MAINE REPORTS

159

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1963 to DECEMBER 31, 1963

CHARLES B. RODWAY, JR.
REPORTER

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ROBERT B. WILLIAMSON, *Chief Justice*

HON. DONALD W. WEBBER

HON. WALTER M. TAPLEY, JR.

HON. FRANCIS W. SULLIVAN

HON. CECIL J. SIDDALL

HON. HAROLD C. MARDEN

Clerks

HON. FREDERICK A. JOHNSON

HON. ERSKINE L. DODGE

JUSTICES OF THE SUPERIOR COURT

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
HON. JAMES L. REID

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

CHARLES B. RODWAY, JR.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE OF MAINE
vs.
MILBRIDGE CANNING CORP.

Kennebec. Opinion, January 3, 1963.

Taxation. Sardine.

Only a whole herring, less head and under certain conditions the tail, packed in a can is a "sardine."

ON REPORT.

This is an action brought by the State for Sardine tax allegedly due on "Herring Snacks." Held, parts of a herring are not sardines within meaning of Sardine tax law. Judgment for defendant. Tax abated.

Ralph W. Farris, Asst. Atty. Gen., for the Plaintiff.

Peter N. Kyros,
Donald Bourassa,
Reid, Brown and Wathen, for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., retired before rendition of opinion.

WILLIAMSON, C. J. The State seeks to collect an excise tax of twenty-five cents a case on sardines on the product

labeled "Herring Snacks" packed by the defendant. The case is reported to us from the Superior Court on an agreed statement of facts. The issue is whether the "Herring Snacks" in question are sardines within the meaning of the sardine tax law. R. S., c. 16, § 261-269, as amended. The pertinent part of Section 261 reads:

> "**Sec. 261. Definitions.**—For the purpose of sections 260 to 269, inclusive: The term 'sardine' shall be held to include any canned, clupeoid fish being the fish commonly called herring, particularly the clupea harengus.
>
> "A 'case' of sardines shall mean:
>
> "**I.** 100 one-quarter size cans of sardines packed in oil, mustard or tomato sauce, or any other packing medium; . . . "

The defendant in the words of the agreed statement "packed parts of a herring under the 'Custom House Brand' in soy bean oil and labeled said parts as 'Herring Snacks' under the name of the Riviera Packing Company of Eastport, Maine."

There is nothing in the case to suggest that the defendant failed to comply with pertinent standards or requirements of law relating to the packing or labeling of the product which is called "Herring Snacks." Only the applicability of the sardine tax is in issue.

The defendant also packed "Maine sardines" properly labeled as such under the same brand name in the same packing medium and in the same quarter size can. The defendant does not question its liability for the sardine tax on the "Maine sardines."

The answer to our problem is found in the definition of sardine in Section 261, *supra.* A sardine includes "any canned, clupeoid fish . . . herring . . . " A herring does not become a sardine under the statute until it is canned. We

construe the statute to mean that only a canned whole herring comes within the definition. In brief, the whole or entire fish, less of course the head and under certain conditions the tail, packed in a can becomes a sardine under the statute. The "parts of a herring," or in the descriptive phrase used in argument "herring chunks" were not a whole fish. Hence the "Herring Snacks" packed by the defendant were not sardines within the sardine tax law and were not subject to the excise tax. Of interest are *State* v. *Vogl, et al.,* 149 Me. 99, 99 A. (2nd) 66, dealing with the sardine tax law, and *State* v. *Kaufman,* 98 Me. 546, 57 A. 886, touching the regulation of the canning business many years ago.

From the agreed statement it appears that the State holds the amount of the claimed tax, or $1255, under an agreement to return the amount in the event the "Herring Snacks" should be held not taxable.

The entry will be

Tax in amount $1255 abated.

Judgment for defendant.

CHARLES L. FERGUSON
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Oxford. Opinion, January 3, 1963.

Wills. Taxation. Inheritance.

In construction of wills "cousin," in absence of testamentary qualifications express or implied, includes only a first cousin.

ON REPORT.

This case is on report to determine whether the word "cousin" under statute is limited to first cousins. Held, word "cousin" in statute fixing inheritance tax on property passing to cousin means "first cousin" only. Abatement denied. Judgment for defendant.

Fred E. Hanscom, for the Plaintiff.

Ralph W. Farris, Asst. Atty. Gen., for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., present at argument, but retired before rendition of decision.

WILLIAMSON, C. J. The application by the executor of the will of John Zowe for abatement of inheritance taxes is reported by the Probate Court on an agreed statement. R. S., c. 155, § 33. The sole issue is whether "cousin" under the statute is limited to first cousin, as the state tax assessor contends, or includes first cousins once or twice removed, as the executor asserts. The statute reads in part:

> "**Sec. 4. Tax on Class B.**—Property which shall so pass to or for the use of the following persons who shall be designated as Class B, to wit: brother, half-brother, sister, half-sister, uncle, aunt, nephew, niece, grandnephew, grandniece or cousin of a decedent. . ." R. S., c. 155, § 4.

Class B with "cousins" was first created in 1909. R. S., 1903, c. 8, § 69, as amended by Laws 1909, c. 186.

The state tax assessor correctly applied the statute. The usual and popular meaning of "cousin" is "first cousin," that is to say, a child of an uncle or aunt.

In the construction of wills "cousins" in the absence of testamentary qualifications express or implied includes only first cousins. *Bishop* v. *Russell,* 241 Mass. 29, 134 N. E. 233, 19 A. L. R. 1408; *Culver* v. *Union & N. H. Trust Co.,* 120 Conn. 97, 179 A. 487, 99 A. L. R. 663; 57 Am. Jur., *Cousins* § 1389; 21 C. J. S., *Cousin* p. 862; 10 Words & Phrases p. 279; 3 Page on Wills, *Cousin* § 1033; 4 Bowe-Parker: Page on Wills *Cousin* § 34.28. There is no reason to believe that the Legislature sought to extend the meaning of "cousin" beyond its usual meaning. It could readily have included more distant cousins had it so desired.

The entry will be

Abatement denied.

Judgment for defendant with costs.

FIDUCIARY TRUST CO., TRUSTEE U/W/O
SARAH G. SILSBEE
vs.
GERALD SALTONSTALL SILSBEE, ET AL.

Waldo. Opinion, January 18, 1963.

Wills. Inheritance. "Issue."

"Issue," as used in will, has prima facie or technical meaning of natural child or descendant by blood.

Burden of proving that word "Issue" in testatrix-settlor's will included adopted son of beneficiary was upon adopted son, who claimed right as "issue."

Unless other intention is shown, beneficiary's adopted son is not "issue" as within will by which beneficiary's mother directed that children's issue should take the created trust upon death of children.

Provision for remainder of trust to descend to nephews or nieces in will, does not include adopted nephews or nieces or their descendants.

The question of distribution of trust estate upon death of living life beneficiaries is permissible and answerable for the court, as long as all necessary and proper parties were present and all persons with special knowledge had been availed of or were available.

ON REPORT.

This is an action for construction of testamentary trust and for mode of executing that trust. Held, in the absence of showing of other intention, beneficiary's adopted son was not "issue" within will, which beneficiary's mother created trust for her children and directed that children's issue should take remainder upon children's deaths. Case remanded with directions.

Pierce, Atwood, Scribner, Allen, and McKusick,
by *Sigrid Tompkins* and *Fred C. Scribner, Jr.,*
for the Plaintiff

Johnson, Clapp, Ives, and King,
Drummond and Drummond by *Paul A. Wescott,*
Verrill, Dana, Walker, Philbrick and Whitehouse,
by *John A. Mitchell,*
Linnell, Perkins, Thompson, Hinckley, and Thaxter,
by *Franklin G. Hinckley* for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., retired before rendition of decision.

SULLIVAN, J. Action for the construction of a testamentary trust and for the authoritative determination of the mode of executing that trust. R. S., 1954, c. 107, § 4, X, as amended. The case comes to this court upon report. Rule 72, M. R. C. P., 155 Me. 573.

Sarah G. Silsbee, the testatrix and a resident of Maine, died on June 6, 1933. She was survived by a son, George S. Silsbee, by a daughter, Elizabeth Silsbee Law, and by a sister, Marian Gray Lewis. The son became deceased on August 21, 1961 and left no natural children or descendants by blood. The daughter and the sister aged 98 are living and are defendants in this action.

Sarah G. Silsbee made her will on October 5, 1928 and thereafter executed 3 codicils dated respectively June 3, 1930, June 8, 1932 and April 11, 1933. The will and codicils were proved and allowed in the Waldo County Probate Court on July 25, 1933. A controversy has evolved concerning the rational and just interpretation of specific terms and provisions contained in the residual disposition of the estate. The relevant text is worded as follows: (partition of clauses for visual purposes, ours.)

"All the residue of my property of every kind,

I give and appoint to the trustees hereinafter named in trust

to divide the same into as many shares as there shall be children of mine then living,

counting for one share the issue if any then living of each child of mine then deceased, or

if at my death one of my children shall have died leaving no issue then living

to set apart the whole fund for the other of my children if living or

if not

for his or her issue if any then living.

Each share so set apart for the issue of a child of mine

shall be paid over to such issue by right of representation free of trust.

Each share so set apart for a child of mine

shall be held in trust to pay the income thereof to such child during his or her life,

paying the same into his or her own hand or upon his or her own separate order or receipt to be drawn always from time to time as such income shall become payable and never by anticipation or by way of assignment and in no case subject to the interference, claims or control of any creditor or other person.

Upon the death of each child of mine for whom a share has been so set apart and held,

such share shall be paid over free of trust to the issue of such child then living by right of representation,

or if there is no such issue then living,

such share shall be added to the trust fund if any then held for the other of my children if then living

and if not

shall be paid over free of trust to the issue then living by right of representation of such other child of mine,

but if no issue of mine is then living

such share shall continue to be held in trust during the life of the survivor of my brothers and sisters and the income thereof paid in equal shares to all my brothers and sisters living from time to time

provided that the issue living from time to time of each brother or sister of mine then deceased shall take by right of representation the share such deceased brother or sister would have taken if living.

Upon the death of the survivor of my brothers and sisters or

upon the subsequent death of the survivor of my two children,

if there is no issue of either of them then living,

the fund shall be paid over free of trust to my nephews and nieces then living taking per capita and not per stirpes

provided that the issue then living of each nephew and niece of mine then deceased shall take by right of representation the share such nephew or niece would have taken if then living."

Plaintiff is the sole successor trustee of the trust created by the residuary provisions just quoted.

On November 12, 1931, prior to his mother's death, George S. Silsbee, son of the testatrix, married. On May 16, 1933, subsequent to his mother's 3rd codicil of April 11, 1933 and before her death on June 8, 1933, George S. Silsbee in California legally adopted as his son, Gerald Warren Mead, natural son of George S. Silsbee's wife and born to her on August 24, 1922 during a former marriage. At the time of the adoption Gerald Warren Mead's natural father was alive and consented to the adoption. George S. Silsbee and his wife in the adoption proceedings executed an agreement that Gerald Warren Mead would be

> "- - - - adopted and treated in all respects as their own issue should be treated - - - -"

The adoption decree read in pertinent part:

> "- - - - that the said GERALD WARREN MEAD be adopted by the petitioners herein and that the said child henceforth be in the custody and regarded and treated, in all respects, as the child of George S. Silsbee and Ruth P. Silsbee, and hereafter bear the name of GERALD SALTONSTALL SILSBEE."

At the time of the execution of the will and codicils of Sarah G. Silsbee, at the date of her death and when Gerald Warren Mead was adopted by George S. Silsbee the adoption statute of Maine was identically, P. L., 1917, c. 245; R. S., 1930, c. 80, § 38.

The adopted Gerald Saltonstall Silsbee and his two children are defendants in this case.

Many defendants are nieces and nephews of the testatrix or descendants of nieces and nephews.

Anne Gilmour Grant and her children are defendants. Anne Gilmour Grant is an adopted daughter of Alice Fay Gilmour, a niece of the testatrix and also a defendant here.

Following the death of the testatrix in 1933 Elizabeth Silsbee Law and George S. Silsbee until his death in 1961, both equally enjoyed the income from the trust.

This proceeding seeks to ascertain if one-half of the principal of the trust formerly allocated to supply a life income to George S. Silsbee shall be added to the other one-half of the corpus and the whole res be held for the life income benefit of Elizabeth Silsbee Law or whether the one-half share of the principal formerly dedicated for the lifetime usufruct of George S. Silsbee must be paid over free of trust to adopted Gerald Saltonstall Silsbee as the "issue" of George S. Silsbee.

This court is further asked to whom the principal devoted to the lifetime income benefit of Elizabeth Silsbee Law who was born in 1893 and has no children or descendants, shall be distributed upon her demise.

To restate variantly the first inquiry: Is Gerald Saltonstall Silsbee within the purport of the will and codicils of the testatrix, Sarah G. Silsbee, the "issue" of his adopter, George S. Silsbee, and therefore entitled to take one-half of the trust res?

The resolution of such a question whenever possible is to be attained by effectuating the lawful intention of the testatrix if she has expressed one in the language of her testament construed as an entirety and as of the time of testamentary execution. *Gorham* v. *Chadwick,* 135 Me. 479, 482; *Cassidy* v. *Murray,* 144 Me. 326, 328; *Barnard* v. *Linekin,* 151 Me. 283, 286; *New England Trust Co.* v. *Sanger,* 151 Me. 295, 301, 302; *Fiduciary Trust Co.* v. *Brown,* 152 Me. 360, 368.

In *Wilder* v. *Butler,* 116 Me. 389, 391, this court said:

> "- - - - The right of inheritance by the adopted child is a matter of statutory creation; the taking

> under a deed or a will depends upon the intention of the grantor or testator, as revealed by the instrument itself construed in the light of the surrounding facts and conditions. Where the grantor or testator is the adopting parent it is reasonable to presume that the adopted child was within the intended bounty of such grantor or testator. But where he is a stranger to the adoption such presumption does not prevail - - - -"

The following excerpt from the text of the testamentary trust is the subject matter and occasion of our primary question:

> "- - - - Upon the death of each child of mine for whom a share has been so set apart and held, such share shall be *paid over free of trust to the issue of such child* then living by right of representation, or
>
> if there is no such issue living, such share shall be added to the trust fund if any then held for the other of my children if then living - - - -" (Italics supplied.)

The decisive term "issue" as utilized by the testatrix-settlor has a prima facie or technical meaning of natural child or descendant by blood. *Woodcock's Appeal,* 103 Me. 214, 217; *Fiduciary Trust Co.* v. *Brown,* 152 Me. 360, 372. But, as it was said in *Gannett* v. *Old Colony Trust Co.,* 155 Me. 248, 249:

> "The word 'issue' does not have such a fixed and limited meaning that it cannot vary with the intention of the testator who uses it - - -"

In *Woodcock's Appeal, supra,* 217, it was held:

> "When in a will provision is made for 'a child or children' *of some other person than the testator,* an adopted child is not included unless other language in the will makes it clear that he was intended to be included, - - - - - - - - - - - - - - - - In making a devise over from his own children to

> their 'child or children' there is a presumption that the testator intended 'child or children' of his own blood, and did not intend his estate to go to a stranger to his blood. Blood relationship has always been recognized by the common law as a potent factor in testacy - - - -" (Italics ours.)

In *Fiduciary Trust Co.* v. *Brown, supra,* 372, this court said:

> "There is a long line of cases, which defines the word 'issue' as prima facie meaning heirs of the body; that the term is synonymous with 'descendants'; and that there is a presumption that a limitation in a trust to 'issue' of a life beneficiary does not include children adopted by him - - - -"

In *Wilder* v. *Butler, supra,* 116 Me. 389, 394, we find:

> "- - - - The gift over by the grantor in this trust deed, as by the testatrix in the will, was not to his own child or children but to the child or children of another party, William L. Wilder. Therefore the presumption is against the estate passing to the adopted son of William L. unless in other ways such clearly appears to have been the intention of the grantor. - - - -"

The burden of proof in this case rests upon the defendant, Gerald Saltonstall Silsbee, to establish that Sarah G. Silsbee contemplated a child by adoption in her use of the term "issue." *Wilder* v. *Butler,* 116 Me. 389, 396: *Fiduciary Trust Co.* v. *Brown,* 152 Me. 360, 378. The latter case at page 374 affirms that "issue" is a "technical word" and that in the absence of "clear evidence" of a contrary intention on the part of the testatrix "there is a presumption that a technical word is to be construed in its technical legal sense": *New England Trust Co.* v. *Sanger,* 151 Me. 295, 302.

The evidence in the record of the case at bar is completely negative as to whether or not Sarah G. Silsbee, the testatrix, ever knew of the adoption of Gerald Saltonstall Silsbee by

her son, George S. Silsbee. There is no information that the testatrix was acquainted with or enjoyed any relations with Gerald Saltonstall Silsbee.

This court in *New England Trust Co.* v. *Sanger,* 151 Me. 295, 307 made this observation:

> "When parties reasonably disagree on the meaning and intention of a testator who has made a complicated will, the court must determine from the words in the will the probable intention. Courts can only deal in probabilities where intention is in question, but if there is doubt or ambiguity, evidence outside the will may assist in finding the probabilities."

For want of proof to the contrary, common understanding of human nature and an average experience with it afford us an indigenous and ingenerate probability. A normal mother would rarely be reconciled — much less desire — that her son through the adoption of a child stranger to her blood and possessing a living natural father, should thereby effect a diversion from her own daughter and foreseeably from her own sister of one-half of this trust income upon the son's death and preclude her blood kin from any derivative participation in one-half of the trust corpus. It is possible that a mother under special circumstances absent from this case might will such eventualities. But upon the record here the intrinsic probability is abiding. The conventional and technical language of this testamentary trust is, without more, insufficient to afford a basis for the unnatural and exceptional interpretation that Gerald Saltonstall Silsbee takes the one-half share of the trust principal set apart for a lifetime income to his adopter and foster father. In accordance with the provisions of the testamentary trust such one-half share of the res will be added by the trustee to the fund for the life benefit and usufruct of Elizabeth Silsbee Law who is also entitled to the net in-

come attributable to the added one-half share since the death of life incumbent George S. Silsbee.

The remaining question propounded to this court is tantamount to a request for instructions as to the mode of executing the testamentary trust after the death of Elizabeth Silsbee Law.

All parties necessary and proper are included here and their number is very large. All persons with special knowledge of facts pertinent in this controversy, we can assume, have been availed of or at least have been available to the parties. Any doubts there may be for allayment, the elimination of added litigation, the obviation of further expense to the trust and persons in interest and an assuring prospect of exhausting the remaining contingencies in the estate are considerations which with other recited factors decide this court to entertain the second question posed, as permissible and answerable.

First Portland National Bank v. *Rodrique,* 157 Me. 277, 285; *Gannett* v. *Old Colony Trust Co.,* 155 Me. 248, 251.

Upon the death of Elizabeth Silsbee Law the trust principal free of the trust shall be paid to her surviving natural child or children equally, any natural child or children of a deceased child taking by right of representation. Should Mrs. Law die childless but with descendants of her blood the trust fund shall be paid free of trust to such descendants by right of representation.

Upon the death of Elizabeth Silsbee Law if she shall have left surviving her no natural child or children or descendants by blood there will be two possible alternatives.

1. Should Marian Gray Lewis, sister of Sarah G. Silsbee, testatrix-settlor, outlive Elizabeth Silsbee Law, the trust shall endure during the lifetime of Marian Gray Lewis and the income during that period shall be paid by the

trustee in equal shares to Marian Gray Lewis and by right of representation to living issue by blood of the already deceased brothers and sisters of the testatrix-settlor. Upon the death of Marian Gray Lewis, the trust principal shall thereafter be paid, free of the trust to the living nephews and nieces by blood of Sarah G. Silsbee per capita and not per stirpes, the living issue by blood of predeceased nephews and nieces taking by right of representation the share such deceased nephew or niece if living would have taken.

2. Should Marian Gray Lewis have predeceased Elizabeth Silsbee Law, then the trust principal upon Elizabeth's death shall be paid, free of the trust to the living nephews and nieces by blood of Sarah G. Silsbee per capita and not per stirpes, the living issue by blood of deceased nephews and nieces taking by right of representation the share such deceased nephew or niece if living would have taken.

The testamentary trust and the case record with respect to the collateral relatives of the testatrix-settlor, Sarah G. Silsbee, discover no expressed intention of the testatrix-settlor to include in her contingent bounty adopted nephews or nieces or any descendants of nephews or nieces through adoption.

The mandate shall be:

> *Case remanded for a judgment in accordance with this opinion. The costs and expenses of the plaintiff, of the guardians ad litem and of each of the parties, including moderate counsel fees, to be fixed by the sitting justice after hearing, and paid from the assets of the trust estate.*

JAMES STANLEY
vs.
ROBERT L. TINSMAN

Cumberland. Opinion, January 21, 1963.

Conjecture and Surmise. Evidence. Damages. Contracts. Verdict.

In the absence of special circumstances, damages for the non-delivery of goods excludes the elements of profits and losses, and recovery is limited to the fair market value of the equipment.

After a breach of contract, the injured party is required to improve all reasonable and proper opportunities to lessen his injury, including the purchase of similar equipment in the open market.

Conjecture and surmise will not substitute for evidence and a scintilla of evidence will not support a verdict.

When both parties understand that special circumstances exist which affect the subject matter of the contract, and reasonably contemplate the damages which would result from the breach of such a contract, the gains prevented and losses sustained thereby may be recovered.

ON APPEAL.

This is an action by the buyer (plaintiff) against seller (defendant) for non-delivery of a used jackhammer. Defendant appeals the award; held, award of $950 was excessive where buyer's testimony as to fair market value of $450 was in no way supported or corroborated and there was no evidence which would entitle the buyer to loss of use. Appeal sustained and new trial ordered.

Udell Bramson, for Plaintiff.

Linnell, Perkins, Thompson, Hinckley & Thaxter, by *Royden A. Keddy* and *Charles P. Barnes,* for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument but retired before rendition of decision.

WEBBER, J. On June 12, 1959 the plaintiff purchased from the defendant for a single sum by conditional sale contract four pieces of equipment commonly used in highway and building construction. Defendant failed to deliver one item, a used L57 Sullivan jackhammer. This unit was in the physical possession of one Morley in Massachusetts with whom it had been lodged for repairs by a previous owner. Mr. Morley failed to respond to defendant's demand for possession after he was informed that a sale had been made to plaintiff. Upon trial of plaintiff's complaint seeking damages for non-delivery, the justice below instructed the jury that they should find for the plaintiff on the issue of liability and submitted to them only the assessment of damages. A verdict for the plaintiff was returned in the amount of $950. Defendant seasonably appealed from the judgment.

It was not error for the presiding justice to take from the jury the issue of liability. Defendant failed to prove any legal excuse or justification for non-delivery. The suggestion that Morley might be holding the equipment as security for the payment of indebtedness owed by plaintiff was not supported by any evidence.

A careful review of the evidence makes it apparent that the verdict is excessive and cannot stand. Plaintiff sought to recover not only the fair market value of the equipment but also damage for loss of use and rentals. "The general rule of damages for the non-delivery of goods excludes the elements of profits and losses. * * * There are cases where both parties understand that special circumstances exist which affect the subject matter of the contract and reasonably contemplate the damages which would result from the

breach of such a contract, and gains prevented and losses sustained thereby may be recovered." *Lumber Co.* v. *Bradstreet,* 97 Me. 165, 173. In the absence of such special circumstances the recovery of one situated as was this plaintiff would be limited to the fair market value of the equipment. The plaintiff was required to "improve all reasonable and proper opportunities to lessen the injury," *Lumber Co.* v. *Bradstreet, supra.* This would include the purchase of similar equipment in the open market. *Miller* v. *Mariner's Church,* 7 Me. 51, 56; Anno. 81 A. L. R. 282. As was stated in Restatement of the Law of Contracts, Vol. 1, Sec. 336, Page 536 in the Comment on Subsection (1):

> "a. After the plaintiff has reason to know that a breach has occurred, or that a breach is impending under circumstances such that it is not reasonable for him to expect the defendant to prevent harm, he is expected to take such steps to avoid harm as a prudent person would take. He cannot get damages for harm that could thus be avoided. Furthermore, gains that he could thus make, by reason of opportunities that he would not have had but for the breach, are deducted from the amount otherwise recoverable. In general, however, it is reasonable for the plaintiff to rely upon the defendant to perform as he has promised. Also, it may be reasonable for him to expect the defendant to take the steps necessary to prevent harm after a breach has occurred; especially is this true if the breach is accompanied by assurances of the defendant that proper performance will soon be rendered and further harm prevented."

So far as the evidence shows there was nothing whatever that was unique about this jackhammer. It may be fairly assumed that it could have been readily replaced in the used equipment market. Plaintiff made no efforts to seek replacement. There is evidence that the defendant gave repeated assurances to the plaintiff that he would secure possession and make delivery. There is also evidence, however, that

about two weeks after the sale the plaintiff discussed the jackhammer with Mr. Morley and was unable to procure from him any indication that he would relinquish possession of the equipment. A question therefore arises as to whether or not plaintiff could proceed thereafter in reliance upon the assurances of the defendant with respect to delivery and take no steps to minimize the loss.

In the instant case the defendant objected to so much of the charge given by the presiding justice as purported to submit to the jury any consideration of loss of use as an element of damage. We think the objection went too far. The presiding justice instructed the jury that they might determine whether or not the equipment was unique and not readily replaceable in the open market. Since there was no evidence whatever to support a finding that it was unique, this portion of the charge was erroneous. On the other hand, it was not error to instruct the jury that they might determine whether or not plaintiff could reasonably rely upon the assurances of the defendant that delivery would be made, although that portion of the charge could have been amplified to advantage. Since this case must be retried, we take this occasion to suggest the proper scope of the instructions as they may deal with the circumstances under which this plaintiff may or may not be entitled to special damages for loss of use or rentals.

