands of said defendant within your precinct you cause to be paid and satisfied unto the said plaintiff at the value thereof in money the aforesaid sums being $....., with legal interest on this Execution from the above said date of judgment, together with 50¢ more for this writ, and thereof also satisfy yourself of your own fees, and make return of this writ with your doings thereon within 3 months from the date hereof.

.....
Clerk

(Seal of the Court)

Dated .....

FORMS 31 to 34. Reserved

FORM 35. COMPLAINT FOR DIVORCE

STATE OF MAINE
....., SS

DISTRICT COURT
District .....
Division of .....
Civil Action, Docket Number .....

OF
v.
OF

COMPLAINT FOR DIVORCE

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Respectfully Represents the Plaintiff ..... that he was lawfully married to ..... at ..... in the County of ..... and State of ..... on the ..... day of ....., 19.... by ..... duly authorized to solemnize marriages; that said Defendant is now of ..... in the County of ..... and State of .....;

That the Plaintiff and Defendant cohabited in the State after their said marriage;

That the Plaintiff resided in this State when the cause of divorce accrued as hereinafter set forth;

That the Plaintiff has resided in this State in good faith for six months prior to the commencement of these proceedings;

That the Defendant is a resident of this State;

That the Plaintiff has even been faithful to h marriage obligations, but that the said Defendant has been unmindful of the same;

That there is no collusion between your Plaintiff and the said Defendant to obtain a divorce;

That the only other divorce or annulment actions previously commenced between the parties, together with the designation of the court or courts involved, and the disposition thereof are as follows:

.....

.....

That

That ..... child h been born to them during their said marriage, of whom ..... now living, viz.:

.....

WHEREFORE Plaintiff prays that a divorce from the bonds of matrimony between h self and the said Defendant may be adjudged, and that the care and custody of their minor child may be given to said Plaintiff, together with a reasonable amount for the support of said minor child .

Also that reasonable alimony may be ordered paid to your Plaintiff out of the estate of the said Defendant, or, in lieu thereof, that a specific sum may be paid to her by him;

Dated at ..... this ..... day of ....., 19....

.....
Plaintiff

.....
Attorney for Plaintiff

STATE OF MAINE

....., SS

Personally appeared ....., the above named Plaintiff, and made oath that the foregoing allegation as to the residence of the Defendant is true.

Before me,

.....
Justice of the Peace
Notary Public

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure are hereby adopted, prescribed and promulgated to become effective on the eighteenth day of September, 1961. The Rules as amended herein shall be recorded in the Maine Reports.

Dated the 5th day of September, 1961.

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

STATE OF MAINE
SUPREME JUDICIAL COURT

MAINE DISTRICT COURT CIVIL RULES and MAINE DISTRICT COURT CRIMINAL RULES

All of the Justices concurring therein, the following rules are hereby adopted, prescribed and promulgated for the District Court for the State of Maine, to become effective on the first day of August, 1962. Said Rules shall be recorded in the Maine Reports.

Dated the 17th day of July, 1962.

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

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE

All of the Justices concurring therein, the following amendments to the rules adopted, prescribed and promulgated on June 1, 1959, as amended on September 1, 1959, November 2, 1959, February 1, 1960, September 1, 1960, January 1, 1961, September 18, 1961 and August 1, 1962 for the Municipal and Superior Courts, Supreme Judicial Court, and Supreme Judicial Court sitting as the Law Court, are hereby adopted, prescribed and promulgated to become effective on the first day of November, 1962. Said rules as thus amended shall be recorded in the Maine Reports.

Dated the 16th day of October, 1962.

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

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Effective September 18, 1961

Rule 53(a). Change the period at the end of the 3rd sentence to a comma and add the following:

> " . . . or by such of the parties, or out of any fund or subject matter of the action, which is in the custody and control of the court, or by apportionment among such sources of payment, as the court shall direct. The referee shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party."

Rule 59(f). Add a subdivision (f) to Rule 59 reading as follows:

> "(f) **Death or Disability of Court Reporter.** When any material part of a transcript of the evidence taken by the Official Court Reporter cannot be obtained because of his death or disability, the justice before whom the action has been tried may on motion, if he is satisfied that the lack of such transcript prevents a party from effectively prosecuting an appeal, set aside any judgment entered in the action and grant a new trial."

Rule 73(d). Filing Record on Appeal. Change the first sentence to read as follows:

> "Eighteen copies of the record on appeal as provided for in Rules 75 and 76, together with one additional copy for each of the parties of record,

shall be filed with the clerk within 60 days from the filing of the final designation of the contents of the record as provided in Rule 75(a)."

A True Copy.

ATTEST:

FREDERICK A. JOHNSON
Clerk of the Law Court

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Effective August 1, 1962

Rules 13(b). Strike the entire subdivision (b) and substitute therefor the following:

> "**(b) Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party."

Rule 13(k). Add the following subdivision (k) to Rule 13.