The plaintiff estimated the fair market value of the equipment as "$400, $450." Admittedly he had not seen the equipment since about 15 months prior to the purchase from the defendant. Although he knew that it had been placed with Mr. Morley to be repaired, he did not know whether or not the repairs had been made, or what they consisted of. He had no knowledge as to whether the machine was usable at the time he bought it. His testimony was in no way supported or corroborated. Under these circumstances a verdict of $950, of which at least $500 is

necessarily attributable to loss of use, is clearly speculative and conjectural and therefore excessive. Conjecture and surmise will not substitute for evidence and a "scintilla of evidence" will not support a verdict. *Glazier* v. *Tetrault,* 148 Me. 127; *Cyr* v. *Giesen,* 150 Me. 248; *Michalka* v. *Great Northern Paper Co.,* 151 Me. 98.

Appeal sustained.

New trial ordered.

BRUNSWICK DIGGERS, INC.

vs.

ANTHONY GRACE AND SONS, INC.

Kennebec. Opinion, January 22, 1963.

Contracts. Directed Verdict. M. R. C. P. 73 (a)

Amendment governing what appeal from judgment preserves for review was adopted to clarify and resolve doubts which may have been created by certain dicta in a case.

Not every grievance, irritation, or dissatisfaction which may be caused to a contracting party constitutes a breach of contractual obligations by the other party.

Law Court directs judgment for defendant, notwithstanding verdict, on record indicating plaintiff could not sustain its burden of proof on new trial.

Subcontractor which had agreed to do certain construction work for contractor was not entitled to renegotiation of contracts by general contractor.

Subcontractor was bound to inspect plans and specifications covering entire project which was undertaken by general contractor; and subcontractor was also bound to anticipate that work done under those circumstances would at times be hampered and unavoidably delayed.

ON APPEAL.

This is an action by subcontractor against general contractor for breach of contract. Held, evidence failed to show that general contractor caused delays which amounted to breach of contract, or that general contractor breached contracts by refusing to pay for authorized extras. Appeal sustained. Judgment for the defendant, notwithstanding verdict on plaintiff's complaint; defendants counterclaim dismissed with prejudice.

Richard B. Sanborn, for Plaintiff.

Harold J. Rubin, for 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. The defendant, hereinafter called the Builder, was a general contractor employed by the United States Navy to complete land development and the construction in Brunswick of 277 dwelling units for military service personnel. The plaintiff, hereinafter referred to as the Contractor, was organized as a corporation by its owner and sole stockholder, Mr. Allen, to subcontract a portion of the work involved in the project. On July 11, 1959 the parties entered into a written agreement by which the Contractor undertook the initial work of "clearing and grubbing" for the sum of $20,440. Plaintiff actually commenced work a few days before the formal execution of the contract. On July 22, 1959, again by written agreement, plaintiff contracted to excavate and backfill the foundations for the 277 dwelling units for the sum of $55,775. In addition, plaintiff was to excavate, trim and backfill for sewer and water connections (called "laterals") from the foundations to the street lines for a unit price of 50c per lineal foot. On

August 13, 1959 the parties entered into a third written contract by which plaintiff agreed to install certain elements of the surface drainage system for the sum of $38,-500. It is not disputed that some time in November, 1959 the parties entered into an oral agreement by the terms of which the Contractor was to construct roadways, sidewalks and utilities outside the main project location but connected with it. For this "off site" work plaintiff was to receive $28,000. The contracts called for payments by the Builder on monthly requisitions. At the request of the Contractor, however, payments were made weekly in advance, the amount of these advances being determined by separate agreement as to each. On April 18, 1960 the Contractor wrote to the Builder as follows:

> "This is to notify you that any contractual relations between your company and Brunswick Diggers, Inc. has been breached and, therefore, I expect your company to advance capital to pay for materials,, rentals, and labor.
>
> It was agreed that your company would supply the necessary capital to expedite the contract. This you have failed to do. Also in order to expedite your work we have cooperated to the extent that we have done much extra work which was not contracted for. The extent of the extra work is so great and intermingled with that contemplated in the contract I can see no other way but to continue work on a cost plus basis or renegociate (sic).
>
> In reference to payments and payment of bills, the only reason that we haven't paid all bills to date is because we haven't been paid enough by your company.
>
> Please advise on what basis you wish to settle this situation as Brunswick Diggers, Inc. can work no longer without knowing how you intend to advance operating money."

It may be noted in passing that the plaintiff adduced no evidence that the defendant had agreed to "supply the necessary capital to expedite the contract." Before writing the foregoing letter claiming breach of contract, the plaintiff had ceased operations with about 70% of its work completed. The plaintiff had received advances of $118,770.87 and when it ceased operations it owed about $45,000 to material men and suppliers whose claims became an obligation of the defendant under the "Miller Act" so-called. When requested to state its conditions for performance of the contracts, the plaintiff demanded a renegotiation which would provide approximately $73,000 additional for work claimed to have already been done and a further sum of $70,000 for the work remaining. These conditions were rejected by the defendant, which then completed the work at a cost to itself of $53,655.88. Plaintiff brought its action asserting breach of contract and defendant responded by counterclaim. A jury returned a verdict for the plaintiff in the sum of $72,000. Defendant seasonably filed its appeal from the judgment below.

Since the plaintiff has raised some question as to what may be open to the defendant on appeal, we take this occasion to comment on the amendment to M. R. C. P. Rule 73 (a) promulgated August 1, 1962 which provides:

> "An appeal from a judgment preserves for review any claim of error in the record including any claim of error in 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."

This amendment was not intended to add to or change the substance of the Rule as it stood before amendment, but was adopted for the purpose of clarification and to resolve any doubts which may have been created by the language

of dicta contained in *Knowles* v. *Jenney*, 157 Me. 392. See 1962 Supplement to Field & McKusick, Maine Civil Practice, page 58.

We view the evidence in the light most favorable to the plaintiff in order to ascertain whether there was credible evidence that the defendant failed to perform its contracts and that the plaintiff was excused from full performance on its part. The plaintiff complains of delays in its work progress alleged to have been caused by the defendant and to have been so substantial and material as to amount to breach of contract. Plaintiff also asserts that it performed many extras which were ordered by the defendant and for which defendant refused payment. The Contractor was bound to inspect and did inspect the plans and specifications covering the entire project. It was obvious from such an inspection that the project was of great magnitude and would require the services of many subcontractors who with the Builder would be working simultaneously with large quantities of material and equipment. Plaintiff was bound to anticipate that work done under such circumstances would be at times hampered and unavoidably delayed. The parties provided in their agreements that they were "subject to delays caused by * * * other causes beyond the control of the parties hereto." In an effort to expedite the work and keep interference at a minimum, the Builder held meetings with its subcontractors at least weekly and often more frequently for the express purpose of correlating their efforts. The evidence is devoid of any proof that the Builder did not make diligent efforts to eliminate delay. It is not every grievance, irritation or dissatisfaction which may be caused to a contracting party which will constitute a breach of the other party's contractual obligations. In the instant case specific problems were met on a day to day basis and resolved by agreement. Moreover, it is apparent that as the work progressed, although suggestions and

criticisms were exchanged, there was no thought on the part of either the Builder or the Contractor that the contracts had been broken. On September 21, 1959 when the work had been in progress for about two and one-half months the Contractor wrote to the Builder a reminder that cold winter weather was coming and suggested that if the concrete work on the foundations could be expedited "it will definitely save both (of) us money." The letter also requested information as to arrangements for putting in "laterals" so that the work might be done immediately after each unit was excavated. Although much of the delay of which plaintiff now complains is alleged to have occurred during the summer months of 1959, there was no suggestion in this letter that the plaintiff considered such delays to have been so unreasonable, excessive or damaging as to amount to breach of contract.

In November, 1959, as already noted, the plaintiff and defendant negotiated their fourth contract. It seems unlikely that Mr. Allen would have made this agreement for his corporation if he had known or believed that defendant had not thus far properly discharged its obligations under the first three contracts. It is even more improbable that plaintiff would have been satisfied with an *oral* agreement in November if it had deemed the conduct of the defendant to have been in violation of the three prior *written* agreements. From time to time during the winter the Builder wrote letters to the Contractor requesting better progress in its work and full compliance with the plans, specifications and contracts, but there is no evidence that the Contractor asserted any breach on the part of the Builder. In fact, Mr. Allen testified that as late as March 29, 1960 he considered the contracts to be in full force and effect.

The first claim of breach and demand for the payment of money for alleged delays came only at or about the time the above quoted letter of April 18, 1960 was sent and at a time

when the Contractor had already quit the job. We conclude that the plaintiff failed to adduce any evidence of delays caused by the defendant amounting to breach of contract as a matter of law or which the plaintiff regarded or treated as a breach. "Whether given conduct can be legally held a breach of a certain contract, i.e., whether capable of being so held is a question of law." *Stachowitz* v. *Anderson Co.*, 121 Me. 534, 536.

As to the claim that defendant broke the contracts by refusing to pay for authorized extras performed by plaintiff, the evidence again fails to offer any proof of breach. The contracts provide:

> "No extra work or alterations of the Plans and Specifications shall be deemed authorized except by written order by the Builder to the Contractor, specifying such extra work or alteration of Plans and Specifications and the agreed cost, if any, therefor."

Some such provision would seem to have been essential if the Builder was to keep any proper control of its own cost or seek to recover the cost of any extra work from the Navy. Mr. Allen testified that this was modified by oral agreement and that extra work was to be done on verbal instruction only. This testimony is not corroborated and defendant asserts the contrary. Plaintiff produced no adequate records to support his claim for extra work. His entire testimony with respect to the nature and extent of alleged extras is vague, unsatisfactory and unconvincing. Whatever the fact may have been as to verbal modification of the written clause, in at least one instance written authorization was obtained and the extra approved in accordance with contract procedure. The first attempted summation of claims for extra work came in the form of a summary sheet dated January 29, 1960. This purports to summarize charges for extra work for the period from August 26, 1959 to January

6, 1960 and the total claimed is $2915.25. As of February 2, 1960 another statement was prepared covering extras from December 15, 1959 to January 11, 1960 and, although no exact total is carried out, the aggregate claim for this period does not appear to have exceeded $2170.40. Sometime in March or April, Mr. Witham, plaintiff's engineer and foreman, and the person most cognizant of the detailed progress of the work, was asked by plaintiff to prepare a summary of the position in which the parties then stood. The first page thereof represented a summary of all of the extras of which Mr. Witham then had knowledge. The total there presented is $8229.75 of which one item of $1980 appears upon its face to represent a claim of damage for alleged delay rather than a claim for extra work performed. This summary includes as its first item the $2915.25 carried forward from the summary sheet of January 29, 1960. The evidence therefore indicates that at this stage plaintiff's maximum claim for alleged authorized extras did not at most exceed an amount of approximately $10,000, yet almost immediately thereafter we find the demand made upon the defendant for payment for extra work suddenly and inexplicably increased to $42,999.25. Moreover, the defendant was offered no detailed explanation of the basis or composition of this new and greatly increased claim. Simultaneously the plaintiff demanded $30,000 more for the work already done and a renegotiation of the contracts which would provide an additional $70,000 to complete the job.

It is apparent that this is not a case of the Builder refusing to pay the reasonable cost of authorized extra work. There is no evidence whatever that the defendant ever declined to pay for authorized extras. In fact, it is apparent that the amount by which the defendant overpaid the plaintiff more than exceeds the amount of the claimed extras as first summarized by plaintiff. All that the defendant flatly and properly refused to do was to renegotiate the contracts

and agree to pay the plaintiff approximately $143,000 in addition to the $118,770.87 already paid. The plaintiff was not legally entitled to a renegotiation of the contracts and the defendant's refusal to accede to this exorbitant demand was not a breach of contract as a matter of law. The defendant in no way prevented the plaintiff from completing performance and obtaining whatever compensation would then have been justly due.

It may well be and doubtless is true that the plaintiff concluded that the job had been underbid. It seems obvious that plaintiff did not have sufficient capital to carry contracts of this magnitude to the point of completion and final payment. However unfortunate these circumstances may be, they will not suffice to excuse the non-performance of the plaintiff or permit it to shift the burden of responsibility to the other contracting party. See *Kenney* v. *Pitt,* 111 Me. 26, 29.

At the close of the plaintiff's evidence the defendant made an oral motion for a directed verdict, which motion was renewed at the close of all the evidence. Although the record fails to disclose the forms of these motions or the reasons assigned in support of them, the comments of the presiding justice in ruling thereon made it clear that defendant had urged as grounds therefor that the evidence viewed in the light most favorable to the plaintiff failed to show any breach of contract by defendant, and that if any such breaches had occurred, they had been effectively waived by subsequent conduct of the plaintiff. The defendant seasonably filed its motion for judgment notwithstanding the verdict, again setting forth as the first ground therefor that "there was no credible evidence before the jury which would sustain a finding that there was any breach of the contracts by the defendant." We are satisfied that the requirements of M. R. C. P. Rule 50 have been complied with and the Law Court may itself direct judgment for the defendant

notwithstanding the verdict. The case was well and fully tried below. The record consists of over 700 pages of testimony and exhibits. There is no indication that the plaintiff could sustain its burden of proof upon a new trial. The judgment must be directed.

As to the defendant's counterclaim, it has been stipulated that if the court should order judgment for the defendant upon the plaintiff's complaint, the counterclaim may be dismissed with prejudice. The entry will be

Appeal sustained.

As to plaintiff's complaint, judgment for the defendant notwithstanding the verdict.

As to defendant's counterclaim, ordered dismissed with prejudice.

PORTLAND RENEWAL AUTHORITY
vs.
JAMES F. REARDON AND MADELINE E. REARDON

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PORTLAND RENEWAL AUTHORITY
vs.
MADELINE E. REARDON

Cumberland. Opinion, January 25, 1963.

Eminent Domain. Slum Clearance. Relocation. Possession. Real Property. Title.

Relocation of condemnees was not a condition precedent to divestment or possession of their ownership of property taken by Renewal Authority for purpose of clearing blighted area.

ON APPEAL.

These cases are appealed upon the defendants' contention that relocation of the defendant by the plaintiff is a prerequisite to the passing of title to condemned real estate. Appeal denied.

Barnett I. Shur,
Herbert A. Crommett, for Plaintiff.

Walter G. Casey, for Defendants.

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

SULLIVAN, J. These are real actions to obtain possession of land and buildings. R. S., 1954, c. 172, §§ 1, 4, 6, 7, 8, with amendments; Maine Rules of Civil Procedure, Rule 80 A, 155 Me. 590. These cases arise upon appeal by the Defendants.

Plaintiff is "a public body corporate and politic" created by the Legislature for the purpose of eliminating slum and blighted areas in Portland preparatory for their eventual redevelopment. P. & S. L., 1951, c. 217, as amended. Plaintiff on March 22, A. D. 1960 filed in the Registry of Deeds for Cumberland County its statutory statement taking real estate of the Defendants by eminent domain. Defendants thereafter remained in possession of the realty until March 2, 1962 when Plaintiff instituted these actions to secure possession. Defendants' answers to Plaintiffs' complaints were general denials. A pretrial conference was held and the pretrial court order rendered without challenge or objection reads pertinently as follows:

> "- - - - The basic issue that these cases produce is whether or not the Plaintiff at this time is entitled to possession of the demanded premises. It is agreed and will be stipulated that the procedural requirements necessary to take the demanded premises by eminent domain have been complied with by the Plaintiff and that title, by virtue of the taking has vested in the Plaintiff. However, the Defendants do not agree that the right of possession follows title at this time, it being the Defendants' position that the act under which the land was taken carried with it the obligation on behalf of the Plaintiff to relocate the Defendants and that the right to possession of the demanded premises does not ripen until such time as the Defendants have been relocated. The Defendants argue that the act involved gives them the right of relocation. The Plaintiff, of course, disagrees with the conclusion reached by the defendants, and takes the position that the obligation of relocation is not a condition precedent to possession.
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> - - - - - - - - - - - - - - - - - -
>
> **CERTIFICATE**
>
> This report fairly reflects matters processed at pretrial conference. Objections to the report will

be filed with the Clerk immediately upon receipt of this order - - - -"

"PRETRIAL PROCEDURE; FORMULATING ISSUES

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

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice - - - -"
M. R. C. P., Rule 16, 155 Me. 508.

"The pre-trial conference culminates in a pre-trial order signed by the justice, and this order controls all subsequent proceedings in the case - - - - - -"
Maine Civil Practice, Field and McKusick, P. 203.

At the beginning of the court hearing in the case at bar there was this colloquy:

(Plaintiff's counsel)

"Well, if Your Honor please, under the pretrial order, as I read it, the parties have agreed that the City of Portland, or rather, the Portland Renewal Authority, has taken all of the steps necessary to complete its title under the eminent domain provisions of the statute. That being so, it is the City's contention that we have a prima facie case established by the pleadings, and that it is up to the Defendant to defeat title and right to the possession which has been agreed upon in the pretrial order.

The Court: You agree with that?

(Defense Counsel) Yes, Your Honor"

Later the Court asked:

"- - - If the element of relocation, the aspect of relocation has nothing to do with the rights of possession then Brother Casey admits that the execution for possession should issue. I think that's a fair statement, isn't it?

Mr. Casey: That's right, Your Honor."

Subsequently Defense Counsel stated:

"We agree, if the Court please, that the City (sic) has taken the necessary steps to obtain title."

The Court stated to Defense Counsel:

"- - - you say that because the Federal Government is putting in some money here that dislocation is an aspect of damages and that the right of possession can't accrue until those things have been considered."

Defense Counsel commented: "That's right."

At the court hearing Defendants who refrained from testifying presented as witnesses personnel in the service of the Plaintiff. Those witnesses testified only of their many efforts to accomplish a condign relocation of the Defendants.

The presiding justice decided that the Plaintiff was entitled to immediate possession of the real estate as demanded and ordered judgment to that end. The essential text of his decision is as follows:

"The above two actions, heard without a jury, seek judgment for the possession of the real estate described in the respective complaints. It was agreed that the conditions precedent to a taking by eminent domain had been complied with by the Plaintiff in both actions - - - - It is noted that no appeal from the original takings have (sic) been prosecuted pursuant to R. S., Chapter 52, Section

17, or otherwise. We have, then, situations where the title to the demanded premises has vested in the Plaintiff, and without appeal.

The Defendants argue that 're-location' is an element of damage in these particular situations and that the right to possession cannot ripen in the absence of consideration of that element. The Plaintiff contends that 're-location' is not an element of damages, but, even assuming so, it does not prevent the maintenance of these actions no appeal having been taken from the awards of damages.

There was evidence presented, de bene, on the factual problem of whether the Plaintiff had made reasonable efforts to re-locate the Defendants - - - - -

Even if it is assumed - - - - that monetary consideration for dislocation, in addition to fair market value, is a part of damage to be awarded, it is no part of the issues here presented. As this Court views the relative position of the parties, the Defendants are in possession of property the title to which has vested, by a taking by eminent domain, in the Plaintiff. Whether or not loss because of 'dislocation' was considered when damages were awarded is not before this Court. It is true that the Defendants have not been relocated. However, this Court does not feel that physical re-location is a pre-requisite to the right of possession. If the owners of real estate in so-called 'slum clearance' areas have a right to be compensated for the economic impact of such takings, in addition to the fair market value of their property, it should be an element of the damages awarded, and not a bar to possession. In this particular case, for example, the construction of the entire project is being delayed because the Defendants refuse to vacate the premises."

P. & S. L., 1951, c. 217, as amended, is constitutional as to the clearance of the blighted area featured in the instant

case and the controversial property of the Defendants was therefore susceptible of a taking "for public purposes" in furtherance of the main purpose of the 1951 Act. *Crommett* v. *Portland,* 150 Me. 217, 235, 236.

We are constrained to infer from the pretrial order, the stipulation and admission of these Defendants and the statutory language that the 1951 Act, § 8 (b), as amended, vested in the Plaintiff the condemned real estate formerly of the Defendants "in fee simple absolute" with the right to immediate possession. *Williams* v. *Maine Highway Commission,* 157 Me. 324 through 327. The 1951 Act did not require for blighted area clearance a relocation of the Defendants as a condition precedent to the divesting of Defendants' property ownership by condemnation.

The 1951 Act, § 8 (d), provides a plenary remedy for the determination and assessment of damages in property condemnation whenever such redress is properly and formally invoked. The case at bar, however, presented exclusively the possessory issue and the presiding justice rendered a decision responsive only to that chastened issue.

Defendants appealed and predicated 16 points in reliance. It is unnecessary to restate those points, 2 of which, at least, were irrelevant. In essence the Defendants maintain that possession of the demanded premises does not follow Plaintiff's title here, without more, because physical relocation of the Defendants is a necessary and qualifying condition precedent to Plaintiff's right of possession for constitutional reasons and because of the provisions of the Federal, Urban Renewal Act. Defendants contend that the Trial Court erred in finding that Defendants' right to property compensation did not embrace an allowance for relocation.

In addition to our holdings previously stated in this opinion it should suffice to comment that the Federal Slum Clearance, Urban Renewal laws, as amended, 42 U. S. C. A.

§§ 1441 through 1462, nowhere purport to ordain that a local public body must first accomplish the physical relocation of a property owner or holder before such body becomes entitled to possession of the condemned property of such owner or holder. Nor did the Trial Court digress to make a finding that the Defendants' right of property compensation did or did not embrace an allowance for relocation of the Defendants.

There was no error in the decision or in the order of the justice below.

The mandate must be:

Appeal denied in each case.

JOAN CASSIDY STETSON, ET AL.
vs.
ERNEST H. JOHNSON, ET AL.

Penobscot. Opinion, February 5, 1963.

Statutory Interpretation. Taxation.
P. L., 1933, Chapter 148. Inheritance Tax.

If meaning is doubtful and words of statute obscure, court may properly take into consideration the practical consequences of any particular interpretation.

The rates and values to be used as a base for assessment of inheritance taxes should be the rates in effect and values determined as of date of death of testator, and not as of date when contingent beneficiaries were ascertained and became entitled to possession.

The 1933 statute changing rate of inheritance tax does not operate retrospectively.

ON REPORT.

This is a petition for a declaratory judgment seeking a determination as to whether the rates and values to be used

as a base for inheritance taxes should be the rates in effect and the values determined as of the date of death of the testator or as of the date when contingent beneficiaries were ascertained and became entitled to possession. Remanded to Superior Court for a decree in accordance with this opinion. So ordered.

Verrill, Dana, Walker, Philbrick & Whitehouse, for Plaintiff.

Ralph W. Farris, Asst. Atty. Gen.,
Rudman & Rudman, for Defendant.

SITTING: WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. WILLIAMSON, C. J., did not sit. DUBORD, J., sat at argument, but retired before rendition of decision.

WEBBER, J. On report. This petition for declaratory judgment seeks a determination as to whether the rates and values to be used as a base for assessment of inheritance taxes should be the rates in effect and the values determined as of the date of death of the testator in 1918 or as of the date when contingent beneficiaries were ascertained and became entitled to possession and enjoyment in 1961.

The will of the late John Cassidy established certain trusts for the benefit of his children with contingent remainders over to their issue. The identity and respective shares of the contingent remaindermen could not be ascertained until the expiration of the last life estate. Accordingly an inheritance tax was initially assessed only upon the life interests and by order of the probate court assessment of the tax upon the remaining interests was deferred until the ultimate takers should be ascertained.

The inheritance tax law in effect at the date of the testator's death was contained in R. S., 1916, Chap. 69. It is

clear that the only value to be considered for assessment purposes under the provisions of the law as it then stood was the value as of the date of the testator's death. When assessment was required to be deferred, the law nevertheless contemplated that the rates and values applicable as of the date of death would be employed to base the final assessment when the ultimate takers were known. As was said in *Matter of Estate of John Cassidy* (1922), 122 Me. 33, 37:

> "The tax of the first section of the statute (R.S. 1916, Ch. 69) is put by the eighth section upon the *actual* value of the property, as a judge of probate shall find it to be. * * * Clearly, from the context of the statute as a whole, the meaning of the Legislature was, *that the prescribed rates should be applied,* not upon a mere possible interest, but upon a beneficial interest, within the time appointed, when consistently possible." (Emphasis ours.)

R. S., 1916, Chap. 69 was continued without any change pertinent to the decision of this case through the revision of 1930 in which it was incorporated as R. S., 1930, Chap. 77. In 1933 the inheritance tax law was revised by P. L., 1933, Chap. 148, the pertinent provisions of which are now found in R. S., 1954, Chap. 155.

P. L., 1933, Chap. 148, Sec. 10 provided for the continuation of what had been the general rule prior thereto but noted a new exception in these terms: "**Sec. 10. Tax or value as of testator's death.** Except as otherwise provided in section 13 the tax imposed by this act shall be assessed on the value of the property *at the time of the death of the decedent.*" (Emphasis ours.) The new exception found in Sec. 13 was stated as follows:

> "**Sec. 13. Proceedings when settlement cannot be effected.** In case it is impossible to compute the present value of any interest, and the tax thereon is not compromised as provided in section 12, said tax shall be assessed on the value of the

> property or interest therein *coming* to the beneficiary *at the time when he becomes entitled to the same* in possession or enjoyment and said tax shall be due and payable, by the executor, administrator or trustee in office when the right of possession to such interest accrues, or, if there is no such executor, administrator or trustee, by the person so entitled thereto at the expiration of 6 months from the date when the right of possession accrued to the person so entitled. * * * . " (Emphasis ours.)

P. L., 1933, Chap. 148 also changed and increased certain applicable rates. The importance of this case both to the petitioners and to the State of Maine stems in part from the fact that the value of the estate in 1961 was far greater than it was at the death of the decedent in 1918.

P. L., 1933, Chap. 148 partially repealed the law as it had stood prior thereto in these terms:

> "**Sec. 42. Limitations.** This act, insofar as it changes the rate of tax applicable to property or interests therein, shall apply only to such property or interests therein *passing* on or after the 1st day of July, 1933, and, as to all property and interests therein *passing* prior to said date, the rate or rates now applicable under the provisions of chapter 77 of the revised statutes (of 1930) shall remain in force. Notwithstanding the rate of taxation applicable in any given case, all proceedings incident to the payment and collection of inheritance and estate taxes after this act shall take effect, shall be conducted under the terms hereof and full jurisdiction shall be vested in the commissioner rather than in the probate courts of the several counties of the state.
>
> "**Sec. 43. Repealing clause.** Chapter 77 of the revised statutes (of 1930) is hereby repealed to take effect on the 1st day of July, 1933, when, in accordance with the terms of section 42, the new rates of taxation applicable to inheritance and estate taxes take effect under the terms of this act;

> provided, however, that the taxes imposed by said chapter 77 of the revised statutes (of 1930) shall notwithstanding such repeal apply to all property or interests therein *passing* prior to that date and provided further that the provisions creating liens in favor of the state, requiring the payment of interest to the state and all other provisions intended for the protection of the state in the collection of such taxes shall continue to remain in force until all taxes due under said chapter 77 have been paid in full." (Emphasis ours.)

The underlying and decisive issue is whether or not P. L., 1933, Chap. 148 was intended to be retrospective or merely prospective.

Our court has indicated the rules of statutory construction applicable in such a situation. "It is undoubtedly a well-settled general rule that acts of the legislature will not be so construed as to have a retrospective operation unless the legislature has explicitly declared its intention that they should have that effect; or such intention clearly appears by necessary implication from the terms employed considered in relation to the subject matter, the present state of the law, the objects sought to be accomplished, and the effect upon existing rights and obligations. * * * It is also declared to be the settled doctrine of the federal supreme court that, 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' " *Lambard, Appellant,* 88 Me. 587, 591; *Coffin* v. *Rich,* 45 Me. 507, 514; *Carr* v. *Judkins,* 102 Me. 506, 509; *Deposit Co., Appellant,* 103 Me. 382, 384.

If the meaning is doubtful and the words of a statute obscure, the court may properly take into consideration the practical consequences of any particular interpretation. *Coffin* v. *Rich, supra,* at page 511. In *Miller* v. *Fallon,* 134

Me. 145, the court quoted with evident approval the following from *Hathaway* v. *Merchants' Trust Co.*, 218 Ill. 580, 75 N. E. 1060:

> "The statute will only be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. * * * And even where this intention clearly appears it will not be given effect if to do so would render it unreasonable or unjust."

In the instant case the statute (P. L., 1933, Chap. 148) contains no language explicitly declaring any intention that it operate retrospectively nor does such an intention clearly appear by necessary implication. On the contrary, if we but construe the word "passing" as used in sections 42 and 43 as meaning the initial passing of the estate from the testator at his death, the statute itself has made the rates and value determinable under and in accordance with the law in effect prior to 1933. The estate did not pass in one single step from the testator to the ultimate takers. It passed first from the decedent to his executor, then to the trustee and eventually from the trustee to the beneficiaries.

The court faced a rather similar situation in *Lambard Appellant*, 88 Me. 587 (cited *supra*). In that case the testatrix died in 1892. The first act of the legislature imposing an inheritance tax became effective in February, 1893. The will was not filed and allowed until June, 1893. The issue was whether or not the estate was subject to any inheritance tax. The act provided in part that "all property within the jurisdiction of this State and any interest therein whether belonging to inhabitants of this State or not, * * * which *shall pass* by will or by the intestate laws of this State, * * * shall be liable to a tax * * * ." (Emphasis ours.) The act further provided that it should not apply "to any case now pending in the probate court." Even though no proceedings were begun in the probate court and no bene-

ficiary received any portion of the estate until after the effective date of the act, our court concluded that the estate was not subject to the tax. There was no language in the statute which expressly or impliedly declared an intention that it should operate retrospectively. In so deciding the court necessarily must have concluded that the use of the words "shall pass" (as above italicized) related to the effect upon her estate caused by and at the death of the testatrix. In the sense of the statute therefore the estate *had already passed* before the effective date of the taxing statute. As a result the court determined that it was the date of death alone which determined whether or not the estate became subject to taxation.

We note with interest that in section 13 of P. L., 1933, Chap. 148, above quoted, the legislature did not use the word "passing" in fixing the new basis of rates and value to be applicable in the case of contingent remainders. As already noted, section 13 applies the tax to "the value of the property or interest therein *coming* to the beneficiary (of a contingent remainder) at the time when he becomes entitled to the same in possession or enjoyment." (Emphasis supplied.) The use of the word "coming" avoids any possible confusion or seeming contradiction which might have arisen if the word "passing" had been substituted. The statute as thus written presents a reasonable and ordered pattern if we construe the word "passing" wherever it is employed as relating to the date of the death of the testator as was done in Lambard. In fact, we may properly assume that the legislature was aware of the effect of Lambard when it enacted P. L., 1933, Chap. 148. It therefore follows that in providing in section 42 thereof that the changes in rate should apply only to "property and interests therein passing on or after the 1st day of July, 1933" and preserving the rates under prior law in other cases, the effective test was intended to be whether or not the testator died "on or

after" that date. So also in section 43 the taxes imposed by Chap. 77 of R. S., 1930 (the same in effect in 1918) were preserved in full effect to apply, as we have construed the act, to the estates of persons who died prior to July 1, 1933. Since P. L., 1933, Chap. 148 readily lends itself to this interpretation, we deem it all the more significant and convincing that the act nowhere clearly and expressly declares any intention that it operate retrospectively.

In view of our holding that there is no indication that the legislature intended that P. L., 1933, Chap. 148 should operate other than prospectively, it is unnecessary here to consider the contention of the petitioners that constitutional limitations effectively prevent such legislation from operating retrospectively in any event.

The cases of *Mitton* v. *Burrill* (1918), 229 Mass. 140, 118 N. E. 274, and *Salomon* v. *State Tax Commissioner* (1929), 278 U. S. 484, 49 S. Ct. 192, principally relied upon by the State are not in point. They are relevant only to the situation as it would have existed in the instant case if the decedent had died on or after July 1, 1933. They do not bear upon the issue as to when and under what circumstances legislation will be deemed retrospective.

We conclude that the inheritance tax due the State of Maine on the remainder created by the trust under the will of John Cassidy must be assessed on the basis of the rates in effect applied to the values determined as of the date of the testator's death, March 25, 1918.

Remanded to the Superior Court for a decree in accordance with this opinion. So ordered.

MERRILL TRUST COMPANY, ET AL.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Penobscot. Opinion, February 12, 1963.

Inheritance. Exemptions. Inheritance Tax.

Tax on right to transfer is "death tax of any character" within Maine statute providing that property passing from Maine decedent to educational institution of another state shall be exempted from Maine inheritance tax only if, at date of decedent's death, such other state did not impose death tax of any character in respect of property passing to similarly otherwise qualified institution in Maine.

An inheritance or succession tax is not a tax on property, but is a tax on the privilege of receiving property.

The burden of proving that a particular legacy is exempt is on the one who claims that it is free from the usual obligation.

ON REPORT.

This is a petition for an abatement of an inheritance tax imposed upon an educational institution. Abatement denied.

John E. Hess, for Plaintiffs.

Ralph W. Farris, Sr., for Defendant.

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

MARDEN, J. On report from the Probate Court for Penobscot County upon petition in Equity for the abatement of an inheritance tax.

Henry J. Hart, late of Bangor, Maine died testate on January 12, 1959. During his lifetime he had made gifts

in excess of $100,000.00 to Brown University, an educational institution incorporated under the laws of and operating in the State of Rhode Island. It is conceded that these gifts may be considered as gifts effective at death. Additionally Mr. Hart by his will bequeathed 5% of his residuary estate to Brown University. This fractional part of his residuary estate is by stipulation slightly under $6,000.00, reflecting a residuary estate of in excess of $100,000.00. The State of Maine Tax Assessor has assessed an inheritance tax upon the property passing both by way of the gifts *inter vivos* and by the residuary bequest to Brown University. It is also conceded that the gifts in both categories stand upon the same footing as relates to the challenged tax.

The tax so assessed was paid under protest and the estate of Mr. Hart petitions for an abatement, contending that such gifts are exempt from inheritance taxation under the provisions of our Chapter 155, Section 2, subsection II, R. S., the pertinent parts of which statute are for convenience abstracted as follows:

> "All property which shall pass to or for the use of * * * institutions now or hereafter exempted by law from taxation, or to a public corporation, or to any * * * institution * * * engaged in or devoted to any * * * educational, * * * or other like work, pecuniary profit not being its object or purpose, or to any * * * institution * * * in trust for or to be devoted to any * * * educational * * * purpose, * * * shall be exempted; * * * ;
>
> (A) (this subdivision identity added) provided further, that if such * * * institution * * * be organized or existing under the laws of a * * * state of the United States, other than this state, * * * all property transferred to said * * * institution * * * shall be exempted, if at the date of decedent's death the said state * * * under the laws of which said * * * institution * * * was

> organized or existing did not impose a legacy or succession tax or a death tax of any character, in respect of property passing to or for the use of such * * * institution * * * organized or existing under the laws of this state, or
>
> (B) (this subdivision identity added) if at the date of decedent's death the laws of the state * * * under which said * * * institution * * * was organized or existing, contained a reciprocal provision under which such passing of property to said * * * institution * * * organized or existing under the laws of another state * * * shall be exempt from legacy or succession or death taxes of every character, providing such other state * * * allowed a similar exemption to such a * * * institution * * * organized or existing under the laws of another state * * * ."

The report further concedes that Brown University is an institution of the type which qualifies for exempt treatment under our statute, abstracted above, provided that the laws of Rhode Island satisfy the conditions therein imposed.

We paraphrase our abstracted statute for application to this case. Property passing to Brown University from a Maine decedent shall be exempted from inheritance taxation by Maine if at the date of decedent's death, the State of Rhode Island did not impose a legacy or succession tax or a death tax of any character in respect of property passing from a Rhode Island decedent to a similarly otherwise qualified college in Maine, or if at the date of decedent's death the laws of Rhode Island contained a reciprocal provision under which such passing of property from a Rhode Island decedent to an otherwise qualified college in Maine, should be exempt from legacy or succession or death taxes of every character, provided the laws of Maine allowed a similar exemption to Brown University.

The report agrees that the Hart benefits to Brown University are exempt from taxation if those gifts qualify for

exemption under the so-called specific charitable exemption under the provisions of our statute, subdivision (A) as we have identified it above, or if the laws of the State of Rhode Island satisfy the conditions imposed by our statute, subdivision (B) as we have identified it above, under what may be termed a "reciprocal" exemption.

Rhode Island law (on January 12, 1959) declared that:

> "A tax shall be and is hereby imposed upon the transfer of the net estate of every resident or non-resident decedent, as hereinafter ascertained, as a tax upon the right to transfer. Such tax shall be imposed at the rate of one per centum upon the excess value of each said estate over ten thousand dollars * * *." Title 44, Chapter 22, Section 1, Rhode Island General Laws.

The report stipulates that for purposes of computing the size or value of such net estate, gifts to charities, wherever located, are included.

The defendant urges that this Rhode Island law nullifies the exemptions offered by the Maine statute and that the reference gifts to Brown University are subject to Maine inheritance tax.

Expressed in terms of the Maine and Rhode Island statutes, is the tax upon the "right to transfer" imposed by Section 1 of Chapter 22, Title 44, Rhode Island General Laws, "a legacy or succession tax or a death tax of any character, in respect of property passing to or for the use of" a Maine institution, otherwise qualified as is Brown University in Rhode Island, from a Rhode Island decedent (relative the specific charitable exemption); or in spite of the Rhode Island tax on the right to transfer, above referred to, does Rhode Island exempt "from legacy or succession or death taxes of every character" on "such passing of property" to an otherwise qualified Maine college providing the laws of Maine allow a similar exemption to

Brown University (relative the so-called reciprocal exemption)?

It is not urged by the defendant that the Rhode Island law imposes a legacy or succession tax as such upon the right of a qualified Maine institution to receive property under the will of a Rhode Island decedent. The controversy centers upon the significance of the phrase "death tax of any character," appearing in clauses (A) and (B) as we have identified them. We can agree with the Hart estate that the transfer tax imposed by Section 1, Chapter 22, Title 44, General Laws of Rhode Island is not a tax on property. It is by its terms a tax upon the right to transfer as to which Maine law has no counterpart. Both Maine and Rhode Island have declared that an inheritance or succession tax is not a tax on property, but is a tax on the privilege of receiving property. *MacDonald, Executor* v. *Stubbs,* 142 Me. 235, 240; 49 A. (2nd) 765; *Old Colony Trust Co.* v. *McGowan,* 156 Me. 138, 143; 163 A. (2nd) 538; *Hazard* v. *Bliss,* 43 R. I. 431; 113 A. 469, 471 (under headnotes 1, 2).

Our statutory phrase "death tax of any character" is obviously very broad, and the phrase "death tax" has been held to cover all forms of taxes based upon death. *Matthews* v. *Jones* (Texas 1952), 245 S. W. (2nd) 974, 977 (under headnote 2).

While the Texas case was dealing with the term "death duty" the word duty there used is synonymous with tax. Webster's Third New International Dictionary "duty" paragraph 4 (a).

We are seeking here also to determine the meaning of the more complete phrase, "death tax of any character, in respect of property passing to or for the use of" a given beneficiary.

No case has been called to our attention nor have we discovered anywhere the phrase "in respect of property passing to or for the use of" has been judicially defined and we must interpret the phrase as justified by the use of the words established by Webster's dictionary.

"Of": A preposition defined as "having to do with"; "relation to"; "pertaining to"; "with reference to"; "concerning"; "about", — in this case property passing to or for the use of an educational institution. Webster's New World Dictionary (College Ed. 1960) subparagraph 7; Webster's Third New International Dictionary 1961 subparagraph 11.

"Respect": An intransitive verb, "To have regard or reference to"; "relate to." Webster's Third New International Dictionary, subparagraph 4.

"In respect of": "With reference to"; "as regards." Webster's New World Dictionary, above under "respect."

It would appear, to again paraphrase, that our question then becomes whether the tax on the right to transfer imposed by Rhode Island law is or is not "a death tax of any character" having to do with, relating to, pertaining to, with reference to, property passing to or for the use of an otherwise qualified Maine educational institution.

We must conclude that as applied to the facts in this case the tax so imposed is a death tax and is a tax of a character having to do with and pertaining to any and all property which passes through a net estate in excess of $10,000.00 from a Rhode Island decedent to an otherwise qualified Maine college. In spite of semantics any residuary bequest to a Maine educational institution, by its nature otherwise qualified, through a net estate in excess of $10,000.00 of a Rhode Island decedent is invaded and depleted by the Rhode Island transfer tax under discussion. The gifts *inter vivos* and bequest here are in fact taxed, though indirectly, and

though the impact of the tax is borne by the residuary estate.

Reciprocity, and we here use the word in its ordinary sense as distinct from the special meaning assigned it as applied to "exemption" *supra,* in fact is the test which we adopt. This test which has been adjudicated in reverse situations is recognized in *Platt* v. *Wagner* (Pa. 1943) 31 A. (2nd) 499, 502 (under headnote 2); *In re Uihlein's Estate* (Wis. 1945), 247 Wis. 476; 20 N. W. (2nd) 120; *McNaughton* v. *Newport* (Idaho 1946), 170 P. (2nd) 601.

It follows, therefore, that as applied to the facts here the State of Rhode Island neither grants a specific charitable exemption, nor does it satisfy the demands of our so-called reciprocal exemption expressed in Chapter 155, Section 2, subsection II, R. S.

We have no occasion to consider the "similarity" of any alleged mutual exemptions. However, see *McLaughlin, Tax Commissioner* v. *Poucher* (Conn. 1941), 127 Conn. 441; 17 A (2nd) 767, 769, 770 (under headnotes 5, 6).

> "The burden of proving that a particular legacy is exempt is on the one who claims that it is free from the usual obligation. 'Taxation is the rule and exemption the exception.'" *MacDonald, Executor v. Stubbs,* 142 Me. 235, 239; 49 A. 2d. 765; followed in *Thirkell, Executor v. Johnson,* 150 Me. 131, 135; 107 A. 2d. 489.

The tax imposed on the gifts to Brown University by the defendant is valid.

Abatement denied.

HARRIETTE M. BUZYNSKI
IDA C. ROSS
vs.
COUNTY OF KNOX AND AETNA CASUALTY & SURETY COMPANY
(TWO CASES)

Knox. Opinion, February 14, 1963.

Torts. Subrogation. Workman's Compensation Act. Damages.

Although the injured employee (as defined in the Death Act) is not entitled to both compensation from his employer and damages in tort, the third party does not escape liability in damages.

Compensation and benefits having been paid or liability therefor having been fixed, the employer (or compensation carrier) "shall be subrogated to the rights of the injured employee to recover against" the third party.

The right to compensation is not a tort claim.

Compensation in part reducing the impact of lost wages is not the equivalent of damages to cover total loss, whether discussing subrogation of rights of a living employee or subrogation of rights of the widow, children, and estate of a deceased employee.

ON REPORT.

These are complaints for declaratory judgments. The prime issue is whether the employer or compensation carrier is subrogated under Workmen's Compensation Act to an action under the Death Act. Remanded for action and for declaratory judgments in accordance with opinion without costs.

David A. Nichols, for Plaintiff Buzynski.
Christy C. Adams, for Plaintiff Ross.

Robert W. O'Connor, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision.

WILLIAMSON, C. J. These complaints for declaratory judgments are reported to us on agreed facts. The prime issue is whether the employer or compensation carrier is subrogated under the Workmen's Compensation Act to an action under the Death Act or Lord Campbell's Act. For convenience the cases were consolidated for argument.

On Labor Day 1959 Frank Ross, Jr. and Frank J. Buzynski, deputy sheriffs in the County of Knox, were killed in an automobile accident. In each instance the widow, left with children under 18 years of age, sought and obtained workmen's compensation and was appointed administratrix of her husband's estate.

There are presently two actions pending in the Knox Superior Court with reference to the death of each deputy sheriff against one George O. Tripp, Jr. charged with liability therefor. One action was brought by the widow in her capacity as administratrix, and the other in the name of the administratrix, by the compensation carrier.

The "question to be decided," is, to quote from the record:

> "What right, if any, have the said County of Knox and Aetna Casualty & Surety Company, Defendants, as employer and compensation carrier, respectively, under Section 25 of the said Chapter 31, to proceed against a third party allegedly causing the said deaths; and to what extent, if any, do the said Defendants share in the damages which may be recovered in such actions for wrongful death?"

Reference to sections of statute herein, unless otherwise indicated, are to sections of the Workmen's Compensation Act. R. S., c. 31. For our purposes the employer and the compensation carrier, that is to say, the defendant County

of Knox and the defendant Aetna Casualty and Surety Company, are one. Section 2, I; *White's Case,* 126 Me. 105, 136 A. 455.

The action under the Death Act or Lord Campbell's Act remains of course unchanged by the Workmen's Compensation Act. R. S., c. 165, § 9 *et seq.* The Act provides for recovery of damages for the benefit of the widow and children and for medical, surgical, hospital, and funeral expenses. The representative of the estate, here the administratrix, brings the action as trustee for the widow and children, and with reference to the expenses for the benefit of the estate. *Picard* v. *Libby,* 152 Me. 257, 127 A. (2nd) 490; *O'Connell* v. *Hill,* 157 Me. 57, 170 A. (2nd) 402. The action is created on the death of the decedent. *Hammond* v. *Street Ry.,* 106 Me. 209, 76 A. 672; *Danforth* v. *Emmons,* 124 Me. 156, 126 A. 821. It must be brought in the name of the personal representative. *Yeaton, et al.* v. *Knight, et al.,* 157 Me. 133, 170 A. (2nd) 398. The question before us is not whether the administratrix has an action against Tripp, but who shall control the action and how shall the proceeds be distributed.

We turn to the pertinent provisions of Workmen's Compensation Act (R. S., c. 31):

> "**Sec. 25. Employee injured by third party has election; employer paying compensation subrogated to employee's rights.**—When any injury **or death** for which compensation or medical benefits are payable under ~~the provisions of~~ this act shall have been sustained under circumstances creating in some person other than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim such compensation and benefits or obtain damages from or proceed at law against such other person to recover damages. Any employer having paid such compensation or benefits or having become liable therefor under any decree or approved

agreement shall be subrogated to the rights of the injured employee to recover against that person; provided if the employer shall recover from such other person damages in excess of the compensation and benefits so paid or for which he has thus become liable, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action or collection. Settlement of such subrogation claims and the distribution of the proceeds therefrom must have the approval of the court wherein the subrogation suit is pending or to which it is returnable; or, if not in suit, of a single commissioner. When the court in which such subrogation suit is pending or to which it is returnable is in vacation, the judge of the court, or, if the suit is pending in or returnable to the superior court, any justice of the superior court, shall have the power to approve the settlement of such suit and the distribution of the proceeds therefrom. The beneficiary shall be entitled to reasonable notice and the opportunity to be present in person or by counsel at the approval proceedings.

"The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within 30 days after written demand by a compensation beneficiary shall entitle such beneficiary or his representatives to enforce liability in his own name, the accounting for the proceeds to be made on the basis above provided." As amended 1961, c. 392, § 3.

The 1961 amendments indicated by emphasis were not in effect at the time of the fatal accident.

"**Sec. 2. Definitions.**—The following words and phrases as used in this act shall, unless a different meaning is plainly required by the context, have the following meaning:

"**II. B.** . . . Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, de-

> pendents and other persons to whom compensation may be payable."

Death benefits, "if death results from the injury," as here, are payable to dependents. Sec. 15. It is not questioned that the widow and the children under the age of 18 years are dependents under Sec. 2 VIII, and that the compensation paid the widow is for the benefit of such children as well as herself.

It is a plain purpose of the Act that the party paying compensation or supplying benefits or whose liability therefor becomes fixed succeeds to the rights of the injured employee. The injured employee (as defined in the Act) is not entitled to both compensation from his employer and damages in tort. The third party does not escape his just liability in damages, nor does the injured employee obtain double compensation. Such is the purpose and intent of the Act. *Mitchell* v. *Peaslee, Jr.*, 143 Me. 372, 63 A. (2nd) 302; *Fournier-Hutchins* v. *Tea Co.*, 128 Me. 393, 148 A. 147; *Travelers Insurance Co.* v. *Foss*, 124 Me. 399, 130 A. 210; *Donahue* v. *Thorndike & Hix*, 119 Me. 20, 109 A. 187. See also *Prudential Ins. Co.* v. *Laval* (N. J.), 23 A. (2nd) 908, and *Zirpola* v. *Casselman, Inc.* (N. Y.), 143 N. E. 222.

There is no reason to believe that the Legislature intended a different scheme with double recovery in cases involving workmen's compensation and liability of a third party under the Death Act. 2 Larson, Workmen's Compensation Law § 74:42; 101 C. J. S., Workmen's Compensation, §§ 994, 995, 996.

Sec. 25, in our view, is applicable in the situations here presented. In the first sentence we have an option to the "injured employee" to claim compensation and benefits under the Act, or obtain damages or proceed at law against a third party. The right of the "injured employee" to proceed against the third party is suspended until failure of the

employer or compensation insurer or carrier is established under the same section. "Injured employee," as we have seen, includes by definition the widow and the children under the age of 18 years as dependents and the legal representative of the deceased. The legal liability of the third person arises under the Death Act. The action there created is the action not of the deceased person, but the action of the wife, the children, and the estate for certain expenses.

Compensation and benefits having been paid or liability therefor having been fixed, the employer (or compensation carrier) "shall be subrogated to the rights of the injured employee to recover against" the third party.

The rights of the injured employee, i.e., of the widow, the children under the age of 18 years, and of the administratrix, to recover in this instance are rights created and existing only under the Death Act. These are the *rights* to which the Legislature intended the employer or compensation carrier should be subrogated.

In *Turnquist* v. *Hannon* (Mass.), 107 N. E. 443, the court, in construing an identical definition of "injured employee" in a wrongful death case, said at p. 444:

> "These words are comprehensive and inclusive. They occur under the subdivision of the act which, among other miscellaneous provisions, undertakes to define the meaning of numerous words used repeatedly in the several sections. There seems to be no sufficient reason for giving to this definition any other than its natural meaning."

Reidy v. *Old Colony Gas Co.*, 315 Mass. 631, 53 N. E. (2nd) 707; *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U. S. 128, 77 S. Ct. 186, 187 (note).

The New Hampshire Court in *Gagne* v. *Garrison Hill Greenhouses* (N. H.), 109 A. (2nd) 840, in holding there

was no application against compensation of amounts recovered from a third party in a wrongful death action, pointed out significantly that the Legislature had struck from a bill a definition of employee, including the precise language quoted above in Sec. 2 II B. The court said, at p. 844: "Had it [the definition] been permitted to remain, little doubt concerning the intended applicability of section 12 to fatal injury cases would have arisen."

In each case the parties interested in compensation and benefits and in damages under the Death Act are identical. There are no children who are not dependents under the Workmen's Compensation Act. The widow and children are entitled to compensation and to an action for damages under the Death Act by and in the name of the administratrix. The estate is or may be entitled to medical, surgical, hospital, and funeral expenses under both Compensation and Death Acts.

In one action the administratrix may sue for and recover damages for the death and the expenses noted. The damages for each type of injury or loss may readily be assessed specially by the jury or fact finder. Thus the right to recover against the third person may pass by subrogation to the employer or compensation carrier as fully and completely on the facts of each case as in the routine subrogation of a tort claim by a living employee. *Turnquist* v. *Hannon, supra.*

It is suggested by the plaintiffs that there can be no subrogation since the cause of action and damages are different. The right to compensation is not a tort claim. Compensation in part reducing the impact of lost wages is not the equivalent of damages to cover total loss. This is so whether we are discussing subrogation of the rights of a living employee or subrogation of the rights of the widow, children, and estate of a deceased employee.

The plaintiffs argue with more force that there can be no subrogation under Sec. 25 since different classes of persons may benefit. For example, adult children are beneficiaries under the Death Act but not under the Workmen's Compensation Act unless "physically or mentally incapacitated from earning. . ." Sec. 15.

In such event, subrogation under Sec. 25 would apply only to the interests of the beneficiaries of compensation and benefits and in no way to the interests of the other adult children. *Joel* v. *Peter Dale-Garage* (Minn.), 289 N. W. 524. The action under the Death Act must be brought by and in the name of the personal representative of the deceased. Fairness and equity dictate that the portion of the recovery to which the beneficiaries under both Death Act and Workmen's Compensation Act would be entitled should be distributed under Sec. 25. *Doleman* v. *Levine,* 295 U. S. 221.