> "**(k) Removed Actions and Appealed Default Judgments.** When an action commenced in the District Court is entered in the Superior Court on removal or on appeal from a judgment by default, any counterclaim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within 20 days after such entry or such further time as the court may allow; and other counterclaims and cross-claims shall be permitted as in an original action in the Superior Court. Upon the entry of such action in the Superior Court, the clerk shall forthwith notify all parties of the requirements of this subdivision."

Rule 64(e). Add the words "or answer" to the last sentence of Rule 64(e) so that that sentence will read in full as follows:

> "All claims by the defendant in replevin for a return of the goods, for damages, or for a lien, shall be made by counterclaim or answer."

Rule 73(a). Add the following two sentences to the first paragraph of Rule 73(a):

> "An appeal from a judgment preserves for review any claim of error in the record including any

of the orders specified in the preceding sentence. An appeal shall not be dismissed because it is designated as being taken from such an order, but shall be treated as an appeal from the judgment."

Rule 80(j). Amend Rule 80(j), added by amendment effective February 1, 1960, to read in full as follows:

"**(j). Motions after Judgment.** Any proceedings for modification or enforcement of the judgment in an action for divorce shall be on motion, a copy of which together with notice of hearing thereof shall be served upon the party himself, whether he be within the state or not, either (i) by delivery in hand or (ii) by registered or certified mail, return receipt requested, with instructions to deliver to addressee only. The court, on motion upon a showing that service cannot with due diligence be made by either of the methods prescribed above, may order service by ordinary mail or by publication or both."

Form 22. In the form of Summons against Third-Party Defendant (Form 22), strike from the next to the last sentence the words "As provided in Rule 13(a)," and substitute in lieu thereof the following:

"Unless the relief demanded in the third-party complaint is for damage arising out of your ownership maintenance or control of a motor vehicle or unless otherwise provided in Rule 13(a),"

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Effective November 1, 1962

Rule 16. Add the following paragraph:

If a party or his attorney fails to appear at a pretrial conference pursuant to this rule, after having been notified thereof, the court on its own motion and without notice may dismiss the action or proceeding or any part thereof or enter a judgment by default against that party.

Rule 80(g). Change the period at the end of the subdivision to a semicolon and add the following:

> nor shall it be in order for hearing until there is on file with the court a statement, which may be contained in the complaint, signed by the plaintiff, stating whether any divorce or annulment actions have previously been commenced between the parties, and if so, the designation of the court or courts involved and the disposition made of any such actions.

FREDERICK A. JOHNSON
Clerk of the Law Court

INDEX

EVIDENCE

INDICTMENT, WAIVER OF

R. S.. c. 147, § 33, as amended, which provides for a respondent to waive Grand Jury Indictment is constitutional.

Anderson, Petr. v. *State of Maine,* 170.

See Constitutional Law.

It is sufficient to charge a crime in the language of the statute if the language used is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation.

State of Maine v. *Child,* 242.

INHERITANCE

The ordinary testator, after a divorce accompanied by a property settlement, no longer owes or recognizes any legal obligations to his former spouse.

Caswell v. *Kent,* 493.

Some positive act on the part of the putative father is necessary to make an illegitimate child heir of the father.

Knowledge that any illegitimate child suffers many social and economic deprivations cannot be permitted to govern a decision dealing with the orderly descent of property.

In Re Joyce Estate, 304.

INSTRUCTIONS

Instruction to the jury that the liability of the defendants was restricted to items which were substantially consumed in the road construction was erroneous.

Carpenter v. *Seaboard Eng'g Co. et al.,* 277

Where the court's instruction leaves the factual determination to the jury, it is not error for the court to instruct the jury to ask themselves whether a left turn could ever be made with reasonable safety.

State of Maine v. *Holt,* 81.

Instruction that certificate of supervision and inspection was not part of contract in action for breach was not erroneous.

Unity Tel. Co. v. *Design Serv. Co. of N. Y.,* 125.

Instruction that evidence of previous incestuous acts was admissible "for such help as that testimony may be to you" was too broad and prejudicially erroneous.

State of Maine v. *Beckwith,* 174.

INTENT

Actual intention as expressed in the writing is the chief thing to be looked to and ascertained.

Carpenter v. *Seaboard Eng'g Co. et al.,* 277

INTOXICATION

Intoxication will not reduce murder to manslaughter where there is malice aforethought. Voluntary intoxication is no excuse for, justification of, or extenuation of crime *except* where knowledge or specific intent are necessary elements of the crime.

Doyon v. *State of Maine,* 190.

MOTION TO QUASH

See Habeas Corpus.

MOTION FOR NEW TRIAL

In a motion for a new trial on the ground of newly discovered evidence, there must be an end to litigation and the evidence must be very strong.

Evidence which is newly discovered only in the sense that it was not made known by the absent party to his agent or attorney before trial which was conducted in his absence, is not a just cause for a new trial.

To be entitled to a new trial on the ground of newly discovered evidence, it must appear that 1) the new evidence will probably change result on new trial; 2) the evidence has been discovered since the trial; 3) it could not have been discovered before trial by exercise of due diligence; 4) it is not merely cumulative or impeaching.

Rodrigue, et al. v. *Letendre, et al.*, 375.