Control of the action would not pass in this situation to the employer or compensation carrier. The retention of control in the personal representative is not, however, a sufficient reason to deny the application of a well recognized purpose of the Act, namely, that recovery from a third party should be applied against compensation. *Reidy* v. *Old Colony Gas Co., supra.*

Lastly, the amendment of Sec. 25 by the addition of "or death" in 1961 did not alter the meaning of the section as it existed in 1959 at the time of the fatal accident. We recognize the presumption that an amendment changes the meaning of a statute. In this instance the presumption is met and destroyed by the definition of "injured employee" and also by the purpose of the Act with reference to application of recoveries from third parties. We treat the amendment of 1961 as an attempt to clarify the section and nothing more.

We conclude, therefore, that under Sec. 25 the compensation carrier was entitled by subrogation to bring the action in each case in the name of the administratrix. We have assumed from the argument that all of the children in each case were under the age of 18 years at the time of the fatal accident. If in either case there were in fact children 18 years of age or older, not dependent under Sec. 15, then in such case the compensation carrier would not be entitled to bring the action for the death.

In either event, whether the action is controlled by the compensation carrier or by the administratrix, there must be an accounting in the Superior Court of any proceeds in which beneficiaries under the Workmen's Compensation Act are interested under Sec. 25 to the end that there shall be no double recovery. See 2 Larson, Workmen's Compensation Law, § 74:30.

On remand, the Superior Court will ascertain whether in either case there were children 18 years of age or older not dependent under Sec. 15, at the date of the fatal accident.

The entry in each case will be

Remanded for action and for declaratory judgments in accordance with opinion without costs.

JULIA B. WHITING
AND
BELL GURNEE
vs.
ARTHUR L. SEAVEY
DAVID L. SHELTON
AND
WILLIAM D. STEWART

Hancock. Opinion, February 15, 1963.

Zoning. Deeds. Appeal. Contracts.

Owners of property in residential zone of town could appeal to the Superior Court from a grant of a zoning exception by town zoning board of appeals even though zoning ordinance made no provision for appeal.

Zoning per se does not abolish restrictive covenants.

Contractual restrictions in a deed are not abrogated or enlarged by zoning restriction.

Restrictive covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law.

When the conditions or terms of a zoning law are repugnant to those contained in the restrictive covenants in a deed of title, the remedy for breach is not through the prescribed procedures of the zoning law, but by an action based upon breach of covenant.

When town zoning board of appeals has not abused its discretion or erred factually in granting an exception to property owner; the board's action is not invalid merely because of the existence of restrictive covenants covering the owner's land.

ON REPORT.

This is an action challenging the granting by town zoning board of appeals of an exception allowing the owner of zoned property to conduct a boat building business in a residential zone. Appeal denied.

R. C. Masterman, for Plaintiffs.

William Fenton, for Defendant.

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

TAPLEY, J. On report. The original complaint was brought in the names of Julia B. Whiting and Sumner Welles as party plaintiffs. After the filing of the complaint one Bell Gurnee was joined as party plaintiff and the action was dismissed as to plaintiff, Sumner Welles, because of his decease after filing of the complaint. The case is reported to the Law Court by agreement, upon the amended complaint, stipulations of the parties and so much of the evidence presented below as is legally admissible. Rule 72, M. R. C. P. The parties by stipulation present the following issues:

> "1. Whether the Appellants Julia B. Whiting and Bell Gurnee have a right of appeal.
>
> 2. Whether the action of the Board of Appeals in granting an exception to John B. Cochran to operate a boat yard at Hulls Cove in the Town of Bar Harbor is invalid on the sole ground that the restrictive covenants in the deeds under which the Plaintiffs hold title prohibit commercial operations in the area where the boat yard is located unless such restrictions have been removed under the express provisions contained in said deeds or unless such restrictions have been rendered void by operation of law."

The defendants in the action constitute the Board of Appeals under the zoning ordinance of the Town of Bar Harbor, Maine. The plaintiffs are owners of property on "Lookout Point" in Bar Harbor. The deeds under which they hold title contain restrictive covenants in common with other land owners in the area which, among other condi-

tions, forbid the carrying on of business enterprises in the described area. In 1957 one John B. Cochran constructed a boathouse on property belonging to his mother, entering in the business of building, repairing, storing and painting boats. Plaintiffs claim that in doing so he was violating some of the restrictive covenants in their deeds.

The property concerned in these proceedings is located in Residence A Zone, as defined by the provisions of the zoning ordinance of the Town of Bar Harbor. Being a residence zone, Mr. Cochran legally could not conduct a business on the premises. In 1957, some years after the effective date of the zoning ordinance, Mr. Cochran established the business and continued until August, 1960 when his use of the premises for business purposes was brought to an end by order of the Municipal Officers of the Town of Bar Harbor. Mr. Cochran on September 7, 1960 requested the Board of Appeals to grant him an exception in order to allow him to build, store and repair boats on the premises. This request was denied October 24, 1960. The zoning ordinance of the Town was amended on March 21, 1961 authorizing the Board of Appeals to grant exceptions, after public notice and hearing, under certain conditions and affecting a defined area. Mr. Cochran, after passage of the amendment, again petitioned the Board of Appeals for an exception and this time the Board granted his petition. It is from this decision the plaintiffs appeal to the Superior Court. The first issue to be considered is one of jurisdiction. Did Julia B. Whiting and Bell Gurnee, the appellants, have a right of appeal from the decision of the Board of Appeals granting the exception to Mr. Cochran? The zoning ordinance for the Town of Bar Harbor was created by authority of the provisions of Chap. 80, R. S., 1944 and acts additional thereto and amendatory thereof. The Inhabitants of the Town of Bar Harbor at a special town meeting held on December 22, 1947 adopted the zoning ordinance,

whereupon it became operative and effective. The zoning ordinance thus adopted, with its legally accepted amendments, is now in full force and effect. It is important to note for the purpose of this review the fact that there is no provision in the zoning ordinance for an appeal from any decision of the Board of Appeals. Sec. 88, Chap. 80, R. S., 1944 provides that:

> "The legislative body of any city and the inhabitants of any town regulating building or use of buildings or land under the provisions of Secs. 84 to 86, inclusive, shall by ordinance create a board of appeals. - - - - - - Appeals shall lie from decisions of said board to the superior court according to the provisions of Sec. 33 of Chap. 84."

This Sec. 88 was amended by Chap. 24, Sec. 4, P. L., 1945 by the adding of Sec. 88a. This new Sec. 88a prescribes the appeal procedure. The Legislature in 1957 passed an Act entitled "An Act Revising the General Laws Relating to Municipalities." This enactment is designated as Chap. 90-A (Chap. 405, P. L., 1957). It constitutes a revision of all the statutory law relating to municipalities. The passage of this revision repealed Chap. 91, R. S., 1954 in its entirety. Sec. 98 of Chap. 91 authorized appeals from Board of Appeals.

Secs. 61 through 63 of Chap. 90-A are concerned with municipal development and provide for the enactment of zoning ordinances and procedures thereunder. Sec. 61-III is mandatory in nature, requiring a municipality in enacting a zoning ordinance to provide for a Board of Appeals. Sec. 61-III-B states in part:

> "An appeal may be taken from any decision of the building inspector to the board of appeals, and from the board of appeals to the Superior Court."

This subsection then goes on to outline the procedure of taking the appeal to the Superior Court. According to the rec-

ord the procedural process used in this case was in pursuance of Rule 80-B (a) M. R. C. P.:

> "(a) **Mode of Review.** When a statute provides for review by the Superior Court of any action by a governmental agency, department, board, commission, or officer, whether by appeal or otherwise or when any judicial review of such action was heretofore available by extraordinary writ, proceeding for such review shall be instituted by filing a complaint with the court. The complaint shall include a concise statement of the grounds upon which the plaintiff contends he is entitled to relief, and shall demand the relief to which he believes himself entitled. No responsive pleading need be filed unless required by statute or by order of the court."

The zoning ordinance of the Town of Bar Harbor has no provision for an appeal from the decision of the Board of Appeals, therefore if the ordinance prevails these appellants are without right of appeal. If we take this position we must conclude that Sec. 61-III-B is not applicable to this case. We have carefully reviewed the 1957 revision of the general laws relating to municipalities (90-A) with particular attention to Sec. 61 and have come to the conclusion that the Legislature in its wisdom intended that irrespective of whether a zoning ordinance contained an appeal provision or not a citizen believing himself aggrieved by a decision of a Board of Appeals should have a statutory right of a review. Justice to a party and his cause would require such a right and, no doubt, the Legislature so intended.

Counsel for the appellee cites *Casino Motor Co.* v. *Needham*, 151 Me. 333 in support of his contention that there is no right of appeal in the instant case. We distinguish *Casino* because of subsequent changes in the statutory review procedure.

The appellants are properly before this court and thus we have jurisdiction to make a determination of the controversy.

This brings us to the second stipulated issue:

> "2. Whether the action of the Board of Appeals in granting an exception to John B. Cochran to operate a boat yard at Hulls Cove in the Town of Bar Harbor is invalid on the sole ground that the restrictive covenants in the deeds under which the Plaintiffs hold title prohibit commercial operations in the area where the boat yard is located unless such restrictions have been removed under the express provisions contained in said deeds or unless such restrictions have been rendered void by operation of law."

The plaintiffs hold their titles by deeds containing restrictive covenants which prohibit commercial operations in the area where the boat yard is located.

> "The validity of a zoning ordinance, the right to use of property in accordance with its restrictions, the right to relief therefrom through grant of a variance and the right to a special exception use provided for therein should be considered independently of the existence of restrictions upon the land involved arising out of covenants in deeds or restrictions imposed therein or through agreements between private parties.
>
> "The zoning ordinance constitutes the regulation of land use through the exercise of the police power in accordance with a comprehensive plan for the entire community. It is entirely divorced in concept, creation, enforcement and administration from restrictions arising out of agreement between private parties who may, in the exercise of their constitutional right of freedom of contract, impose whatever restrictions upon the use of their lands that they desire, such covenants being enforceable only by those in whose favor they run.

"A zoning ordinance restriction which permits less restrictive uses than those to which property is limited by a covenant in a deed or private agreement is usually held not to impair the efficacy of the latter.

"The rights and obligations of parties to private covenants are to be determined in appropriate actions to enforce or to be relieved of the burden of, such covenants; they are not to be determined by reference to the zoning restrictions applicable to the land although the effect of the zoning restriction in its operation upon the surrounding area may be considered.

"The zoning restrictions imposed upon a property owner's land are the measure of his obligations to the community; the private covenant is merely an indication of the measure of his obligation to a private party, which may or may not be enforceable but which cannot, in either event, affect the necessity of conforming to the comprehensive plan set forth in the ordinance."
Chap. 74-1-3, The Law of Zoning and Planning (Rathkopf).

"Zoning laws are enacted under the police power in the interest of public health, safety and welfare; they have no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts. If these applicants were to succeed in obtaining a variance relieving them from the restrictions of the zoning ordinance they would still be subject to the restrictions contained in their deeds, but the enforcement of those restrictions could be sought only in proceedings in equity in which the grantors, their representatives, heirs and assigns, would be the moving parties. As is well said in Bassett on 'Zoning,' (ch. 9, pp. 184-187): 'Contracts have no place in a zoning plan. Zoning, if accomplished at all, must be accomplished under the police power. It is a form of regulation for community welfare. Contracts be-

> tween property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations. * * * The municipal authorities enforcing the zoning regulations have nothing whatever to do with private restrictions. Zoning regulations and private restrictions do not affect each other. * * * It is obvious that the zoning and the private restrictions are unrelated. One is based on the police power, the other on a contract. The municipality enforces the former by refusing a building permit or ousting a nonconforming use. A neighbor having privity of title enforces the latter by injunction or an action for damages. * * * Courts in trying a zoning case will ordinarily exclude evidence of private restrictions, and in trying a private restriction case will exclude evidence of the zoning. This is done on the grounds of immateriality.' " *In re Michener's Appeal,* 115 A. (2nd) 367 at 369-370 (Pa.).

Zoning per se does not abolish restrictive covenants. *Brown* v. *Williams,* 148 N. Y. S. 2, 841. Contractual restrictions in a deed are not abrogated or enlarged by zoning restrictions. *Martin* v. *Weinberg,* 109 A. (2nd) 576 (Md.). See 26 C. J. S. — Deeds — Sec. 171 (2).

The law is well established that restrictive covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law.

When the conditions or terms of a zoning law are repugnant to those contained in the restrictive covenants in a deed of title the remedy for a breach is not through the prescribed procedure of the zoning law but rather by an action based on a breach of covenant.

In the case at bar the appellants do not contend that the Board of Appeals abused its discretion or was in error factually but only that its decision was invalid because of the existence of the restrictive covenants.

The Board of Appeals had the legal right to grant the exception.

Appeal denied.

EVA BARTKUS
vs.
EDWARD GILMAN

Androscoggin. Opinion, February 20, 1963.

Statute of Frauds. Contracts.

Any promise to pay debt, having been made after the creation of the debt, is not an original promise to pay debt; it constitutes no more than a promise to answer for the debt of another, and it is required by the statute of frauds to be in writing.

ON APPEAL.

In this complaint for money had and received, the plaintiff appeals the granting of a directed verdict by the presiding justice. Appeal denied.

Edward J. Beauchamp, for the Plaintiff.

John Platz, for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision.

PER CURIAM.

On appeal. The complaint was for money had and received in the sum of $2,000. At the conclusion of the evidence the presiding justice granted a motion for a directed

verdict for the defendant, from which action the plaintiff appealed.

The evidence disclosed that a withdrawal of $2,000 was made from a savings account in the names of Eva Bartkus or Alice Gilman, the plaintiff and her daughter, the wife of the defendant. This money was delivered to Alice Gilman by the plaintiff. The position of the plaintiff appears to be that Alice Gilman received the money from the plaintiff in the form of a loan while acting as agent of the defendant in the transaction. The plaintiff claims the defendant ratified the agency by later advising the plaintiff not to worry about the money and stating that when he received certain insurance money she would receive all her money. This conversation took place within a few days after the money was received by the defendant's wife and during a time when the plaintiff was being taken for a ride in defendant's automobile. Some time later the defendant's wife died.

The defendant was not present during the transaction between his wife and the plaintiff. A careful examination of the record fails to disclose any evidence whatever that the defendant's wife was acting as his agent at the time she received the money from the plaintiff. The conversation during the automobile ride in no way indicated that the defendant's wife as his agent borrowed the money for the recovery of which the complaint was brought.

Any promise, made by the defendant during the automobile ride, to pay the plaintiff the sum of $2,000, having been made after the creation of the debt, was not an original promise on the part of the defendant to pay that amount to the plaintiff. Giving the most favorable interpretation to the plaintiff, it constituted no more than a promise to answer for the debt of another and is required by the statute of frauds to be in writing. *Fairbanks* v. *Barker*, 115 Me. 11, 16.

The plaintiff claims that the defendant is estopped by his conduct from denying his wife's authority. We find no evidence in the case to justify that contention.

The entry will be

Appeal denied.

STATE OF MAINE
vs.
JAMES G. AUSTIN
(TWO CASES)

York. Opinion, February 20, 1963.

Fraud. False Pretenses. P. L., 1961, Chap. 40. Statutes.

A false pretense as to future acts or events will not support a conviction for obtaining property under false pretenses.

After the effective date of the enactment of P. L., 1961, Chap. 40, the failure to perform a promise, if unconditional and made without present intention of performance, constitutes a false pretense within the meaning of the statute; however, the State must allege and prove that the promise was unconditional and was made without a present intention of performance.

In the absence of a statute authorizing prosecution upon a promise made without a present intention of performance, a false pretense to be indictable must be an untrue statement of a past or an existing fact.

ON EXCEPTIONS.

These cases involve two indictments for cheating by false pretenses, under P. L., 1961, Chap. 40. Exceptions sustained.

John J. Harvey, for the Plaintiff.

Philip E. Graves, for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before the rendition of decision.

SIDDALL, J. On exceptions. These cases involve two indictments against the defendant for cheating by false pretenses. In one, which for convenience we refer to herein as the first indictment, the State charged that the defendant represented that he "would deliver to the said Allen S. Menter a specified number of bank wallets with specified advertising thereon and all within a designated period of time." The pretense charged in the second indictment was in the identical language except that the promise was alleged to have been made to one Myron A. Butler.

The first indictment charged the crime as having been committed on July 14, 1961, and the second indictment charged the crime as having been committed on December 28, 1961. The only significance in these dates is that by legislation effective on September 16, 1961, the statute under which the defendant was indicted was amended by adding thereto the following provision: "A promise, if unconditioned and made without present intention of performance, will constitute a false pretense within this section." P. L. 1961, Chap. 40.

The rule is well established that in the absence of a statute authorizing a prosecution upon a promise made without a present intention of performance, a false pretense to be indictable must be an untrue statement of a past or an existing fact. A false pretense as to future acts or events will not support a conviction for obtaining property under false pretenses.

In the case of *State* v. *Albee,* 152 Me. 425, 429, 132 A. (2nd) 559, the court said: "If, as the respondent argues, the

evidence is such that the statements made by the respondent, '. . . pertained to acts which the respondent was to do in the future and were not statements of present existing fact . . . . .' no crime has been committed." In an early case, *State* v. *Mills*, 17 Me. 211, 217, we find the following dictum: "But a pretense, that the party would do an act, he did not mean to do (as a pretense to pay for goods on delivery), is not a false pretense. . . ." See also Wharton's Criminal Law and Procedure, Sec. 589; 35 C. J. S. False Pretenses, Sec. 8; 22 Am. Jur. False Pretenses, Sec. 14.

The pretense alleged in these indictments was nothing more than a promise to fulfill a contract. Prior to the enactment of P. L., 1961, Chap. 40, the failure to perform such a promise was not indictable. After the effective date of this legislation the promise, if unconditional and made without present intention of performance, constituted a false pretense within the meaning of the statute. In such case, however, the State must allege and prove that the promise was unconditional and was made without a present intention to perform. Although the date of the commission of the offense set forth in the second indictment was subsequent to the effective date of its amendment to the statute, the indictment contained no such allegations and is therefore insufficient on demurrer.

We note in passing that both indictments are defective in another respect. Each indictment contains an allegation that the defendant promised to deliver bank wallets "within a designated period of time" without specifying the date of the promised delivery. If the indictments were otherwise sufficient, neither on its face shows that the period of the promised delivery has expired and consequently fails to show the commission of an offense prior to the date of the indictment.

The entry will be in each case

Exceptions sustained.

SOUTH SHOE MACHINE CO., INC.
vs.
ERNEST H. JOHNSON, STATE TAX ASSESSOR

Kennebec. Opinion, February 27, 1963.

Use. Taxation. R. S., 1954, Chap. 17, §§ 2, 4.

The word "use" as employed in the language of R. S., 1954, Chap. 17, §§ 2 and 4, would be given its ordinary meaning and the lessee in Maine under a lease giving him full possession and control of the property would be deemed to be the sole user; the nonresident lessor would be deemed to "use" the property in Maine within the meaning of the statute only if he exercised some right or power over the property within this state incident to his ownership.

The mere existence of certain rights or powers in the owner-lessor reserved by the lease would not suffice to subject him to taxation if he failed to or refrained from exercising any such right or power in Maine.

ON APPEAL.

The state tax assessor urges that the court reconsider and overrule the *Trimount* case, 152 Me. 109, which was used as the precedent in the above case. Appeal denied.

Berman, Berman, Wernick, & Flaherty, for the Plaintiff.

Ralph W. Farris, Sr.,
John W. Benoit, for the Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. SULLIVAN, J., does not concur. DUBORD, J., sat at argument, but retired before rendition of decision.

WEBBER, J. The defendant in his capacity as State Tax Assessor appeals from a decision of the Superior Court setting aside the imposition in 1960 of a tax on the "use" of

property owned by plaintiff. The plaintiff, a nonresident corporation, leased shoe machinery to resident lessees to be used by them in their business in this state. No sales tax was paid on the sale of the property to the owner-lessor. Upon the facts disclosed by the record the plaintiff has correctly stated the issue to be "whether the lessor, having leased the machinery for use by lessees within the State of Maine, being an out of state corporation not qualified to do business in Maine and not having transacted any business in Maine, and having done nothing in Maine with respect to this machinery while located in Maine, can be said to have exercised in this state any right or power over this tangible personal property incident to its ownership thereof."

In *Trimount Co.* v. *Johnson, State Tax Assessor,* 152 Me. 109, we held that under such circumstances there was no taxable use by the owner-lessor in Maine within the meaning of the statute. The learned justice below, finding no distinguishing facts, concluded that *Trimount* governed in the instant case. The defendant, while recognizing that the matter before us is indistinguishable, urges that we reconsider and overrule *Trimount.*

Sec. 4 of R. S., Chap. 17 imposed a tax "on the storage, use or other consumption in this state of tangible personal property, purchased at retail sale." Sec. 2 defined "use" as follows: " '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." In *Trimount* we held in effect that except as provided in the foregoing definition the word "use" as employed in the language of the act would be given *its ordinary meaning* and the lessee in Maine under a lease giving him full possession and control of the property would be deemed to be the sole user. The nonresident lessor would be deemed to "use" the property in Maine within the meaning of the statute only if

he *exercised* some right or power over the property within this state incident to his ownership. The mere *existence* of certain rights or powers in the owner-lessor reserved by the lease would not suffice to subject him to taxation if he failed to or refrained from *exercising* any such right or power in Maine. In *Trimount* we concluded at page 113: "From the agreed statement it appears that the petitioner (nonresident owner-lessor) has done nothing with respect to the machine within the State of Maine either before or since making the lease. We conclude, therefore, that the petitioner *has not exercised in this State any right or power* over the property within the statutory definition of 'use.'" (Emphasis supplied.)

No compelling reason has been advanced for assigning any different meaning to the language of the statute. No decision of any appellate court reaching a contrary result on like facts under a like statute has been brought to our attention.

The justice below correctly determined upon the facts of the instant case that there had been no "use" by the owner-lessor of the machinery in Maine as thus defined.

We note with interest that P. L., 1961, Chap. 58 amended R. S., Chap. 17 by adding a new section numbered 4-B, which section imposes a use tax on the rental of property in this state under certain conditions. The instant case arose prior to this amendment and is controlled by the form of the statute as it existed before the effective date thereof.

Appeal denied.

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER DATED FEBRUARY 14, 1963 ANSWERED FEBRUARY 27, 1963

SENATE ORDER PROPOUNDING QUESTIONS

SENATE ORDER

WHEREAS, it appears to the Senate of the 101st Legislature that the following is an important question of law and the occasion a solemn one; and

WHEREAS, there is pending before the Senate of the 101st Legislature a bill entitled "An Act Providing Expense Reimbursement for Members of the Legislature." (S. P. 159) (L. D. 435) As Amended by Senate Amendment "A"; and

WHEREAS, Article IV, Part Third, Section 7, Maine Constitution, provides that

> "The Senators and Representatives shall receive such compensation, as shall be established by law; but no law increasing their compensation shall take effect during the existence of the legislature which enacted it. The expenses of the members of the House of Representatives in traveling to the legislature, and returning therefrom, once in each week of each session and no more, shall be paid by the State out of the public treasury to every member, who shall seasonably attend, in the judgment of the House, and does not depart therefrom without leave."

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

ORDERED, that in accordance with the provisions of the Constitution of the State, the Justices of the Supreme Judicial Court are hereby respectfully requested to give the Senate their opinion on the following questions:

(1) Is it within the power of the Legislature to provide for the reimbursement of Senators and Representatives for expenses, other than travel, in attendance at daily sessions?

(2) If the answer to the first question is in the affirmative, would the bill, "An Act Providing Expense Reimbursement for Members of the Legislature." (S. P. 159) (L. D. 435), As Amended by Senate Amendment "A", if enacted by the Legislature, be constitutional?

In Senate Chamber
Feb 14 1963

READ AND PASSED

CHESTER T. WINSLOW
Secretary

A true copy
Attest:

CHESTER T. WINSLOW
Senate Secretary

(EMERGENCY)

ONE HUNDRED AND FIRST LEGISLATURE

Legislative Document **No. 435**

S. P. 159 In Senate, January 17, 1963

Referred to Committee on State Government. Sent down for concurrence and ordered printed.

CHESTER T. WINSLOW, Secretary

Presented by Senator Hinds of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SIXTY-THREE

AN ACT Providing Expense Reimbursement for Members of the Legislature.

Emergency preamble. Whereas, acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, Legislators suffer great financial sacrifices while attending the Legislature; and

Whereas, the Legislators should be reimbursed at least in part for their expenses in such attendance; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine, and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 10, § 2, amended. The first paragraph of section 2 of chapter 10 of the Revised Statutes, as amended, is further amended by adding a new sentence at the end to read as follows:

'Each member of the Senate and House of Representatives shall be reimbursed for expense, other than travel, in attending the daily sessions of the Legislature in the amount of $10 for each day in attendance.'

Sec. 2. Effective date. This act shall be retroactive to January 2, 1963.

Sec. 3. Appropriation. There shall be appropriated to the Legislative Appropriation from the General Fund the sum of $150,000 to carry out the purposes of this act.

Emergency clause. In view of the emergency cited in the preamble, this act shall take effect when approved.

A True Copy Attest:

CHESTER T. WINSLOW
Senate Secretary

STATE OF MAINE

SENATE

101st LEGISLATURE

SENATE AMENDMENT "A" to S. P. 159, L. D. 435, Bill, "An Act Providing Expense Reimbursement for Members of the Legislature."

Amend said Bill in section 1 by striking out all of the 6th and 7th lines and inserting in place thereof the following: **'sessions of the Legislature in an amount not to exceed $10 for each day in attendance. Payment shall be made monthly upon vouchers approved by the majority leader of the respective body.'** "

Further amend said Bill by striking out all of section 3 and inserting in place thereof the following:

'**Sec. 3. Appropriation.** There shall be appropriated from the Legislative Appropriation the sums necessary to carry out the purposes of this act.'

IN SENATE CHAMBER
READ AND ADOPTED
Sent down for concurrence
Feb 12 1963

CHESTER T. WINSLOW
Secretary

Filed by Senator HINDS of CUMBERLAND.

Reproduced and distributed pursuant to Senate Rule #11A.

(Filing #S-7)

2-12-63

A true copy attest CHESTER T. WINSLOW
Senate Secretary

ANSWERS OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on February 14, 1963.

QUESTION (1): Is it within the power of the Legislature to provide for the reimbursement of Senators and Representatives for expenses, other than travel, in attendance at daily sessions?