Alleged error in argument made by county attorney in rebuttal is reached by motion for new trial and not by exceptions.

State of Maine v. *Mottram*, 325.

MUNICIPAL CORPORATIONS

See Contracts.
Ratification.

Personal property of a quasi-municipal corporation may be taken to pay any debt due from the body corporate.

School Dist. No. 3 v. *M.S.D.C., et al.*, 420.

MURDER

See Criminal Law.
Intoxication.

Where an unlawful killing is proved and there is nothing to explain, qualify or palliate the act, the law presumes the act to have been done maliciously and it is upon the respondent to rebut the inference of malice.

State of Maine v. *Wardwell*, 307.

NEGLIGENCE

The owner of a parking lot is not negligent in permitting and causing the operation of a motor vehicle where the defendant did no more than assist a young man, competent in the eyes of the car owner to fix a flat and to have the keys, in starting the car. R. S., 1954, Chap. 22, Sec. 156.

If the defendant in the instant case had known or should have known of the young man's age, experience, and lack of license, there would have been a jury issue whether the negligence was a proximate cause of the injury. Restatement of Torts, Sec. 390.

Sweet v. *Austin*, 90.

NOTICE

Lack of notice is no substitute for consent.

Carey et al. v. *Boulette et al.*, 204.

STATUTES CONSTRUED

STIPULATIONS

SUMMARY JUDGMENT

(M.R.C.P. 56 (b))

SUNDAY SALES LAW

TAXATION

When a statute imposing or enforcing a tax or other burden on the citizen, even in behalf of the state, is fairly susceptible of more than one interpretation; the court will incline to the interpretation most favorable to the citizen.

The Legislature of Maine is vested with the full power of taxation and that power is measured not by grant, but by limitation.

Each parcel of land should be exclusively holden for the tax with which it is charged.

Where separate and distinct real estate belong to the same owner, they are to be considered as distinct subjects of taxation, and must be separately valued and assessed; each estate is subject to a lien for the payment of that portion only of the owner's tax which shall be assessed upon such particular estate.

McCarty v. *Greenlawn Cem. Assn.*, 388.

TAX COLLECTOR'S COMPENSATION

Town tax collector, as collector of village appropriation taxes, is entitled to percentage in fact received as collector of town taxes, rather than higher rate of compensation resulting from determination based purely on votes of town.

When town votes to furnish tax collector with any expenses of collection, in addition to compensation, the collector is entitled to receive similar expenses from village corporation embraced in town.

Lucerne-in-Maine Village Corp. v. *Bennoch*, 396.

THREATS

The intent of the legislature is clear in R. S., 1954, Chap. 130, Sec. 27, that it intended to make it a crime for one to make, publish or send to another any communications, written or oral, containing a threat to injure the person or property of that person.

Haynes, Petitioner v. *Robbins*, 17.

TOWNS

See Tax Collector's Compensation.

UNEMPLOYMENT TAXES

Unemployment tax assessments at the maximum percent due to late payment are not penal in nature. A low tax rate based upon experience record is a condition to be met by an employer for entitlement to the privilege of paying at the lower rate.

M. E. S. C. v. *Charest*, 43.

USE

See Passage Ways.

The receipt of rentals, under a lease executed in another state, of property bought and physically located in that state, is not a "use" of tangible personal property in the state where the rentals were received, within the contemplation of the Sales and Use Tax Law.

Hanbro, Inc. v. *Johnson*, 180.

VALUE

Value is any consideration sufficient to support a simple contract.

Payson v. *Cohen*, 297.

VILLAGE CORPORATIONS

WILLS

Some positive act on the part of the putative father is necessary to make an illegitimate child heir of the father.

In Re Joyce Estate, 304.

It is the intention of the testator which governs the construction of a will. In Maine there is no judicial inclination to prefer either a *per capita* or *per stirpes* distribution.

In construing the provisions of a will which direct that at the termination of a trust by the death of his five children the estate shall vest in "all my lineal descendants . . . in the same proportions as shall then be provided" by the laws of descent in the State of Maine, the statute should be applied as though the testator's death had occurred at the time of the termination of the trust.

In the instant case the six grandchildren take per capita rather than by representation per stirpes.

Murray v. *Sullivan, et al.*, 98.

WITNESSES

Finding of presiding justice as to competency of child to testify is largely discretionary.

State of Maine v. *Beckwith*, 174.

Whether or not a witness called as an expert possesses the necessary qualifications is a preliminary question for the court.

State of Maine v. *Wardwell*, 307.

WRITS OF ERROR

Writs of error in criminal cases remain in full force and effect under the New Rules. R. S., 1954, Chap. 129, Secs. 11 and 12.

Carlson v. *State of Maine*, 15.

WRITS OF ERROR, CORAM NOBIS

It is not the purpose of a Writ of Error Coram Nobis to re-try issues which were tendered and fully tried prior to conviction.

Writ of Error Coram Nobis does not give the respondent the opportunity to reconsider his earlier decisions as to what evidence to offer in his own behalf and what evidence to seek to have excluded.

Doyon v. *State of Maine*, 190.