ANSWER: We answer in the affirmative.

QUESTION (2): If the answer to the first question is in the affirmative, would the bill, "An Act Providing Expense Reimbursement for Members of the Legislature" (S. P. 159) (L. D. 435), As amended by Senate Amendment "A", if enacted by the Legislature, be constitutional?

ANSWER: We answer in the negative.

L. D. 435 as amended by Senate Amendment "A" provides that "Each member of the Senate and House of Representatives shall be reimbursed for expense, other than travel, in attending the daily sessions of the Legislature in an amount not to exceed $10 for each day in attendance. Payment shall be made monthly upon vouchers approved by the majority leader of the respective body." The Act carries an Emergency Clause and is made retroactive to January 2, 1963.

The decisive point in our consideration is whether or not reimbursement for *expense, other than travel,* is compensation within the meaning of our Constitution.

If compensation, an Act providing therefor would clearly fall within the prohibition of the Constitution, which reads:

> "The senators and representatives shall receive such compensation, as shall be established by law; but no law increasing their compensation shall take effect during the existence of the legislature, which enacted it. The expenses of the members of the house of representatives in traveling to the legislature, and returning therefrom, once in each week of each session and no more, shall be paid by the state out of the public treasury to every member, who shall seasonably attend, in the judgment of the house, and does not depart therefrom without leave." Article IV, Part Third, Section 7.

In an Opinion of the Justices of the Supreme Judicial Court in 1953 (148 Me. 528), the Justices said that the Legislature could not constitutionally by Order provide for reimbursement of expense, other than travel, in attending the daily sessions of the Legislature in the amount of $7 for each day in attendance. The Justices pointed out that the expenses, being personal in nature, could not be authorized or payment thereof directed by joint legislative Order.

In an Opinion of the Justices in 1957 (152 Me. 302), the Justices were of the view that travel expense is a personal expense which may be provided only by an Act or Resolve passed as a law and not by a legislative Order. The Justices pointed out that the travel expense sought in the Order, that is to say, mileage at an increased rate retroactive to the commencement of the session, was not compensation within the meaning of the Constitution. Provision therefor may properly be made by Act or Resolve.

In our opinion expenses other than travel, for which reimbursement is here proposed, are living or subsistence expenses and come within the meaning of compensation

under the Constitution. *Jones* v. *Hoss,* 285 P. 205 (Ore. 1930); *State* v. *Turner,* 233 P. 510 (Kan. 1925); *Dixon* v. *Shaw,* 253 P. 500 (Okla. 1927); *State* v. *Clausen,* 253 P. 805 (Wash. 1927); *Ashton* v. *Ferguson,* 261 S. W. 624 (Ark. 1925); *Hall* v. *Blan,* 148 So. 601 (Ala. 1933); *Peay* v. *Nolan,* 7 S. W. (2nd) 815 (Tenn. 1928); *Ferris* v. *Aten,* 28 N. W. (2nd) 899 (Mich. 1947); *State* v. *Tracy,* 190 N. E. 463 (Ohio 1934); *Opinion of the Justices,* 64 A. (2nd) 204 (N. H. 1949), and to the same conclusion the courts of last resort in Colorado, Florida, Idaho, Iowa, Illinois, and South Carolina. Expenses of this type are distinguishable factually and constitutionally from travel expenses.

It is implicit in our Constitution that the amount paid to members of the House and Senate for the regular sessions and for attendance at extra sessions is intended to cover all personal expenses except expense of travel.

We are strengthened in this view by the practice since Maine became a State. The constitutional provision in question has remained unchanged since 1820, except that travel expense since the 1947 amendment is paid weekly and not once in each session. From at least 1823 Senators and Representatives have received a sum for attendance plus mileage. Expense of travel from home to the Legislature has always been set apart from compensation.

We are aware of the ever increasing burden of time and expense falling on members of the Legislature over the years. The question for us is not whether the proposed expense may be needed or justified, but solely whether the Legislature may constitutionally provide therefor by the Act before us.

Since we have determined that reimbursement for expense, other than travel, is compensation, the mandate of the Constitution becomes applicable. "No law increasing their compensation shall take effect during the existence of the Legislature which enacted it."

In view of the fact that our answer to the second question is in the negative for the reasons above set forth, we deem it unnecessary to determine here whether or not the proposed statute could lawfully be enacted as emergency legislation within the limitations imposed by the Constitution. Article IV, Part Third, Sec. 16.

Dated at Augusta, Maine, this twenty-seventh day of February, 1963.

Respectfully submitted:

ROBERT B. WILLIAMSON

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

FRANCIS W. SULLIVAN

CECIL J. SIDDALL

HAROLD C. MARDEN

BANGOR & AROOSTOOK RAILROAD CO. RE: APPLICATION TO AMEND P. U. C. CERTIFICATE J #44

Kennebec. Opinion, March 4, 1963.

Statutes. Transportation. Appeals and Error. Legislation. Public Service Commissions.

Factual finding, on which decree of Public Utilities Commission granted extension of certificate to transport baggage, mail, and express, was final if supported by such evidence as taken alone would justify conclusion.

If there is irreconcilable conflict amendatory act will control as being latest expression of Legislature.

Generally, material change of statute by amendment thereof evidences purpose and intent to change effect of existing law.

Phrase "public convenience and necessity" and phrase "public interest" are not synonymous and phrase "public interest" is broader and involves adequate service to meet needs of public community involved.

Fact that extension of Public Utilities Commission certificate would reduce volume of carriage and revenue of competing carriers was not controlling in determining whether extension was in "public interest" under statute.

Public Utilities Commission is not permitted to base decision on facts outside record.

Exceptant must show wherein he is aggrieved by rulings which he attacks.

ON EXCEPTIONS.

This is upon exceptions to the granting of an extension of carrier certificate to cover carrying of baggage, mail, and express. The first five of eight exceptions challenge the validity of the decision in the light of the evidence presented. The other exceptions attack the evidence, opinions,

and findings of the commission. Case remanded to P. U. C. for a decree upon existing record in accordance with this opinion.

William M. Houston, for B. & A. Railroad Co.

Raymond E. Jensen, for Intervenors.

John G. Feehan, for P. U. C.

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

MARDEN, J. On exceptions. The petitioner, hereinafter referred to as "B & A," presently holder of certificate J-44, for the carrying of passengers for hire from Bangor into Aroostook County seeks authority to transport "baggage, mail and express" in its passenger motor vehicles under the provisions of Section 5 of Chapter 48, R. S. B & A supports its petition by introducing evidence of what it terms as the inadequacy in the freight delivery service in Aroostook County by reason of such scheduling and operation of the common carriers of freight whereby, in substance, any merchandise offered in Bangor for shipment after noon of a given day does not reach the consumer in Aroostook County until the following day, and as to some of the existing freight carriers "overnight" delivery is scheduled, though the merchandise is offered in Bangor for shipment as early as 7 o'clock on a given morning. B & A presented witnesses in various merchandising fields and located in Brewer, Bangor, Lincoln, Van Buren, Millinocket, and Presque Isle, who pointed out that in their respective businesses "same day delivery" was not only important to their consumer public, but with relation to drugs, spare parts for oil burners in winter, and refrigerators in summer, and automotive equipment "same day delivery" became at times a matter of emergency; that the movement of such items upon an "express" basis at premium rates would not seriously com-

pete with existing common carriage; that, as distinct from common carriage of freight, B & A contemplated no pick-up and delivery service and that such additional authority was in the public interest.

This petition is opposed by four common carriers of freight hereinafter called "protestants" serving part or all of the geographical area involved, which carriers contend that such extended service by B & A is neither in the public interest nor a matter of convenience and necessity; that such extended authority would seriously invade the volume of their carriage of and operating revenue on similar items and that the petition should be denied.

The Public Utilities Commission by majority decree granted the extension of B & A's certificate to include baggage, mail and express, subject to restrictions as to the size and weight of the express packages to be so carried, which point is not pivotal.

Protestants have filed eight exceptions, the first five of which challenge the validity of the decision in the light of the evidence presented, the sixth challenges the expressed opinion "that the presenting of further witnesses would not have produced a record substantially different from that now before us except the list of commodities may have been broader and repetitious reasons advanced for using such service" and contends that the Commission was improperly projecting the evidence and, therefore, that any finding based upon such projection was invalid; the seventh questions the propriety of the Commission's considering the effect of such extended authority on B & A's operating revenue as within "the public interest" and eighth, the granting by the Commission of the right to B & A to transport mail and baggage in, what protestants aver is, the absence of evidence in the case bearing upon either of those items.

It is conceded that if the factual finding upon which the Commission decree is based is supported by such evidence as taken alone would justify their conclusion, its finding is final. *B. & A. R. R. Co., Petr.,* 157 Me. 213, 221; 170 A. (2nd) 699; *Richer, Re: Contract Carrier Permit,* 156 Me. 178, 183; 163 A. (2nd) 350.

Issue is raised as to the interpretation of certain phrases in Section 5, Chapter 48, R. S., the application of which governs our consideration of the problem.

The second sentence of Section 5, Chapter 48, R. S., provides that the Public Utilities Commission shall issue an original certificate (permitting operation of motor vehicles for profit) *or amend* (emphasis supplied) a certificate (permitting such operation) only if it finds after public hearing that public convenience and necessity require such operation. In 1959 this section was amended by adding the following paragraph:

> "The commission also may authorize transportation of baggage, mail and express for hire in passenger motor vehicles in such cases as the said commission, after notice given to motor carriers operating under sections 19 to 32 and to the extent therein provided, and after hearing, at which persons protesting shall be heard on such matters as may be applicable under this or other laws, finds the transportation of baggage, mail and express for hire in passenger vehicles to be *in the public interest.* Such authority shall be made a part of the certificate of public convenience and necessity described above and may be made subject to such terms, conditions and restrictions as said commission may prescribe." (Emphasis supplied.)

B & A contends that its privilege to extend its certificate turns upon the requirement of "the public interest" as used in the reference paragraph. Protestants urge that the extension of B & A's authority must be based upon "public

convenience and necessity" as used in Section 5 and that as applied to this case the phrase "in the public interest" and the phrase "public convenience and necessity" are synonymous.

Before determining whether the decision of the Commission is supported by substantial evidence it is proper to record an interpretation of the phrases under consideration.

It has been determined that the word "public" as used in carrier cases is the general public as distinguished from any individual or group of individuals, *Merrill* v. *P. U. C.*, 154 Me. 38, 41; 141 A. (2nd) 434; *M. C. R. R. Co.* v. *P. U. C.*, 156 Me. 284, 286; 163 A. (2nd) 633; and we conclude that the whole public as applied to this case consists of that body of persons, that public community, served by the common carriers here involved. *Fornarotto* v. *Board of Public Utility Com'rs.* (N. J. 1928), 143 A. 450, 453 (headnote 5).

Our court has defined "public convenience and necessity" in *Re: John M. Stanley,* 133 Me. 91, 93; 174 A. 93; followed in *Chapman, Re: Petition to Amend,* 151 Me. 68, 71; 116 A. (2nd) 130.

The phrase "public interest" appears in the second paragraph of Section 23 and subparagraph III of the same section of Chapter 48, R. S. as applied to contract carriers, in a context not synonymous with public convenience and necessity and has been a subject of discussion in *Merrill* v. *P. U. C.*, 154 Me. 38, 43; 141 A. (2nd) 434, and in *M. C. R. R.* v. *P. U. C.*, 156 Me. 284, 286, 291; 163 A. (2nd) 633; confirming non-synonymity.

Upon its face the pre-1959 portion of Section 5, Chapter 48, and the 1959 amendment do not reconcile. Inasmuch as the phrase "public interest" appears in other sections of the public utility law and used in a sense distinct from

"public convenience and necessity" we conclude that its use in the 1959 amendment of Section 5, was intended to have a meaning unto itself.

> "If there is an irreconcilable conflict, the amendatory act will control, as being the latest expression of the legislature." 82 C. J. S., Statutes § 384, Page 897.

See also *Crawford* v. *Iowa State Highway Commission* (Iowa 1956), 76 N. W. (2nd) 187, 190 (headnote 6, 7).

> "It is a general rule that a material change of a statute by amendment thereof evidences a purpose and intent to change the effect of the existing law." *Haraburda* v. *U. S. Steel Corporation,* 187 F. Supp. 79, 83 (headnote 3).

We hold that the phrases "public interest" and "public convenience and necessity" as used in Section 5 of Chapter 48, R. S., are not synonymous, that the phrase "public interest" is of broader scope than "public convenience and necessity." *In re Megan* (S. D. 1942), 5 N. W. (2nd) 729, 735 (headnote 22, 23); *Briggs Corp. v. P. U. C.* (Conn. 1961) 174 A. (2nd) 529, 532 (headnote 6).

Matters "in the public interest" as applied to carriers under Public Utilities law involve adequate service to meet the needs of the public community involved; *Briggs, supra* at 532, a consideration of the carrier competition; *In re Bermensolo* (Idaho 1960), 352 P. (2nd) 240, 242 (headnote 2, 3), the interests of competing carriers; *Ratner* v. *United States of America* (Ill. 1957), 162 F. Supp. 518, in which respect the interest of the petitioner to the extent that the extended service may contribute to the successful transportation of passengers, was not improperly considered by the Commission. The fact that an extension of B & A Certificate J-44 will reduce the volume of carriage and revenue of competing carriers is not controlling.

Richer, Re: Contract Carrier Permit, 156 Me. 178, 187; 163 A. (2nd) 350.

With the phrase "in the public interest" as used in the last paragraph of Section 5 of Chapter 48, R. S., so defined, and applied to the public community involved, we conclude that the factual finding by the majority of the Commission as to express shipments including the specified size of packages authorized was based upon substantial evidence and that exceptions one through five, inclusive, must be overruled.

As to exception six, it is clear that the Commission is not permitted to base a decision upon facts outside the record, *P. U. C.* v. *Cole's Express,* 153 Me. 487; 138 A. (2nd) 466, and we having found that the factual conclusion reached by the Commission as to express shipments is justified by the evidence, that portion of the finding challenged by exception six was gratuitous and of no moment. This exception is overruled.

Exception seven criticizes the acceptance of B & A's testimony as to the significance of the increased revenue resulting from the extended service proposed as relevant to the issue. We hold that such evidence is a matter to be considered properly under "the public interest" as defined above, and as to express shipments, this exception must fail.

While the statute granting the protestants right to "except" as to matters of law (Section 67, Chapter 44, R. S.) does not specifically provide that aggrievement is prerequisite (as in Section 32 of Chapter 153 relative probate appeals, for example) it is implicit in the law that an exceptant must show wherein he is aggrieved by the rulings which he attacks.

> "The bill of exceptions, except in cases where it is claimed that facts were found without any evi-

> dence, should show wherein the excepting party was aggrieved by the alleged rulings." *P. U. C.* v. *Gallop,* 143 Me. 290, 298, 62 A. (2nd) 166.

The protestants here do not represent how they are aggrieved by the license to B & A to carry mail and baggage,—and we do not see at this time how they could demonstrate any legal interest in the carriage of mail. This exception, therefore, must stand or fall on the presence or absence of evidence in the record from which "the public interest" in the carriage of mail and baggage may be found.

B & A did not request the Commission to take official notice of "the public interest" in the carriage of mail. See *P. U. C.* v. *Cole's Express,* 153 Me. 487, 498, 138 A. (2nd) 466. We find, however, in the record, testimony on behalf of B & A to the point that "mail is a primary interest" and successful bidding by B & A on transportation of mail for some "Star routes * * * has added substantially to" its revenues. We have already found and declared that the revenue aspect of this proposed service, as it may beneficially affect the successful carriage of passengers, is relevant to "the public interest," *supra.* We find that the evidence offered as to "the public interest" in the transportation of mail justifies the finding of the Commission. Exception eight is overruled as to the carriage of mail.

We find no evidence bearing upon "the public interest" in the carriage by B & A of baggage and although the protestants have not demonstrated any aggrievement by virtue of this extended license to B & A, we are not unaware that baggage not accompanying its owner as incidental to passenger carriage might become a subject of express (*American Railway Express Company* v. *Wright,* 91 So. 342, 343 (Miss. 1922)) transportation, by choice of its owner, or freight (*People* v. *Ackert,* 63 N. Y. S. (2nd) 118, 119) transportation, either by reason of its exceeding the size

and weight limitations imposed herein upon B & A as to the carriage of express, or by choice of its consignor, in which category the protestants do have a statutory interest. Exception eight is sustained as to the carriage of baggage.

Exceptions one through seven are overruled as to carriage of express.

Exception eight is overruled as to carriage of mail.

Exceptions one through eight are sustained as to carriage of baggage.

Case remanded to the Public Utilities Commission for a decree upon the existing record in accordance with this opinion.

DONALD E. FARRINGTON
AND
CHRISTINE E. FARRINGTON

vs.

MAINE STATE HIGHWAY COMMISSION

Kennebec. Opinion, March 4, 1963.

Eminent Domain. Damages. Evidence. Jury.

A jury may not base its assessments of damages on view alone.

Barring error in the submission of evidence from the record, the court cannot substitute its judgment for that of the jury.

Purpose of a jury view in a condemnation case is not to receive evidence, but to enable the jury to more intelligently apply and comprehend testimony presented in court.

In a land damage case a view constitutes a special kind of evidence.

ON APPEAL.

This is an appeal by the state from a highway land damage verdict, based on the contention that the evidence did not support the verdict. Appeal denied.

Lewis I. Naiman, for Plaintiffs.

Frank E. Southard, for Defendant.

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

MARDEN, J. On appeal from judgment and from the denial of a motion by the State for a new trial on the usual grounds addressed to the Presiding Justice. This is a complaint for damages occasioned by the taking of land from plaintiffs for highway purposes and involves the usual elements of the actual taking of a certain area (.78 approximately acre), the rendering of a second portion inacces-

sible (.10 approximately acre) and the imposition on the plaintiffs' remaining land of two drainage easements.

The jury was given the benefit of testimony of the owners, an appraiser (whose qualifications were conceded by the appellant) called by the plaintiffs, testimony from State Engineers, and an appraiser (whose qualifications were accepted by the court) offered by the State, and a view of the premises. To a verdict in the amount of $2,800.00 the State addressed its motion and prosecutes its appeal contending that the owners' testimony of fair market value was based upon an erroneous foundation; that the opinion of the expert offered by the owner was not based upon sufficient facts of record; and that that evidence together with the view by the jury did not support the verdict.

The authorities which the State cites in support of its appeal are recognized as sound. The State urges that an owner's testimony properly to be accepted by the jury should not be based upon the opinion of others or involve sentimental value (*Maher* v. *Commonwealth,* 197 N. E. 78 (Mass. 1955)); that likewise the testimony of a professional appraiser properly to be accepted must be based upon sound principles, and not ignore consideration of the highest and best use of the land involved (*In Re: Clearview Expressway,* 174 N. E. (2nd) 522 (N. Y. 1961)); that opinion evidence without any support in the demonstration and physical facts is not substantial evidence and that opinion evidence is only as good as the facts upon which it is based (*Washington* v. *United States,* 214 F. (2nd) 33, 43 (Wash. 1954) and (headnotes 14-16)); that the opinion of an appraiser is no better than the hypothesis or the assumption upon which it is based (*International Paper Company* v. *United States,* 227 F. (2nd) 201, 205 (Ga. 1956)); and that an appraiser should give facts upon which his opinion is based (*City of Newport* v. *Dorsel Co.,* 136 S. W. (2nd) 11 (Ky. 1940)).

The State also urges that in the light of what it submits as insufficiency upon the record, the jury must have placed unauthorized reliance upon their view of the premises and that a jury may not base its assessment of damages on view alone, with which last statement we concur, Jahr on Eminent Domain § 249, but see *Bangor and Piscataquis R. R. Co.* v. *McComb,* 60 Me. 290, 302. We have no way of knowing the impression which the jury received from the view as compared to the recorded evidence, but are mindful of the declarations of this court in jury-viewed land damage cases in *Wakefield* v. *Boston & Maine R. R.,* 63 Me. 385 and *Shepherd* v. *Camden,* 82 Me. 535, 20 A. 91.

> "In order to enable the jury to form a correct judgment of the amount of damages sustained by reason of the location of the railroad, they should 'view the premises' from such standpoints, and in such a manner as will give them an accurate knowledge of the considerations that go to make up the damages, such as the value of the land taken and the use to be made of it, the effect of the severance upon the character, situation, present and prospective use of the remainder of the lot, and any other facts that diminish the value of the premises." *Wakefield* v. *Boston & Maine R. R.,* 63 Me. 385, 387.

> " * * * there was evidence on both sides, submitted to the jury, and the preponderance is not so great as to satisfy us that the verdict was the result of bias or prejudice of the jury, or of any mistake made by them. Furthermore, we have not before us all the evidence which the jury had to act upon. They properly viewed the premises; and they had a right to take into consideration what they saw of their situation, — to what extent, in their judgment, the change of the grade in the street affected the value of the plaintiff's premises. In such a case, the court hesitates to set aside the verdict." *Shepherd* v. *Camden,* 82 Me. 535, 537, 20 A. 91.

That rule is followed in *State* v. *Slorah,* 118 Me. 203, 214, 106 A. 768, wherein the aspect of a "view" in a criminal case was discussed and the court said:

> "We are, therefore, of the opinion, without modifying the prior views of this court in land damage cases, as laid down in *Shepherd v. Camden* and *Wakefield v. Boston & Maine R. R.,* supra, * * * that the theory most consonant with reason is to hold that the purpose of a view is not to receive evidence, but as the court has so frequently phrased it, to enable the jury to more intelligently apply and comprehend the testimony presented in court; and that so far as the information received on the view can in any way be considered by the jury it must be limited to such as is obtained from an ocular examination of the premises."

The collective expressions of the court in these cases seem to have given rise to the more frequently quoted pronouncement which appears in *Reed* v. *Central Maine Power Company,* 132 Me. 476, 479, 172 A. 823, where the court stated:

> "In a land damage case, a view constitutes a special kind of evidence."

It is not felt that the "view" aspect of this case is controlling and we propose to give it no undue attention, but for the statement in the *Reed Case* to be understood, reference to *McComb, Shepherd* and *Slorah* is suggested as necessary, and the following discussions are additionally helpful.

> Orgel on Valuation under Eminent Domain, effect of the view § 129.
>
> Wigmore on Evidence, Third Edition, Autoptic Proference, Discussions of jury view § 1168.

We must conclude that the points urged by the State as to the insufficiency of the evidence as to damage can right-

fully be applied to the present record without determining, and indeed it is unnecessary for us to determine, that the evidence of the plaintiff alone is or is not sufficient, or the evidence of his appraiser alone is or is not sufficient, or the evidence of the view was or was not properly evaluated by the jury. The sum total of the evidence received by the jury in the form of testimony of witnesses, exhibits, and view, — its conduct not criticized, supports the verdict.

There is no occasion to cite authority for the principle that barring error in the submission of evidence apparent from the record this court cannot substitute its judgment for that of the jury. Attention is again invited to the quotation from *Shepherd* v. *Camden, supra.*

The State in its brief urged consideration of *Peabody* v. *Hewett,* 52 Me. 33, and we paraphrase and quote from that case at page 49. On the question of the value of the premises the finding of the jury may differ from the opinions of some of the witnesses introduced. But, adequate facts on which these opinions were based were disclosed by the witnesses "and may be considered as an important element for the consideration of the jury in finding the value which they were to pronounce in their verdict; and we are not satisfied that the jury was under such influences as to make it the duty of the court to disturb the verdict on this account."

Appeal denied.

STATE OF MAINE
vs.
JOSEPH A. DUPUIS

Androscoggin. Opinion, March 13, 1963

Discretion. Criminal Law. Forgery. Exceptions.

Specific intent to defraud must be shown affirmatively as an element of the crime of forgery; although intent is seldom capable of direct proof, it may be inferred from the proven surrounding circumstances and in particular from the presence, companionship, and conduct of the respondent before and after the offense is committed.

The presiding justice is more than a mere umpire or referee; it is his duty to propound to witnesses such questions as he deems necessary to bring out any relevant and material evidence without regard to its effect to one party or the other.

An exception which fails to specify the particular claim of error or the manner in which a specific ruling is claimed to have aggrieved or been prejudicial to the respondent raises no issue.

One may be guilty as principal if he is actually or constructively present, aiding, abetting and assisting person to commit felony.

Jury could properly conclude that respondent was constructively present and participating as principal in crime of forgery though he was in another room during part or all of the time during which another prepared the check.

ON EXCEPTIONS.

This is on exceptions to the failure of the Presiding Justice to direct a verdict and to the conduct of the Presiding Justice in recalling a witness. Exceptions 1 and 2 overruled, exception 3 dismissed. Judgment for the State.

Gaston M. Dumais, County Atty.,
Laurier T. Raymond, Jr., Asst. County Atty., for State.

Edward J. Beauchamp, for Defendant.

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

WEBBER, J. The respondent was tried and convicted of the crime of forgery. At the close of all the evidence respondent addressed a motion to the court for a directed verdict, which motion was denied. After the witnesses for the State had completed their testimony and the State had rested, the presiding justice recalled one of these witnesses and over the respondent's objection made further inquiry of the witnesses which elicited certain answers. The respondent now seeks to attack these adverse rulings by way of a bill of exceptions.

The respondent's first exception is addressed to the claim of error in failure to direct a verdict of not guilty. The evidence discloses that four persons including the respondent engaged in concerted activities to forge and utter a check; that the respondent participated in an initial plan that one Sherman would prepare the check and respondent would cash it; that all four were together in the respondent's apartment when Sherman prepared the check although the respondent may have been in another room during part or all of the time; that the respondent entered into a common agreement to change the plan and send one Polley to utter the forged check; that the respondent supplied Polley with his Social Security and Selective Service cards to be used as an aid in uttering the check; and that after the forged check had been successfully cashed, the respondent joined in dividing and sharing the spoils.

The respondent appears to entertain the theory that if Sherman in fact prepared the check and forged the signature thereon, the respondent would thereby be relieved from criminal responsibility as a principal. One may be guilty as a principal if he is actually or constructively present, aiding, abetting and assisting a person to commit a felony. *State* v. *Burbank,* 156 Me. 269; *State* v. *Rainey,* 149 Me. 92; *State* v. *Berube,* 158 Me. 433. In *Burbank* the respondent was deemed constructively present although in

another room from that in which the physical acts constituting the felony were being performed. In *State* v. *Flaherty,* 128 Me. 141, the respondent was convicted of rape where he was present, aiding and abetting, even though he himself had no carnal intercourse with the prosecutrix. In the instant case the jury could properly conclude that the respondent was constructively present and participating as a principal in the crime of forgery.

R. S., Chap. 133, Sec. 1 as amended requires that a specific intent to defraud must be affirmatively shown as an element of the crime of forgery. As was stated in *State* v. *Berube, supra,* knowledge or intent is seldom capable of direct proof but may be inferred from the proven surrounding circumstances and in particular from the presence, companionship and conduct of the respondent before and after the offense is committed. Applying this test to the evidence before us, there was ample support for a jury finding of the requisite criminal intent. There being no occasion for the direction of a verdict, the first exception must be overruled.

The second exception seeks to attack the conduct of the presiding justice in recalling a witness for examination after the State had rested its case. This the court did upon his own motion and over objection by the respondent. Mr. Sherman, testifying for the State, had during his direct and cross-examination by counsel described the respondent's participation with him in the activities which produced the forgery. In his answers the witness without objection had been permitted to state his own conclusions as to what the respondent wanted to do or was going to do in connection with the forged check and in particular as to what the "arrangement" was between them. Neither counsel had made any effort to restrict the witness to conversations with and statements by the respondent which might or might not justify the conclusions drawn by the

witness. The inquiry by the presiding justice on recall sought to elicit from the witness the basis, if any, for his stated conclusions. In particular he desired to ascertain what if anything the respondent had said to the witness. The questions asked were entirely impartial and were clearly designed only to ascertain the truth. It was entirely within the sound discretion of the presiding justice to participate in the conduct of the trial in this manner and to this extent. He was more than a mere umpire or referee. As was stated in *State* v. *Dipietrantonio,* 152 Me. 41, 48:

> "A justice who presides over a jury trial occupies a place of great responsibility. He must not only see that a dignified order is maintained in the court room and that the procedure is according to rule and statute, but also that the rights of all parties are protected. In a civil case he must hold the 'scales' evenly. In a criminal case he must protect the constitutional rights of a respondent, and at the same time remember that the public is also entitled to protection. A trial in a court of justice is not arranged for the purpose of testing the respective abilities of the attorneys involved upon the one side or the other. The purpose of a trial is to determine what is the truth, and what is justice under the facts and the law, and to that end the trial judge is not only permitted but it is his duty to participate directly in the trial to facilitate its orderly progress, in order to elicit the truth and to administer justice. His remarks or conduct in performing this duty will not constitute error if they are such as do not discriminate against or prejudice either party in a civil proceeding, or (to) prejudice the constitutional rights of an accused in a criminal case. * * * It is always permissible for the court, and, if it appears necessary for him to do so, it is his duty to propound to witnesses such questions as he deems necessary to bring out any relevant and material evidence, without regard to its effect, whether beneficial to one party or the other. * * * The

> examination of a witness by the presiding judge must be conducted without prejudice to an accused, and in such a manner as to impress the jury that the judge is impartial and is not indicating his opinion on the facts."

In the instant case the interrogation by the presiding justice fell well within both the letter and the spirit of the guiding principles above set forth. This exception cannot be sustained.

The third exception is general in its nature and seeks to attack "all the rulings of the presiding justice that were adverse to the respondent." An exception in this form which fails to specify the particular claim of error or the manner in which a specific ruling is claimed to have aggrieved or been prejudicial to the respondent raises no issues of law for determination here. This exception sounds in part in appeal but no appeal was taken in this case. Matters which might properly have been raised by appeal, however, have been fully considered above under the first exception. The third exception must be dismissed.

The entry will be

Exceptions 1 and 2 overruled.

Exception 3 dismissed.

Judgment for the State.

HENRY S. MALLOCH, ET AL.
PLAINTIFFS - APPELLEES
vs.
MAINE EMPLOYMENT SECURITY COMMISSION
DEFENDANT - APPELLANT

Kennebec. Opinion, March 18, 1963.

Maine Employment Security Law. Legislative Intent. Wages.

The word "wages" as used in provision of Unemployment Compensation Act includes only that which comes from personal efforts.

SUB-benefits are not deductible from benefits payable under State unemployment system.

ON APPEAL.

This case is on appeal from the final judgment of the Superior Court where the case was upon review of the decision of the Maine Employment Security Commission. Appeal denied.

Clark D. Chapman, Jr.,
M. Donald Gardiner, for Plaintiffs.

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

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision.

TAPLEY, J. On appeal. This case is on appeal from the final judgment of a single Justice of the Superior Court. Action in the Superior Court was a judicial review of the decision of the Maine Employment Security Commission, Chap. 29, Sec. 16 (IX), R. S., as amended, and in accordance with Rule 80B, M. R. C. P.

Henry S. Malloch, plaintiff appellee, was employed by the American Can Company as a general laborer, the American Can Company being an employer subject to the provisions of the Maine Employment Security Law. Mr. Malloch was laid off for lack of work on July 31, 1961, whereupon he filed for unemployment benefits. He was entitled to benefits of $33.00 per week for total unemployment. He was allowed the sum of $21.00 per week as a reduced benefit under provisions of Sec. 3 (III) of the Maine Employment Security Law for partial unemployment. Mr. Malloch had reported receiving the sum of $22.17 under a plan entitled "Supplemental Unemployment Benefit Plan" (to be hereinafter referred to as the SUB Plan). Mr. Malloch appealed the ruling of the Commission to the Superior Court and after a hearing the sitting justice rendered judgment by sustaining the appeal on the basis of his findings that Mr. Malloch was entitled to the full amount of $33.00 in unemployment benefits for the week of August 12, 1961 notwithstanding the supplemental unemployment benefits payable to him under the SUB Plan. The Maine Employment Security Commission appealed this decision to the Law Court.

The question before us is whether the receipt of benefits by an employee under the SUB Plan constitutes wages within the meaning and intent of the provisions of the Maine Employment Security law (Chap. 29, R. S., 1954, as amended). The pertinent provisions of the Act 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. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with regulations prescribed by the commission, except that for the purposes of subsection II of section 13, subsection V of section 14, and section 17 such terms shall not include:

> "**B.** The amount of any payment made after December 31, 1950 to, or on behalf of, an employee under a plan or system established by an employing unit which makes provision for his employees generally or for a class or classes of his employees, including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment, on account of retirement, or sickness or accident disability, or medical and hospitalization expense in connection with sickness or accident disability, or death; - - ."
>
> "**Sec. 13 (III). Weekly benefit for partial unemployment.** On and after April 1, 1959, each eligible individual who is partially unemployed in any week shall be paid with respect to such week a partial benefit in an amount equal to his weekly benefit amount less that part of his earnings paid or payable to him with respect to such week which is in excess of $10 plus any fraction of a dollar except that any amounts received from the Federal Government by members of the National Guard and Organized Reserve, including base pay and allowances, shall not be deemed wages for the purpose of this subsection."

The Legislature, in the enactment of the Maine Employment Security Law, declared a statement policy in the following language (Chap. 29, Sec. 1, as amended):

> "**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. This objective can be furthered by operating free public employment

> offices in affiliation with a nation-wide system of public employment services; by devising appropriate methods for reducing the volume of unemployment; and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power, promoting the use of the highest skills of unemployed workers and limiting the serious social consequences of unemployment. - - ."

This case rests, primarily, on statutory interpretation and construction.

> "We have no hesitation in holding that statutes such as our Maine Employment Security Law are remedial and must be liberally construed for the purpose of accomplishing their objectives — in this instance the stabilization of employment conditions and the amelioration of unemployment." *Stewart v. Maine Employment Security Commission,* 152 Me. 114, at 120.

> "In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience and injustices are not to be overlooked." *Brackett* v. *Chamberlain,* 115 Me. 335, at 340.

> " - - - it is fundamental that we look *to the purpose for which a law is enacted* and that we avoid a construction which leads to a result clearly not within the contemplation of the lawmaking body. - - - -

> "There is danger in extending a statute beyond its purpose, - - - ." (Emphasis supplied.) *Inhabitants of the Town of Ashland* v. *Wright,* 139 Me. 283, at 285.

The SUB Plan is an agreement entered into between the American Can Company and the International Association of Machinists. The purpose of the plan is:

> "**Sec. 1.** It is the purpose of this plan to supplement state system unemployment benefits to the levels provided herein, and not to replace or duplicate them."

Under the terms of the SUB Plan the American Can Company (hereinafter called the Company) established a trust fund with a trustee selected by the Company. The fund is to be maintained by contributions made by the Company and benefits to the employees will be paid only from the fund. The initial maximum funding is set at $304,000 and from time to time payments will be made into the fund by the Company, as determined by a formula set out in the agreement. An employee, in order to obtain benefits, must make an application in accordance with procedures established by the Company and described in the SUB Plan and must also meet certain eligibility requirements. These eligibility requirements are based on the employee's layoff from the Company, the SUB Plan specifying conditions of layoff. The applicant, in order to benefit from the SUB Plan, must also be eligible to receive State Unemployment Benefits by qualifying for the same. He shall meet, in all respects, the statutory requirements of the Maine Employment Security Law. The amount of benefit the employee is to receive over and above the benefits paid to him under provisions of the Maine Employment Security Law is determined under a formula prescribed in the SUB Plan. It provides benefits for an employee who qualifies under its provisions, these benefits being supplemental to those allowed under the State system. There is much similarity between the provisions of the Maine Employment Security Law and the SUB Plan. They both provide for benefits to the unemployed, payable from a fund created for the purpose. They each prescribe qualifying conditions required to be met by the employee in order for him to receive the benefits. The SUB Plan and the Maine Employment Security Law have established formulae to be used in

determining the amount of benefits to be paid, and the length of time in which they are to be paid. The SUB Plan is effective only if the State has a law providing benefits based on unemployment, and if the employee can qualify for benefits thereunder. If the appellant's position is sound and the benefits paid under the SUB Plan are wages, then the Company must not only contribute to the State Unemployment Compensation Fund on the basis that the supplemental benefits are wages, but also must contribute to the fund established as a condition of the SUB Plan. The employee's only recourse for supplemental benefits is to the fund and not to the employer and, should depreciation or loss occur from the depreciation of the security held in the fund, the Company would not be obligated to make up the depreciation or loss. The SUB Plan is, in effect, an insurance against unemployment — it does not provide for the payment of any wages to the employee when no work is available to him. The SUB Plan does not guarantee wages, severance pay or standby pay. It is designed to supplement benefits paid under Maine Employment Security Law. The amount of the supplemental benefit is based upon the amount of the benefit the applicant is entitled to receive from the State system. The SUB Plan, using the State unemployment benefit as a basis, determines the amount to be paid the employee as supplemental benefits. The SUB Plan provides a fixed gross benefit but the Company, through the fund, does not pay this gross benefit. It pays only the difference between the State benefit and the total amount of the gross benefit. Under the SUB Plan two employees with the same work history, on the same job, may receive two different and distinct amounts as supplemental payments depending on the number of dependents they have. If these benefits were in the category of wages then there would be two different wage scales to be determined, not on the basis of labor performed on the same job classification and like work history, but on the number of de-

pendents of each worker. This standard of fixing wages would certainly present an incongruous situation.

The SUB Plan is the result of the natural growth of a modern relationship between management and labor. It is a product of the "bargaining table" and is in the nature of a fringe benefit through the terms of which the employee and his family are insured against a substantial portion of of an economic loss occasioned by unemployment. The SUB Plan embodies the principles of social security and the performance of its conditions results in the supplementation of a State unemployment benefit. It does not seek to defeat the interests of the State nor does it in any manner attempt, by its terms, to undermine the philosophy and purposes of the Maine Employment Security Law—rather, it embraces the philosophy and conforms to the purposes.

The SUB Plan employs provisions of the Maine Employment Security Law as standards upon which supplemental payments for unemployment are based. The SUB Plan is so dependent upon the existence of a State system that without it the SUB Plan is a nullity. This fact alone gives it the character of a supplemental agreement. The contributions the employer makes to the fund cannot, according to our view, be determined or characterized as wages paid to the employee for personal service rendered to his employer. According to the SUB Plan and the philosophy, as expressed in its purposes, the contracting parties never intended that the employee, in receiving benefits thereunder, would be accepting them as wages as the State contends. To so determine would be to do violence to the intent of the contracting parties. The appellant, however, takes the position, and so argues, that payment to the employee under the terms of the SUB Plan comes within the statutory definition of wages and that the Legislature, when it enacted the Maine Employment Security Law, intended that it should be so construed.

Since the advent of plans for supplementation of unemployment benefits, much controversy has arisen in the various States as to their interpretation in relation to State systems of employment security. There have been many opinions rendered by Attorneys General of various States on the subject and there are some recorded decisions of appellate courts.

The Supreme Court of North Carolina, in 1961, had occasion to consider the very question now before us. The pertinent provisions of a North Carolina Act are substantially like those of Maine. The language is nearly identical. A North Carolina case in point is, *In re Shuler,* 122 S. E. (2nd) 393 (N. C.). The court in the *Shuler* case goes into detail in pointing out various court and administrative decisions bearing on the question and states, on page 395, in holding that SUB benefits are not wages and therefore not deductible from benefits payable under the State System, as follows:

> "(1) The contract between Dayco and Local Union No. 277 under which SUB payments are authorized, specifically provides: 'Neither the company's contribution nor any benefit under the plan shall be considered a part of any employee's wages for any purpose.' Another condition of SUB payments is that State law must permit 'supplementation' which is defined as 'recognition of the right of a person to receive both a state system unemployment benefit and a weekly supplement benefit under the plan for the same week of lay-off * * * and without reduction of the state system unemployment benefit.' Of course, the agreement of the parties as to their rights is persuasive but not necessarily binding on the Commission.
>
> "(2) Supplementation of unemployment insurance benefits is designed to assist those employees who, on account of a lay-off due to no fault

of their own, are out of work. It is a method by which the employer, as suggested in G. S. c. 96, recognizes its public duty. The employer and the laid-off employee keep their connections each with the other. The relationship thus continued is likely to lead the employee to return to his job if and when it is available. Can it be said, therefore, that Dayco, by setting up the trust, and Shuler and Medford, by participating in it as laid-off employees, to the extent of their participation, received pay for work during the week beginning June 26, 1960? The reasons advanced and the cases cited in the Commission's excellent brief do not justify an affirmative answer.

Hence we conclude the Superior Court of Haywood County, and consequently the Employment Security Commission, erroneously deducted SUB payments from the unemployment insurance benefits due Shuler and Medford."

"The word 'wages' as used in provision of Unemployment Compensation Act limiting wages to all forms of remuneration received for personal services, includes only that which comes from personal efforts." Words & Phrases, Vol. 44A, Page 88.

This court in *Dubois* v. *Maine Employment Security Commission,* 150 Me. 494, considered the definition of "Wages" as related to a pension payment characterized as "Retirement Separation Pay." The "Retirement Separation Pay" was based on the formula of one week for each year of employment. The Commission held that the payment was remuneration for employment for the number of weeks determined on the basis of one week for each year of employment. In respect to wages, the court said, on page 501:

"We conclude - - - - - that in the weeks following separation these claimants were 'totally unemployed,' and were then *neither performing any*

> *personal services nor receiving any wages or remuneration* 'with respect to' those weeks." (Emphasis supplied.)

The force of the *Dubois* case bears on the instant case, particularly in reference to the fact (1) that Malloch at the time he qualified for State benefits was totally unemployed; and (2) the payment under the SUB Plan was not for a personal service performed for his employer.

The Legislature, in its statement of policy, declared in part:

> "Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment - - - 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. - - - This objective can be furthered - - - by devising appropriate methods for reducing the volume of unemployment; and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment - - - ."

Thus the Legislature spoke in terms of economic security for the unemployed and followed this statement of policy with legislation tending to minimize the "serious social consequences of unemployment."

The SUB Plan is designed to strengthen the economic security of the employee — not to weaken it.

To hold that the benefits paid under the supplemental unemployment insurance afforded by SUB Plan are wages and thereby disqualifying the employee from receiving State benefits to the extent of said payments would be inconsistent with and do violence to the declared legislative philosophy and purposes as expressed in the declaration

of policy under which the Maine Employment Security Law was enacted.

The entry will be:

Appeal denied.

FARM BUREAU MUTUAL INS. CO.

vs.

ROBERT L. WAUGH, ERNEST L. HAMMOND AND LAWRENCE J. HAMMOND

Aroostook. Opinion, March 18, 1963.

Insurance Policy.

The conditions of an insurance policy should be considered liberally in favor of the insured.

An insurance contract which expressed in plain language an undertaking by the insurer to defend and to indemnify an insured person, an authorized operator of the automobile, against the personal injury claim of, and for damages awarded to, "any person," includes protection for injuries sustained by the insured.

ON APPEAL.

Plaintiff appeals the denial of a declaratory judgment by the presiding justice. Appeal denied.

Scott Brown,
Berman, Berman, and Berman,
by *C. Martin Berman of Lewiston,* for Plaintiff.

Albert M. Stevens, for Defendant.

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

SULLIVAN, J. Plaintiff instituted a complaint for a declaratory judgment, R. S. (1954), c. 107, § 38 ff. Defendants answered and a hearing was had before a justice who ordered a judgment adverse to the plaintiff. Plaintiff has appealed.

Ernest L. Hammond, defendant, owned a passenger automobile and the plaintiff had issued to him its "Family Combination Automobile Policy" which in its pertinent content reads as follows:

"PART 1 - - LIABILITY

- -

Coverage A - - Bodily Injury Liability;
Coverage B - - Property Damage Liability;
To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:
A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury' sustained by any person;

- -

arising out of the ownership, maintenance or use of the owned automobile - - - - and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, - - - - - Persons Insured; The following are insureds under Part 1:

(a) With respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

- -

'named insured' means the individual insured in item 1 of the declarations and also includes his spouse, if a resident of the same household;

'insured' means a person or organization described under 'Persons Insured;'

- -

'owned automobile' means a private passenger, farm or utility automobile or trailer owned by the named insured, and includes a temporary substitute automobile;

- -

'private passenger automobile' means a four wheel private passenger, station wagon or jeep type automobile;

- -

DECLARATIONS

Item 1, Named Insured and Address;
Hammond, Ernest J.
R F D 1
Easton, Me."

Ernest L. Hammond had a son, Lawrence J. Hammond, a defendant here, aged 20, who was a resident in his father's household. During the term of the policy, one evening Ernest L. Hammond permitted his son, Lawrence, to drive the automobile for the latter's recreation. The son was accompanied as a passenger by the third defendant, Robert L. Waugh, a neighbor and friend. Waugh enjoyed a standing and continuous permission from Ernest L. Hammond to drive the automobile. During their ride Lawrence J. Hammond became sleepy and requested Waugh to operate the car. Waugh drove only 500 feet when the vehicle left the road and Lawrence J. Hammond became injured.

Through its complaint the plaintiff seeks to ascertain authoritatively if it must defend Robert L. Waugh in an action, believed to be imminent, against Waugh to be brought by Lawrence J. Hammond and if the plaintiff within the limits of its policy would be beholden to Lawrence J. Hammond to pay any recovered judgment.

Plaintiff contends that the policy confers no coverage for injuries to the assured's son, Lawrence, who "cannot reap the financial benefits of the policy and thus enrich himself from the funds of his own insurance company."

The justice below ruled:

> "Upon the wording of the policy with which we are here involved and a study of the authorities referred to, it is held:
>
> (1) That the plaintiff is obligated under its policy to the plaintiff, Lawrence Hammond, as an injured person, assuming of course, that liability under the facts is established."

The facts in the case at bar are established by the findings of the justice below and are not disputed.

The policy explicitly obligated the plaintiff to pay on behalf of an insured all legal damages which the latter should become liable to satisfy for actionable bodily injuries sustained *by any person.* By the policy the plaintiff undertook to defend any suit against an insured person for such damages. Robert Waugh was indisputably a person insured in as much as his use of the automobile at the time of the accident was by consent of Ernest L. Hammond, the named insured.

Plaintiff contends nevertheless that it is not bound by the policy either to defend Robert Waugh in a suit by the injured Lawrence J. Hammond for bodily injuries or to satisfy any damages awarded in such action. Lawrence J. Hammond had become an insured person under the policy because of his residence in his father's household and because of his usage of the automobile by permission of his father. But plaintiff argues that Lawrence J. Hammond cannot exact compensation from the plaintiff for his bodily injuries as the purpose and fulfillment of the policy were to hold an insured person harmless as to the bodily injuries of others and not at all to recompense an insured person for

his own personal injuries. In fine the plaintiff's contention is that the policy is not to be misconstrued or distorted into an undertaking of personal accident coverage for an insured person but must be regarded as affording only protection to an insured from public liability and not as contemplating indemnity of one insured person against a fellow insured.

For the judicial construction of policies of insurance this court has adopted and soundly applied certain rational canons.

> "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations that which will sustain his claim and cover the loss must, in preference, be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured. May on Insurance, Sec. 175, Note 1. The same author, by way of illustration, says: 'Thus, if a stipulation be ambiguous and no light can be thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is to be resolved against the party by whom and in whose favor the stipulation is made. Idem. The object of the contract being to afford indemnity, it will be so construed in case of doubt, as to support rather than to defeat the indemnity provided for. - - - - -"
>
> *Barnes* v. *Ins. Co.*, 122 Me. 486, 491.

" 'The conditions of an insurance policy should be considered liberally in favor of the insured.' Bartlett v. Union Fire Insurance Co., 46 Maine, 500. 'A forfeiture is to be construed strictly. Its enforcement is not to be favored.' North Berwick Co. v. New England Fire Insurance Co., 52 Maine, 336 - - "
Russell v. *Fire Ins. Co.,* 121 Me. 248, 252.

" 'In case of ambiguity, or inconsistency, it is often said that the court will give the policy a construction most favorable to the assured, for the reason that as the insurer makes the policy and selects his own language he is presumed to have employed terms which express his real intention.' Dunning v. Accident Ass'n., 99 Me., 390, 394, 59 A., 535."
Langevin v. *Prudential Ins. Co.,* 132 Me. 392, 396.

" - - - - Ambiguities in an insurance contract are resolved against the insurer - - - - "
Reliable Furniture Co. v. *Trust Co.,* 138 Me. 87, 90.

"A standard policy of insurance such as this is prepared by the insurers and should be interpreted most strongly against the defendant - - - - "
Shaw v. *Home Ins. Co.,* 146 Me. 453, 454.

"A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others. Blinn v. Ins. Co., 85 Maine, 389. Smith v. Blake, 88 Maine, 247."
Swift v. *Insurance Co.,* 125 Me. 255, 256.

The pertinent provisions of the insurance policy in the case at bar contain no ambiguities. Insurer and insured have expressed in plain language an undertaking by the plaintiff to defend and to indemnify an insured person, an authorized operator of the automobile, against the personal injury claim of, and for damages awarded to, "any person"

without exception here applicable. Plaintiff had enjoyed full contractual freedom when it issued the policy. Had the insurer plaintiff elected to except from policy coverage bodily injuries to insured persons it could have effected its purpose with trifling effort. *Sibothan* v. *Neubert* (Mo.), 168 S. W. (2nd) 981, 982; *Frye* v. *Theige,* 253 Wis. 596, 34 N. W. (2nd) 793, 794.

The defendant Waugh is personally obligated to Lawrence J. Hammond for any actionable and demonstrated damages. Waugh, an additional insured, was at the time of the accident plainly covered by the plaintiff's policy and accordingly entitled to its protection. Plaintiff has thus obligated itself to defend Waugh in a suit by Lawrence J. Hammond for the actionable injuries of the latter and if Waugh be adjudged legally liable for Hammond's bodily injuries plaintiff must discharge its financial responsibility for their compensation to the extent of its policy monetary limit.

Farm Bureau Mut. Ins. Co. v. *Garland* (N. H.), 126 A. (2nd) 246; *Maryland Casualty Co.* v. *U. S. Fidelity and Guaranty Co.,* 91 Ga. App. 635, 86, S. E. (2nd) 801; *Rodriguez* v. *State Farm Mut. Ins. Co.* (La.), 88 So. (2nd) 432; *Aetna Casualty etc. Co.* v. *Gen. Cas. Co.,* 140 N. Y. S. (2nd) 670; and authorities cited in the foregoing decisions.

The mandate must be:

Appeal denied.

JOSEPH PAUL LABREQUE

vs.

OREL E. HOLMES

Androscoggin. Opinion, March 20, 1963.

Negligence. Verdict.

The presiding justice can properly direct a verdict for the defendant, if it can be shown that as a matter of law the plaintiff did not exercise due care.

ON APPEAL.

This negligence action is on appeal from the direction of a verdict by the presiding justice. Appeal denied.

Edward J. Beauchamp, for Plaintiff.

Mahoney, Desmond, and Mahoney,
by *James R. Desmond,* for Defendant.

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

WILLIAMSON, C. J. This negligence action is before us on appeal from the direction of a verdict for the defendant.

The plaintiff, a tenant of the defendant, fell on the ice while walking on the driveway which the parties used in common and which the defendant landlord had agreed to keep "cleaned and plowed." There was no evidence to indicate that the ice accumulated from other than natural causes.

The plaintiff, who had been ill for a short period, was advised by his physician, "You got to get a little exercise, and get the air." At noon on a "nice, sunny day" in January the plaintiff went for a walk on the driveway. He

could have walked from the garage to the corner of his house and return without crossing the ice, which he had observed. He preferred, however, to go further and to cross the ice. On retracing his steps he crossed the ice a second time without incident. On crossing the ice a third time, the plaintiff slipped, fell and was injured.

The plaintiff had no purpose in walking other than to obtain exercise. He was in no sense a captive on his premises seeking a path of escape. There was no emergency or urgency whatsoever requiring that he cross the ice.

In our view, an ordinarily prudent and careful person under the same circumstances would not have crossed the ice with the risk of falling. *Rosenberg* v. *Bank,* 126 Me. 403, 139 A. 82, 58 ALR 1405. Cf *Thompson* v. *Frankus,* 151 Me. 54, 115 A. (2nd) 718; *Daniel* v. *Morency,* 156 Me. 355, 165 A. (2nd) 64.

In reaching this conclusion we have taken the evidence in the light most favorable to the plaintiff. The presiding justice properly directed the verdict on the ground that the plaintiff as a matter of law was not in the exercise of due care.

The entry will be

Appeal denied.

STATE OF MAINE

vs.

GERARD CHARETTE

York. March 21, 1963

Reckless Driving. Indictment. Demurrer. Statute.

If the statute does not sufficiently set out the facts which constitute the crime, then the pleadings must contain a more definite statement of the facts.

Although a respondent has a constitutional right to have the written allegation of the accusation full and complete, the prosecutor is not required to make averments in indictments or complaints to the degree that they become a recital of evidence.

ON EXCEPTIONS.

This is a bill of exceptions taken to the overruling of a demurrer attacking the sufficiency of the indictment. Exceptions overruled.

John J. Harvey, County Attorney,
George S. Hutchins, Asst. County Attorney, for the State.

Robert G. Pelletier, for the Defendant.

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

TAPLEY, J. On exceptions. The respondent was indicted under provisions of P. L., 1957, Chap. 333, Sec. 2, as amended (now Chap. 22, Sec. 151-B, R. S., 1954). The pertinent portion of the section reads:

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

The respondent filed a demurrer attacking the sufficiency of the indictment. The demurrer was overruled, whereupon the respondent took exceptions.

The indictment is couched in the following language:

"STATE OF MAINE

YORK, ss.

At the Superior Court, begun and holden at Alfred within and for the County of York, on the first Tuesday of MAY in the year of our Lord one thousand nine hundred and sixty-two

THE GRAND JURORS FOR SAID STATE upon their oath present that Gerard Charette of Sanford in the County of York, laborer, on the twenty-third day of March in the year of our Lord one thousand nine hundred and sixty-two at Old Orchard Beach in the County of York, with force and arms did willfully, unlawfully and feloniously operate a motor vehicle, to wit, an automobile, over and upon Saco Avenue, so called, in said Old Orchard Beach, with reckless disregard for the safety of others, to wit, with reckless disregard for the safety of Joseph Vincent Bell, in that he did then and there fail to keep a proper lookout under the surrounding circumstances, and failed to see said Joseph Vincent Bell who was crossing said Saco Avenue, did then and there fail to have his motor vehicle under proper control, did then and there operate said motor vehicle knowing that said motor vehicle was not then and there provided with brakes adequate to stop said motor vehicle and sufficient to control said motor vehicle, whereby the said Gerard Charette did then and there operate his said motor vehicle on and into the person and body of said Joseph Vincent Bell and did then and there cause the death of said Joseph Vincent Bell within one year thereafter and on the twenty-third day of March, 1962, against the peace of said State, and contrary to

the form of the Statute in such case made and provided.

A TRUE BILL

Kenneth R. Stowe FOREMAN.

John J. Harvey

Attorney for the State for said County."

The respondent contends that the indictment is insufficient in law because:

"1. The indictment fails to appraise the respondent of what the 'surrounding circumstances' were.

2. The indictment fails to appraise the respondent of the manner in which he failed to have the motor vehicle under proper control.

3. The indictment is insufficient in that it does not allege that an unlawful act committed by the respondent was the proximate cause of death.

4. The indictment is insufficient in that it does not state the date said Joseph Vincent Bell died.

5. The indictment fails to contain all the allegations necessary to sustain an indictment of reckless homicide in that it does not sufficiently set out the facts that make the crime, and therefore the respondent is not appraised of what the State is attempting to prove."

If the statute does not sufficiently set out the facts which constitute the crime, then the pleadings must contain a more definite statement of the facts. *State* v. *Strout,* 132 Me. 134; *State* v. *Lashus,* 79 Me. 541.

The object of an indictment is (1) to furnish the respondent with a *reasonable* recital of the alleged crime so that he is sufficiently apprised of the charge in order that he may properly prepare his defense; (2) to enable him to use a conviction or acquittal for his protection against a further prosecution for the same cause; (3) to give the

court sufficient information to determine whether the facts alleged in the indictment would support a conviction should one be obtained. *State* v. *Strout, supra; State* v. *Beattie,* 129 Me. 229; *State* v. *Navarro,* 131 Me. 345. In the instant case counsel for the respondent, in contention, says that the indictment, although it contains more than the mere words of the statute, nevertheless lacks sufficiency in law because it fails to describe the charge with the exactness and precision which proper criminal pleading requires.

The test to be applied is whether a respondent of reasonable and normal intelligence, would, by the language of the indictment, be adequately informed of the crime charged and the nature thereof in order to be able to defend and, if convicted, make use of the conviction as a basis of a plea of former jeopardy, should the occasion arise.

This court recently had occasion to consider an indictment of similar import and content in the case of *State* v. *Child,* 158 Me. 242 (1962). The similarity of the pleadings in the *Child* case and the instant case, in our view, bears heavily on determining that the indictment now under consideration is sufficient.

The respondent has a constitutional right, in being charged with crime, to have the written allegation of the accusation full and complete, both as to statutory language and words descriptive of the alleged crime in case the language of the statute is so vague and indefinite as to require further description of the substance, nature or manner of the offense. The prosecutor, however, is not required, by the accepted rules of criminal pleading, to make averments in indictments or complaints to the degree they become a recital of evidence.

The justice below was not in error in overruling the demurrer.

Exceptions overruled.

EUGENE F. MESERVE

vs.

ALLEN STORAGE WAREHOUSE CO., INC., ET AL.

Cumberland. Opinion, March 25, 1963.

Negligence.

A licensee enters a building at his own risk, and is bound to take the premises as he finds them.

ON APPEAL.

The plaintiff appeals from the direction of verdicts by the presiding justice. Appeal denied.

Julian C. Hubbard, for Plaintiff.

James R. Desmond, for Defendant.

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

WILLIAMSON, C. J. This negligence case is before us on appeal from the direction of verdicts for the defendants at the close of the plaintiff's case. Under the familiar rule we take the evidence with the reasonable inferences in the light most favorable to the plaintiff. *Ward* v. *Merrill,* 154 Me. 45, 141 A. (2nd) 438; *Sweet* v. *Austin,* 158 Me. 90, 179 A. (2nd) 302; Maine Rules Civil Procedure, Rule 50; Field & McKusick, Maine Civil Practice, § 50.1 *et seq.*

The plaintiff fell through an unguarded elevator shaft on premises in Portland owned by defendant Allen Storage Warehouse Co., Inc. (hereinafter called Allen) and used for purposes of a storage warehouse. The action is against Allen and Mr. Harold A. Putnam, a warehouseman employed by Allen.

The plaintiff was a dishwasher in a restaurant across the street from the warehouse. Putnam spoke to the plaintiff at the restaurant, suggested that he had some work for him at the warehouse and requested him to come there after he was through work. At about 2:45 o'clock in the afternoon the plaintiff crossed the street to the warehouse and entered through an open door which, as he said, was a "large door where the truck was backed in." He then proceeded in a narrow space between the wall and the right side of the truck until he fell into the elevator shaft. In his words,

"Q Could you see where you were going, or couldn't you, ahead of you?

"A No.

"Q You couldn't?

"A No. It was all dark.

"Q And you walked along until you fell into the shaft; right?

"A Right."

To the left of the large open door was a door marked "office" which the plaintiff observed as he entered the building. The plaintiff did not know Putnam's position with Allen and he had never before been in the warehouse.

Putnam and Mr. MacKenzie, manager of Allen, were called to the stand by the plaintiff. The evidence was clear and unequivocal that Putnam had no authority to hire employees for Allen.

The verdicts were properly directed.

First: The plaintiff failed to establish that he was an invitee of Allen at the warehouse. At best, with respect to Allen, he was a licensee who came to the warehouse to see Putnam. Allen owed to the plaintiff the duty to refrain from wanton, wilful or reckless acts of negligence, and no

more. "As a mere licensee, he went in to the building at his own risk, and was bound to take the premises as he found them." *Stanwood* v. *Clancey,* 106 Me. 72, 75 A. 293; *Robitaille* v. *Maine Central Railroad Co.,* 147 Me. 269, 86 A. (2nd) 386; *Lewis* v. *Mains,* 150 Me. 75, 104 A. (2nd) 432; *Robinson* v. *Leighton,* 122 Me. 309, 119 A. 809; *Parker* v. *Portland Publishing Co.,* 69 Me. 173; *Dixon* v. *Swift,* 98 Me. 207, 56 A. 761; Annot. 89 A. L. R. 757. On this ground alone the verdict was properly directed in favor of Allen.

Second: Putnam may be said to have invited the plaintiff to see him at the warehouse. From the record, there appears no reason whatsoever on the part of Putnam to have anticipated that the plaintiff would do more than enter the office and inquire for him. There was no invitation to the plaintiff to enter through the truck entrance or to be in that part of the warehouse where the business was actively conducted. Evidence of negligence on the part of Putnam with reference to the plaintiff is totally lacking. For this reason alone the verdict for Putnam was properly directed.

Third: A second compelling ground for direction of each verdict was that the plaintiff as a matter of law was guilty of contributory negligence. Without reviewing again the facts, it appears that the plaintiff, who had never been in the warehouse, undertook to walk between a wall and a truck in darkness and without seeing where he was going fell into an unguarded elevator shaft. He was "a stranger wandering ignorantly in the dark," to use the expressive words of Justice Cornish in *Cook* v. *McGillicuddy,* 106 Me. 119, 122, 75 A. 378.

> "It is impossible to resist the conclusion that the plaintiff was guilty of that thoughtless inattention which has been said to be the very essence of negligence." *Stanwood* v. *Clancey, supra.*

See also *Olsen* v. *Portland Water District,* 150 Me. 139, 107 A. (2nd) 480; *Daniel* v. *Morency,* 156 Me. 355, 165 A. (2nd) 64; *Parker* v. *Portland Publishing Co., supra;* Annot.

34 A. L. R. (2nd) 1366, 1406, 1441; Annot. 163 A. L. R. 587.

Illustrative cases on contributory negligence in analogous situations are: *Curet* v. *Hiern,* 95 So. (2nd) 699 (C. A. La.); *Tryba* v. *Fray* (Nev.), 339 P. (2nd) 753; *Tyler v. Martin's Dairy, Inc.* (Md.), 175 A. (2nd) 587; *Keller* v. *Elks Holding Co.,* 209 F (2nd) 901 (8th Cir. 1954); *Benton* v. *Watson,* 231 Mass. 582, 121 N. E. 399.

The entry will be

Appeal denied.

JOYIME LEVESQUE

vs.

FRASER PAPER LIMITED

Aroostook. Opinion, March 26, 1963

Damages. Negligence. Latent Danger.

An employer has an affirmative duty to warn and instruct employees concerning the dangers of their work.

It is the duty of the owner-contractee to give notice of danger, actual or latent, in premises he turns over to an independent contractor; this duty extends to the independent contractor's employees.

ON APPEAL.

This is on appeal by the plaintiff from summary judgment for defendant based upon complaint, answer, interrogatories to defendant and answers thereto, pre-trial order

and motion therefore under Rule 56 M. R. C. P. Appeal sustained.

Rudolph T. Pelletier, for Plaintiff.

Scott Brown, for Defendant.

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

MARDEN, J. On appeal by the plaintiff from summary judgment for defendant based upon complaint, answer, interrogatories to defendant and answers thereto, pre-trial order and motion therefor under Rule 56 M. R. C. P.

The pleadings, interrogatories, replies, and stipulations in the pre-trial order established the basis of the trial court's consideration, and for the purpose of testing the validity of the summary judgment we accept as true the following allegations in the record:

The plaintiff was an employee of Consolidated Constructors, Inc., hereinafter designated as "Contractor," which company undertook for a sum certain to demolish a railroad loading shed belonging to the defendant. This building was erected in 1927 and prior to the date of plaintiff's injury had been unused for "several weeks." The roof had not been repaired since its construction, but had been inspected annually. It would appear that the defendant may have relinquished to Contractor the custody, control and management of the building as early as March 10, 1959, but the date upon which the Contractor began work does not appear. In the course of the demolition work on June 29, 1959, the plaintiff, at the direction of his employer, the Contractor, had occasion to mount the roof of the shed, which roof "gave way and collapsed" precipitating plaintiff into a fall of approximately 40 feet and resulting in his serious personal injury.

At the time of the plaintiff's injury the building was not being used in any way connected with the defendant's business, the defendant had no property located in said building and had no employees working in or about the building. The Contractor had complete control of the building relative to its demolition, supplied its own crew and determined the methods used to prosecute the work. We hereinafter treat the Contractor as an independent contractor.

Plaintiff complains in negligence "that the defendant failed to warn, inform, instruct and otherwise bring to the attention of the plaintiff the defective and dangerous condition of said roof, which it had knowledge of, or which in the exercise of due care it should have had knowledge of, or which in the exercise of due care it should have had knowledge of" (Complaint). The defendant does not admit "not informing, warning or otherwise bringing to the attention of the plaintiff the defective and dangerous conditions of the roof on said building" (Defendant's reply to interrogatories) but contends that it owed no such duty to the plaintiff, the plaintiff being an employee of an independent contractor engaged to demolish the building; and that as to the Contractor, it was independent and that "the defendant was under no obligation to do anything, except to pay" (Defendant's reply to interrogatories) Contractor for its services. It is noted that plaintiff does not allege that defendant failed to notify Contractor of the allegedly dangerous condition of the roof.

For our purposes we infer, as did the trial court, that the roof was in fact defective, and that defendant did not give either plaintiff or Contractor notice of such defect.

In passing it is to be noted also that the record does not disclose whether the defendant's shed here involved had reached a state of disrepair which might have exposed it to Section 25 of Chapter 141, R. S. as a nuisance or whether

the building was being razed for other business reasons. We proceed upon the assumption that the building was not a "nuisance."

Upon the above facts and respective contentions the trial court granted summary judgment for the defendant, which grant had to be predicated upon a determination by it that there was "no genuine issue as to any material fact" and that the defendant was entitled to judgment as a matter of law. Rule 56 (c) M. R. C. P.

The parties agree that whether or not there was a genuine issue as to any material fact depends upon the duty, if any, imposed by the legal relationships among the defendant-contractee, the Contractor, as an independent contractor, and the plaintiff as an employee of the independent contractor. The trial court determined that the defendant-contractee owed no duty to the independent contractor or the plaintiff-employee of the independent contractor to warn of any structural defects in the roof of the building subject to demolition. Absent such a duty, actual or constructive knowledge of such defect on the part of the defendant-contractee becomes of no moment.

In examining the validity of the summary judgment, our attention is attracted to two allegations by the plaintiff, first, that the plaintiff *had no knowledge of a defective and dangerous condition of the roof* and *could not have ascertained such condition in the exercise of due care,* of which allegations "the defendant has no knowledge or information sufficient to form a belief * * * and, therefore, denies" (Answer) and, second, that the defendant *had knowledge of* or *in the exercise of due care should have had knowledge of* the defective and dangerous condition of the roof, which allegation the defendant denies. These claims by plaintiff and these denials by defendant create issues. Whether or not these issues are material governs our approach to this appeal.

As to the first, the plaintiff pleads a defective condition of the roof which he, in the exercise of due care, could not have ascertained, which pleading, by definition, declares that there was a hidden or latent defect in the roof.

> "Latent" means hidden, concealed, dormant and that which does not appear on the face of a thing. *McDaniel* v. *Drilling Co.*, 343 S. W. (2nd) 416, 420, (Ark. 1961).
>
> A "latent danger" in a structure upon which work is to be performed, is one that is neither visible nor discoverable by ordinary inspection or test. *Paul* v. *Edison Corp.*, 155 N. Y. S. (2nd) 427, 436, (N. Y. 1956).
>
> A "latent defect" is one which is hidden from knowledge as well as from sight and one which could not be discovered by ordinary and reasonable care. *Garshon* v. *Aaron*, 71 N. E. (2nd) 799, 801 (Ill. 1947).

If the condition of the roof is of no significance with relation to defendant's duty, knowledge by the defendant of that condition is immaterial, but if there be present a condition which affects the defendant's duty, defendant's denial of such a condition creates a material issue.

As to the second, if, regardless of the facts, there be absence of duty on the defendant to warn plaintiff or Contractor of defects, actual or constructive knowledge on the part of the defendant is immaterial, but if there be present the actual or constructive knowledge by the defendant and that knowledge affects defendant's duty, the allegation by plaintiff of defendant's actual or constructive knowledge of a roof defect, and defendant's denial thereof, creates a material issue.

Summarizing at this point, the plaintiff pleads the existence of a building with a latent, defective and dangerous condition in its roof, of which defective and dangerous

condition the defendant had knowledge, or of which, in the exercise of due care, it should have had knowledge, being surrendered to an independent contractor for demolition, of which independent contractor the plaintiff was an employee, without notice to the Contractor or the plaintiff of such roof condition. Under this situation what duty, if any, did the defendant owe the Contractor and the plaintiff?

While a legal status peculiar to landowner-independent contractor relationship is recognized in Maine as shown by *Leavitt* v. *B. & A. Railroad Company,* 89 Me. 509, 36 A. 998; *Boardman* v. *Creighton,* 95 Me. 154, 49 A. 663; and *Wilbur* v. *White,* 98 Me. 191, 56 A. 657, no case has been called to our attention, nor do we find one, declaring the respective rights and obligations as among a landowner, an independent contractor and the independent contractor's employees.

In *Boardman* an employee of an independent contractor engaged in quarrying limerock for the defendant mine owner was killed by a fall of rock and in a complaint by the administratrix of the deceased against the mine owner alleging negligence on the part of the mine owner, a demurrer to the declaration was sustained on appeal because of absence of allegation that the quarry was unsafe when the plaintiff's independent contractor-employer took possession, out of which unsafety a duty on the part of the defendant owner might have arisen. The case implies that had there been an unsafe condition of the quarry when the quarry was turned over by owner-contractee to the plaintiff's independent contractor-employer a duty might have arisen on the part of the defendant owner in favor of the independent contractor or the decedent employee-plaintiff.

We then resort to text law and find that:

> "Although one employs an independent contractor to do certain work, and although he thereby escapes liability for the negligence of such con-

> tractor, he is nevertheless answerable for his own negligence. * * * if an injury is caused by his own negligence, * * * the employment of such contractor is no defense, notwithstanding the injury is occasioned to a person in the employ of such contractor. * * * In accordance with the familiar principle that every man who expressly or by implication invites others to come upon his premises assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware, if the owner negligently permits a defect to exist in his premises before a contractor commences his work, and a servant of the contractor * * * thereby receives an injury, it is obvious that the employment of the contractor is of no import in determining the owner's liability." 27 Am. Jur., Independent Contractors § 30, Pages 508, 509, 510.
>
> "* * * where there is some hidden danger connected with the condition of the premises which the owner * * * having the work done knows or should know of, and of which the servants of the independent contractor * * * do not have actual or constructive notice, the owner * * * owes a duty to use reasonable care to protect the servants from the danger, and he will be liable for injuries sustained by a servant who has not been duly warned of the danger." 57 C. J. S., Master and Servant § 606, Page 378.

See also § 279 Shearman & Redfield on Negligence, Rev. Ed. Vol. II, and § 343 Restatement, Torts.

Cases on point are found in *Brown* v. *Trustees, Leland Stanford University*, 182 P. 316, 319 (under headnote 5) (Cal., District Court of Appeal, 1919) Owner's duty to notify contractor or employee; *Calvert* v. *The Light & Power Company*, 83 N. E. 184, 185 (Ill. 1907) Owner's duty to notify contractor or servants; *Gallo* v. *Leahy*, 8 N. E. (2nd) 782, 784 (headnote 1-4) (Mass. 1937) Own-

er's duty to notify workmen; *Williams* v. *United Men's Shop, Inc.,* 58 N. E. (2nd) 2, 3 (under headnote 1-3) (Mass. 1944) Owner's duty to notify employee; *Snodgrass* v. *Cohen,* 96 F. Supp. 292, 294 (headnote 1, 2) (*D. C.* 1951) Owner's duty to warn contractor or employees; *Florida Light & Power Company* v. *Robinson,* 68 So. (2nd) 406, 411 (headnote 2-5) 413 (under headnote 7) (Fla. 1953) Owner's duty to notify contractor; *Belliveau* v. *Greci,* 157 A. (2nd) 602, 603 under headnote 1) (Conn. 1960) Owner's duty to warn contractor; *Engle* v. *Reider,* 77 A. (2nd) 621, 624 (Pa. 1951) (under headnote 1) Owner's duty to warn contractor; *Stevens* v. *United Gas & Electric Company,* 60 A. 848, 853 (N. H. 1905) Owner's duty to warn employee; and *Wells* v. *The Coal Company,* 162 S. W. 821, 822 (Ky. 1914) (under headnote 2) Owner's duty to warn contractor and his servants; see also Annot. 44 A. L. R. 932.

We are conscious that the cases cited are not uniform in their declaration of the basis of the owner-contractee's duty to "warn" i.e. whether arising only out of actual knowledge of latent defects, or, as well out of constructive knowledge of latent defects.

It is our conclusion that there is a duty on the part of the owner-contractee to give notice of danger actually or constructively known by him to be latent in the premises being turned over to an independent contractor and that this duty extends to the independent contractor's employees.

> The line of cases here used does not involve premises which, at the time of their surrender to the independent contractor, could be legally characterized as nuisances, or property affected by public uses, or property involving an unlawful operation, or property involving inherently dangerous work, as to which situations and the law applicable thereto, we are not here concerned.

A resolution of the issues before us requires us to go no further, but inasmuch as our conclusion will of necessity apply to the ultmate trial of this case it is considered appropriate to determine in what manner the duty which the law imposes on the owner-contractee may be fulfilled.

The series of cases last cited, bearing upon the establishment of the duty with which we are concerned, do not answer this question definitively. Text law states that:

> "Warning (of danger) to the superiors in employment of a person is warning to that person, the employment relation permitting a reasonable assumption that such notice will be communicated in the ordinary course to all employees in the work." Shearman & Redfield on Negligence, Rev. Ed. § 26, Page 66.

This statement is obviously grounded upon firmly established law that the employer has an affirmative duty to "warn and instruct" employees concerning the dangers of their work.

35 Am. Jur., Master and Servant, § 145

Shearman & Redfield on Negligence, Rev. Ed., § 213.

56 C. J. S., Master and Servant, § 287

Some cases on point are as follows:

Storm v. *New York Telephone Co.*, 200 N. E. 659 (N. Y. 1936); *Schwarz* v. *General Electric Realty Corporation*, 126 N. E. (2nd) 906 (Ohio 1955) (under headnote 1-3); *Valles* v. *People's Trust Company*, 13 A. (2nd) 19, 23 (Pa. 1940) (under headnote 7); *Grace* v. *Henry Disston & Sons, Inc.*, 85 A. (2nd) 118, 119 (Pa. 1952) (under headnote 1, 2); *Texas Service Co.* v. *Holt*, 249 S. W. (2nd) 662, 666 (Texas 1952) (under headnote 3); *Gulf Oil Corporation* v. *Bivins*, U. S. Court of Appeals, certiorari denied 81 S. Ct. 70, and Re-hearing denied 81 S. Ct. 231; 276 F. (2nd) 753, 758 (Texas 1960) (under headnote 8, 9); *Engle* v. *Reider*,

supra. These cases and their holdings as to adequacy of notice given only to the independent contractor or someone in charge of the operation on the independent contractor's behalf, reflect, as indeed we must, the realistic problem posed by the not uncommon turnover of help hired by the independent contractor, the varying numbers involved and the probable absence of normal communication between the owner and independent contractor's employees. As the court said in *Storm,* "to require the defendant (owner-contractee) to bring notice home to every employee * * * who might possible be involved on this job on penalty of otherwise failing in duty would result in imposing a standard of duty exceeding reasonable bounds."

We declare, therefore, that in this case, assuming a latent dangerous defect in the roof of the loading shed, of which defect the defendant had actual or constructive knowledge, and out of which defect and knowledge arose a duty on the part of the defendant to notify plaintiff or Contractor, such duty could be performed by giving notice of the danger actually or constructively known by it to be latent in the roof of the loading shed to the Contractor, or someone in charge of the operation on Contractor's behalf.

We must conclude that the alleged existence of a latent danger in the roof of the defendant's building, the presence of which is denied by defendant, and the declaration by the plaintiff of actual or constructive knowledge on the part of the defendant of the hidden danger, which knowledge the defendant denies, from which knowledge a duty on the part of the defendant to the plaintiff would be created, are both genuine issues of material facts, and it follows that the granting of summary judgment to the defendant was error.

Appeal sustained.

STATE OF MAINE
vs.
PAUL E. GREENLAW

STATE OF MAINE
vs.
THOMAS J. LAYTE

Cumberland. Opinion, March 26, 1963.

Criminal Law. Constitutional Law. Intent. Instructions.

The intent to deprive the owner, permanently of his property is the gist of the offense of larceny.

It is a constitutional right of the accused to have the issue as to the prevalence of finality in the intent motivating his taking of the object submitted to the jury for resolution and decision.

ON EXCEPTIONS AND APPEAL.

Exceptions are taken to specific instructions rendered to the jury by the presiding justice; the failure of the justice to communicate certain requested instructions to the jury; and to the failure of the justice to not direct verdicts of not guilty. Respondents appeal the denial of a motion for new trial. Exceptions sustained. Appeal sustained. Motion for new trial granted.

Arthur Chapman, Jr., County Attorney, for the State.

Basil A. Latty, for the Defendants.

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

SULLIVAN, J. By separate indictment each respondent was accused of robbery. The same criminal incident was

detailed in each accusation and the respondents were jointly tried by jury. Verdicts of guilty were returned. The respondents here prosecute their exceptions to specific instructions rendered to the jury by the presiding justice, to the refusal of the justice to direct verdicts of not guilty, and to communicate certain requested instructions to the jury. Respondents appeal from the denial of their motions for new trials.

The indictments charged that at Portland on April 4, A. D. 1961 each respondent respectively:

> "- - - - on one George W. Berry feloniously did make an assault, and by force and violence, One motor vehicle, to wit, a 1959 Ford four-door taxicab, color red and yellow, of the value of Eighteen hundred dollars, of the property of Central Cab Company, Inc., a corporation - - - - - - - from the person of said George W. Berry feloniously did steal, take and carry away - - - -"

The case record affords this narration. On April 4, 1961 the respondents and three male companions had consigned and abandoned themselves to a drinking bout and carouse. They rented a taxicab operated by George W. Berry and paid him the fare for a trip to Biddeford but forthwith altered their plan and instructed Berry to proceed to Westbrook. En route, at the Portland City Hospital Layte voiced a desire to visit a friend and inmate and had Berry stop the cab and turn off the motor. Berry was at the driver's wheel. Greenlaw sat at Berry's right and Layte occupied the other end of the front seat. The other three passengers were in the rear portion of the cab. Greenlaw put his hand into his shirt and pressed something into Berry's ribs, advised Berry that he, Greenlaw, had a gun and demanded Berry's money. Layte left the cab through its right front door, passed in front of the vehicle and opened the left front door. He seized Berry's left arm and put his knee against Berry. Layte's other hand remained

in Layte's pocket. He admonished Berry that he, Layte, had a knife, demanded Berry's money, said he was taking the cab and attempted to push Berry over to the middle of the seat. The companions fled out of the back of the cab and disappeared. Greenlaw gripped Berry's shirt. A nurse on the hospital veranda heard the altercation and witnessed the struggle. She yelled. Layte, distracted or alarmed momentarily desisted from his attack on Berry who wrenched himself free from Greenlaw and propelled himself out of the cab. Berry ran into the hospital to notify the police by telephone. Layte accompanied by Greenlaw drove the cab away in the direction of Westbrook. The time was then approximately 12:45 P.M.

Within the hour in Westbrook at a distance of one-half mile from Portland City Hospital Layte and Greenlaw were found lying asleep in the snow not far from the parked and empty taxicab.

The taxicab possessed a yellow body and red fenders. Painted upon each side in three inch letters of red was the name, Central Cab Company. The vehicle was designedly a cynosure adapted to attract public gaze and notice. Any prospect of stealing, secreting and marketing it in its conspicuous state must be regarded as highly delusive.

The statute defining and punishing robbery reads as follows:

> "Whoever by force and violence or by putting in fear, feloniously steals and takes from the person of another property that is the subject of larceny is guilty of robbery and shall be punished - - - -" R. S. (1954), c. 139, § 16.

Robbery has been described as:

> "- - - - It is 'larceny committed by violence from the person of one put in fear'."
> *State* v. *Perley*, 86 Me. 427, 432.

R. S., c. 132, § 1 generically defines larceny and assigns its punishment:

> "Whoever steals, takes and carries away, of the property of another, money, goods or chattels, - - - - is guilty of larceny; and shall be punished - - - -"

For larceny to obtain the taking of a thing must generally be accompanied by a purpose to deprive the owner or possessor of the chattel permanently.

> "In order to constitute a larceny there must be not only a taking and carrying away of the goods of another, but there must also exist contemporaneously the felonious intent, the animus furandi, on the part of the taker, which means a taking without excuse or color or right with the intent to deprive the owner permanently of his property and all compensation therefor. The felonious intent is the very gist of the offense - - - -"
> *Stanley* v. *Prince,* 118 Me. 360, 364.

> "- - - - This court in criminal prosecutions and in a libel suit has considered larceny as a carrying away with animus furandi. There must be a felonious intent to deprive the owner permanently. - - - -"
> *Wheeler* v. *Phoenix Assurance Co.,* 144 Me. 105, 109.

> "- - - - 'A felonious intent' observes Baron Parke, in *Regina* v. *Holloway,* 2 Cor. & Kir., 61 E. C. L., 944, 'means to deprive the owner, not temporarily, but permanently of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner.' "
> *State* v. *Coombs,* 55 Me. 477, 480.

> "A conviction for larceny will not be sustained unless a felonious intent at the time of the taking is shown. Generally, the intent must be to deprive the owner permanently of the property;

> merely borrowing property for a temporary use does not constitute larceny. Intent is a jury question."
>
> Underhill's Criminal Evidence, 5th ed., Herrick, Larceny, Vol. 3, P. 1440. See, also, Larceny, 32 Am. Jur., § 37, P. 927; Wharton's Criminal Law, 12th ed., Ruppenthal, Larceny, Intent, Vol. 2, § 1122, P. 1431; *Poster* v. *Andrews,* 183 Tenn. 544, 194 S. W. (2nd) 337, 339; *Putinski* v. *State,* 223 Md. 1, 161 A (2nd) 117, 119.

The presiding justice in his instructions to the jury discoursed upon the applicable elements of the inclusive and complex crime of robbery, as follows: (italics supplied).

> "- - - - You will note from my reading of the statute that in order for a person to be found guilty of robbery, such person must use force and violence, or place the other person, in this case, George Berry, in fear, *and have feloniously stolen and taken* from George Berry *the automobile* described in the indictment, and in the custody of George Berry - - - -
>
> "However, if you find that either force and (sic) violence was used, or Berry was put in fear, then there is another element which you must consider, and that is, did the respondents intend to commit a *larceny.* The *intent to commit the crime* is an essential element and requires proof on the part of the State - - - -
>
> "- - - - The respondents say to that: 'No, we are not guilty even though you find that the evidence is sufficient to satisfy you that the elements of force and violence or fear, and of the *taking of the automobile,* as we were at that particular time in such a state of intoxication as not to be able to form an intent which is a necessary element to the commission of the crime of robbery.' - - - -
>
> "If you find, as a matter of fact, the respondents did either use force and violence, or place Berry

in fear, and *did steal the automobile, with the intent to commit larceny,* then the respondents, in order to be excused from the commission of the offense, must satisfy you by a preponderance of the evidence, that is by the weight of the evidence, that they were in that state of intoxication which stripped them of the mental faculties necessary to form an intent - - - -

"- - - - And if you find that they did take part, or did use force and violence, or fear, then you go on to the next step as to whether *they did actually take from another property of value* - - - -

"- - - - if they had that faculty to form an intent *to take from the possession of George Berry, this taxicab with the intent to deprive him of it,* then they would be guilty of the offense (robbery)

"If you find that the respondents or either of them, on the facts as you determine them to be, after applying the law that I have given you, are not guilty of robbery, that does not end the case, because then you have to go to the question of larceny. Generally speaking, all the rules that I have given you pertaining to robbery apply to larceny, excepting as you will see from my reading of the statutes pertaining to larceny. Our Legislature has said: '*Whoever commits larceny from the person of another shall be punished* - - - -" You see that in the first instance, robbery is nothing more or less than larceny, but a grossly more serious offense. Of course, you will remember in robbery is needed the force and violence, or fear. In larceny the law does not require that there be force and violence, or fear, but the law does require intent - - - - Your first thing is to *consider as to whether there was a taking of this automobile* by the respondents. Of course, *if there was no taking,* there wouldn't be any offense committed. *If you find* on the evidence, and are satisfied, *that there was a taking,* then, of course, you have to consider *by that taking did they intend to deprive that person the possession of the property* of

> which he was possessed. Now, there, again the State says that the respondents did intend to commit the larceny and says to you that you may infer that intent from the commission of the act itself - - - - - - - If you find in the first place that there was no taking, and you again find *that there was no intent to commit the larceny; no intent to deprive the owner or person in possession of the automobile, there wouldn't be any larceny;* that would end that, and they would be entitled to a *verdict of not guilty of larceny.* If you find there was a taking and there was an intent, then you consider the affirmative defense. (intoxication) - - - - - -"

At the close of the presiding justice's charge to the jury the respondents requested that the following instruction be given:

> "If you find that Respondents intended to take the cab but to take it only temporarily, then your verdict as to robbery and also larceny must be not guilty."

The presiding justice refused to comply "except as it may already be covered by my instructions." Respondents have perfected their exception to such judicial ruling.

In *York* v. *Railroad Co.*, 84 Me. 117, 128 it is stated:

> "- - - - He (the judge presiding) shall do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence and form a correct judgment - - - -"

The court's instructions nowhere contain in commonplace or familiar language any explanatory notification or interpretative amplification to the jury apprising them that to verify robbery or larceny the evidence adduced must demonstrate beyond any reasonable doubt a taking by a respondent with intent to deprive the chattel's owner or possessor *permanently* of the object appropriated. Such expressions as "feloniously stolen and taken," "commit a

larceny," "steal the automobile, with the intent to commit larceny," were utilized. To the legally subtilized such clauses and phrases have a clear but scholastic connotation. To a jury of lay folk they are doubtlessly just recondite vocabulary. Indeed, a comprehensive definition of the crime of larceny is not easy of attainment even for the legal elite.

> "- - - - Notwithstanding the frequency of the offence, neither law writers nor judges are entirely agreed on its exact definition - - - -"
>
> May's Criminal Law, Beal's, 2nd ed., Larceny, § 270. See, also, Wharton's Criminal Law, 12th ed., Vol. 2, Larceny, §§ 1096, 1097.

The intent to deprive the owner permanently of his property is of the very gist of the offense of larceny. *Stanley* v. *Prince, supra.*

The instructions include such diluted or broad phraseology as "whether they did actually *take* from another property of value," "an intent to *take* from the possession of George Berry, this taxicab with the intent to deprive (how long?) him of it," "whether there was a *taking* of this automobile," "no taking," "if you find - - that there was a *taking* - - - by that taking did they intend to *deprive* that person the possession of the property."

Robbery is a major crime. Such an estimation is attested by the punishment fixed at any term of years. R. S., c. 130, § 16. By contrast the mere taking of an automobile without authority from its owner or without the consent of the owner or custodian has been classified by the Legislature as a misdemeanor. R. S., c. 22, § 149, as amended; R. S., c. 131, § 25. In a trial of the gravity of the case at bar the respondents were rightfully entitled to an exposition of the indispensable element of *animus furandi* or the essential intent to deprive *permanently.* There was evidence at the trial of a hue and cry raised by

the nurse and by Berry at the City Hospital, a crisis potentially adapted to have occasioned and precipitated the flight of the respondents with the taxicab. There was the brief dominion of the respondents over the vehicle and their early abandonment of it - - the egregious unmarketability of the extravagantly colorful automobile - - the dissipated condition and mettle of the respondents. Such circumstances could well have posed a crucial jury question as to whether the expropriation of the taxicab at midday in a public place was a larcenous theft or a sodden escapade. It was the constitutional due of the respondents to have that issue as to the prevalence of finality in the intent motivating their taking of the taxicab unmistakably and beyond peradventure submitted to the jury for resolution and decision.

While in technical and juristic terms the justice presiding academically and formally told of felonious stealing and larceny, as such, we are constrained to conclude that the instructions in their totality generate an irresoluble doubt as to the adequacy of the jury understanding of the law applicable to the fact of taking, here. The instruction requested by the respondents would have afforded an elucidation which under the circumstances must be deemed to have been necessitous and probably would have supplied definitive enlightenment unpossessed by the jury. There was prejudicial error and the exception must be sustained. *State* v. *Quigley,* 135 Me. 435, 442.

By inadvertence the following instruction was unfortunately delivered in the court charge:

> "In arriving at your decision, of course, as I previously indicated, you must consider all of the evidence; you must consider not only the evidence that was presented here, but you may consider the evidence that was nonexistent, or was not presented. You evaluate the witnesses; you give

such credence to their testimony as you see fit to give it."

To this communication no objection was noted but, in as much as it may have misled the jury and motions for new trials are before us, we deem this manifest error in law an efficient cause for setting aside the verdicts below. *Pierce* v. *Rodliff,* 95 Me. 346, 348; *State* v. *Meservie,* 121 Me. 564, 566; *State* v. *Smith,* 140 Me. 255, 285; *State* v. Wright, 128 Me. 404, 406.

Because of the foregoing opinion it becomes unnecessary to weigh other exceptions.

The mandate must be, in each case:

Exception sustained,
Appeal sustained,
Motion for new trial granted.

PUBLIC FINANCE CORPORATION OF MAINE

vs.

RICHARD T. SCRIBNER

Cumberland. Opinion, March 26, 1963.

Deceit. False Representation. Justices.

The justice to whom a case is submitted upon an agreed statement, cannot properly add to or subtract from the facts thus agreed upon, but must apply the applicable law to that which is presented to him.

The Plaintiff in an action of deceit, must prove a material misrepresentation which is false, known by the defendant to be false, or made by the latter recklessly as an assertion of fact without knowledge as to its truth or falsity, made with the intention that it shall be acted upon and acted upon with damage.

Plaintiff must show that he relied upon the representations, was induced to act upon them, did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity.

Actual fraud is characterized by an intent to deceive and the defendant must have actual knowledge of the falsity of his representations and the facts related must be particularly within his own knowledge and neither inherently absurd or incredible.

The action of deceit was not intended to be made easy to prove.

ON APPEAL.

This is a complaint submitted on an agreed statement alleging deceit wherein the plaintiff claimed the defendant made false representations about the ownership of a chattel upon which a loan was secured. Appeal denied.

Basil A. Latty, for Plaintiff.

Theodore R. Brownlee, for Defendant.

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

WEBBER, J. On appeal. This matter was submitted to the justice below upon an agreed statement of facts. The complaint charged the defendant with having obtained a loan from the plaintiff by falsely representing that he was the owner of a truck offered as security. The defendant had had a prior loan from plaintiff secured by a chattel mortgage on this truck and three other vehicles. The agreed statement established the fact that the defendant had sold the truck before seeking the new loan from the plaintiff but contained no assertion that the loan was made in reliance upon this particular security or the representations of ownership. Moreover, it contained no assertion that the plaintiff had no knowledge of the prior sale. The justice below treated these omissions as fatal and found for the defendant.

Many cases readily lend themselves to submission upon an agreed statement of facts. Where the facts are not in dispute and only questions of law arise, such a submission is a practical, inexpensive and expeditious method of resolving legal controversy. Counsel must, however, be vigilant in order that no fact be omitted which may be essential to the claim of either side. The omission of such facts from an agreed statement may result in a judgment adverse to the party who has the burden of proving them. The same result occurs of course whenever there is a failure of required proof upon a full hearing or trial before a court or jury. The justice to whom a case is submitted upon an agreed statement cannot properly add to or subtract from the facts thus agreed upon but must apply the applicable law to that which is presented to him.

It has been held that the plaintiff in an action of deceit must prove a material misrepresentation which is false, known by the defendant to be false, or made by the latter recklessly as an assertion of fact without knowledge of its truth or falsity, made with the intention that it shall be acted upon and acted upon with damage. Plaintiff must show that he relied upon the representations, was induced to act upon them, did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity. "Every one of these elements must be proved affirmatively to sustain an action of deceit." *Crossman* v. *Bacon & Robinson,* 119 Me. 105, 109; *Coffin* v. *Dodge,* 146 Me. 3, 5; *Bragdon* v. *Chase,* 149 Me. 146, 150. In the case of *Pelkey* v. *Norton,* 149 Me. 247, the court recognized and imposed an exception or limitation upon the requirement that the plaintiff prove that "by the exercise of reasonable care (he) could not have ascertained their falsity." The effect of the limitation is to eliminate the necessity of proving freedom from negligence in any case in which it is shown that the defendant was guilty of intentional misrepresentation amounting to active and

actual rather than constructive fraud. The court noted that actual fraud is characterized by an intent to deceive and we think that it is further implicit that the defendant must have actual knowledge of the falsity of his representations and the facts related must be particularly within his own knowledge and neither inherently absurd or incredible. Inferentially at least, the court was suggesting that the plaintiff will still be required to prove that he exercised reasonable care under circumstances not involving actual fraud and especially where the false statements were "made recklessly as an assertion of fact without knowledge of (their) truth or falsity." It suffices to say that for the purposes of the instant case it is nowhere suggested in *Pelkey* that the plaintiff is ever relieved of the burden of proving his reliance upon the false statements and his lack of knowledge of their falsity in an action for deceit. In fact, *Pelkey* reaffirms the statement that *every element, including reliance, must be affirmatively proved.*

In the instant case the justice below accurately appraised the effect of the omission of essential facts from the agreed statement in these terms:

> "The question as to whether the Plaintiff was thus misled is a more difficult one, and again the agreed statement is silent on that point. I do not know whether the Plaintiff might not have been willing to extend this loan, even though the truck in question was not the property of the Defendant, believing itself to be well secured by the other vehicles. It may have been that the Plaintiff actually knew that the Defendant had conveyed the truck and was thus not deceived at all, but was willing to extend the loan. I am unable to infer from the agreed statement of facts and Plaintiff's Exhibit No. 1 (the chattel mortgage) that the Plaintiff was thus misled and deceived."

We conclude that if this case had been fully tried before a jury and at the close of the evidence the plaintiff had

utterly failed to prove "that he did not know the representations to be false," and "that he relied upon them and was induced to act upon them," the presiding justice would have been compelled to grant a motion to direct a verdict for the defendant. So in this agreed statement the plaintiff has failed to satisfy his burden of proving certain essential elements of his action for deceit.

As was stated in *Crossman* v. *Bacon & Robinson,* 119 Me. 105, 110 (cited *supra*) : 'For the action of deceit was not intended to be made easy to prove. Its purpose was to restrain law suits in commercial and trading transactions so that every time a party, through reliance upon opinion, or trade talk, or without taking pains to inquire for himself, got the bad end of a bargain he should not be permitted to fly to the courts for redress. Hence the purpose * * * of the action, *and proof of all the necessary elements,* have always been adhered to with strictness, with the avowed design of abridging instead of enlarging the field of litigation." (Emphasis ours.)

The entry will be

Appeal denied.

LUDGER MARTIN

vs.

OSWALD DESCHAINE AND CHARLES AYOTTE

Aroostook. Opinion, April 1, 1963.

Damages. Negligence. Verdicts. Jury.

A verdict may be directed when no other verdict can be sustained.

A verdict should not be directed when the evidence and inferences to be drawn therefrom present issues for jury consideration.

ON APPEAL.

Defendant appeals from the final judgment of the presiding justice denying a motion for judgment notwithstanding verdict and the denial of a motion for a directed verdict. Appeal denied.

Albert M. Stevens, for Plaintiff.

Arthur J. Nadeau, Jr., for Defendant.

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

SIDDALL, J. In this case the plaintiff sued the defendant to recover damages for personal injuries sustained in a collision between motor vehicles operated by the plaintiff and by defendant agent. A jury trial was had and a verdict was returned in favor of the plaintiff. At the close of plaintiff's case defendant moved for a directed verdict on the grounds that the case presented no evidence of negligence on the part of the defendant and that the evidence indicated that the plaintiff was guilty of contributory negligence. The motion was taken under consideration by the presiding justice. At the close of all the evidence the motion was renewed on the same grounds. The motion

was not granted and judgment was entered for the plaintiff. After judgment the defendant seasonably filed a motion for judgment notwithstanding the verdict based upon the grounds relied upon in the motion for directed verdict. After denial of this motion the defendant appealed from the final judgment.

Defendant's motion for directed verdict and his motion for judgment notwithstanding verdict raise the same issues. The plaintiff at the trial must have presented evidence which with all reasonable inferences would have warranted a reasonable jury in finding the defendant guilty of negligence which was a proximate cause of the accident and that the plaintiff was not guilty of contributory negligence. See *Palmitessa* v. *Shaw*, 157 Me. 503, 504, Maine Civil Practice, Field and McKusick, 411, 415.

A verdict should be directed only when no other verdict could be sustained. Where the evidence and inferences to be drawn therefrom present issues for jury consideration, a verdict should not be directed. *Robichaud* v. *St. Cyr*, 150 Me. 168, 170, 107 A. (2nd) 540.

> "It is well established in this state that 'a verdict should not be ordered for the defendant by the trial court when, taking the most favorable view of the plaintiff's evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds.' *Howe v. Houde*, 137 Me. 119; *Wellington v. Corinna*, 104 Me. 252."
> *Archer* v. *Aetna Casualty Co.*, 143 Me. 64, 68.

At approximately 7:30 a.m. on November 9, 1961, the plaintiff was operating a pickup truck in a general southwesterly direction on the Deschaine Road, so called, in Van Buren. At the same time a farm truck owned by the defendant and operated by his agent was being driven on the same highway in the opposite direction. A heavy fog per-

meated the area and the surface of the road was somewhat slippery. The pickup truck measured from 12′ to 15′ in length, and the farm truck measured 23′ 10″ from bumper to bumper, and was 7′ 10″ wide. The farm truck was equipped with a flat body on the rear, and the distance from the rear wheels to the end of the body was 5′ 8″. The vehicles collided and the plaintiff received serious injuries. The road was a dirt or gravel road and at the place of collision was straight in both directions. The travelled part of the road measured 15 feet, with shoulders of two feet on each side. The plaintiff's vehicle came to rest in a ditch on the westerly side of the road, and the defendant's vehicle struck a bank on the easterly side of the highway and came to an immediate stop, and the body of the truck protruded into the highway at an angle. The plaintiff's vehicle remained in position until the arrival of a police officer, but the defendant's vehicle was moved from the scene in order to allow the driver to call the police and a doctor. After the return of defendant's truck a police officer made certain measurements which were indicated on a chalk used at the trial of the case and reproduced as an exhibit in the record.

The evidence of the circumstances surrounding the accident was conflicting indeed. Some considerable difficulty has been encountered interpreting the testimony of the various witnesses who have used the words "here" or "there" or "this area" in referring to certain locations on a chalk used in the trial of the case. Although we have had the benefit of a reproduction of the chalk we have been unable to identify some of the points thereon which have been referred to in this manner.

The only eyewitnesses to the accident were the plaintiff, the driver of the defendant's vehicle and his son who was a passenger therein. Plaintiff's testimony is summarized as follows: He was travelling along the road with his head-

lights on. Shortly before the accident he had passed a car travelling in the opposite direction, and at that time he had placed his truck in second gear where it had remained until the time of the collision. The morning was foggy, and he could see about 25 to 30 feet ahead. He had been travelling 20 to 25 miles on hour before the accident, and at the time of the accident he was travelling 15 to 20 miles an hour. When he first noticed the defendant's vehicle it was 20 to 30 feet ahead and was being driven in the middle of the road. The plaintiff at the time was "practically on my side of the road." The defendant's vehicle turned to its right and went off the road. The plaintiff thought he had plenty of room to go by, but the front wheels of defendant's truck became stuck in the ditch and its rear end swung in front of him and collided with his vehicle. At the time of the collision the defendant's vehicle occupied almost all of the road, and plaintiff's vehicle was in the ditch. On the other hand, the operator of defendant's vehicle testified that he was driving along the highway with his son as a passenger and that he saw the plaintiff's truck when it was about 75 to 100 feet away. He testified on one occasion that the small lights of the plaintiff's truck were on, and on another occasion that only one light was on. The plaintiff's truck was travelling at 45 to 50 miles an hour, and he, himself, was travelling at about 20 miles an hour on a slight downgrade. He turned his vehicle to the right and drove into the ditch. His right front wheel struck a bank stopping his truck, and while he was in that position his truck was struck by plaintiff's vehicle. He testified that no part of his truck was on the plaintiff's side of the road, but on cross-examination he also gave the following testimony:

"Q Were you at all into the Martin side of the road at the time of the collision?

A I was more on my side than on his side.

Q Was at least part of your truck on his side of the road?

A When it happened?

Q Yes, when the accident happened.

A No.

Q Were you watching in your rear view mirror at the time of the accident, could you tell if Mr. Martin was not on his side of the road?

A I do not look in my rear view mirror but when I got out I glanced and he was a little bit more on my side than I was on his.

Q You said he was more on your side than you were on his side; is that correct?

A Yes."

The defendant's testimony was corroborated by his son. Other witnesses in the case were the police officer, the owners of the vehicles, the garage owner who moved the plaintiff's vehicle and the operator of a car which passed the plaintiff's truck in the opposite direction shortly before the accident.

The defendant contends that although plaintiff's testimony in itself may prove that defendant was guilty of negligence, his statement of facts lacks probative force and is inconsistent with objective facts. He also contends that the plaintiff was travelling at a speed greater than reasonable under the existing circumstances, and that his inaction in failing to stop or to make an effort to stop his vehicle constituted negligence as a matter of law.

> "Uncontroverted and undisputed physical facts may completely override the uncorroborated oral testimony of an interested witness which is completely inconsistent with those physical facts, and natural and physical laws have universal application anl may not be disregarded." *Jordan* v. *Portland Coach Company,* 150 Me. 149, 158, 107 A. (2nd) 416.

The plaintiff in his complaint alleged many negligent acts and omissions on the part of the defendant, including

an allegation that the defendant, through his driver, failed to keep a proper lookout for other vehicles on the highway, and an allegation that he failed to turn seasonably to the right of the middle of the traveled part of the highway so that plaintiff's vehicle might pass in safety. Taking the most favorable view of the evidence from the standpoint of the plaintiff, and every justifiable inference therefrom, a reasonable jury could have found that immediately preceding the accident the defendant's truck was being driven in the center of the highway, and as a result of the failure of the driver to keep a proper lookout for approaching vehicles and to seasonably turn to the right of the middle of the highway a portion of the vehicle, at the time of the collision, protruded into the area westerly of the center line of the highway, although not so far over on that side as the plaintiff's testimony might indicate. A reasonable jury could have concluded that the defendant was thereby guilty of negligence and that such negligence was a proximate cause of the accident.

We cannot say that the undisputed physical facts, including the damage to the vehicles, are inconsistent with a finding that the point of collision was westerly of the center line of the highway. There was testimony of the police officer that he found tire marks on the highway, beginning approximately 100 feet northerly of the supposed point of collision and running to a point near the rear of the farm truck. These tracks were located on the chalk by the witness, who testified that the easterly track started five feet from the easterly side of the road. Assuming that these tracks were made by the plaintiff's truck, they appear to bear gradually to the west and a jury could have reasonably concluded that they had reached the westerly side of the center of the road prior to the collision. The measurements placed upon the chalk and purporting to show the location of the farm truck were made after it had been re-

moved from the ditch and returned to a position which the defendant's driver claimed to be its original position. The location of the truck at the time of the collision was important, and whether it was returned to its original position was a question for jury determination. It is reasonable to suppose that in the process of moving the farm truck from the ditch and attempting to return it to its original position, important physical evidence might have been obliterated.

We cannot say that the operation of plaintiff's vehicle at 25 to 30 miles an hour prior to the accident and 15 to 20 miles an hour at the time of the collision is so unreasonable under the circumstances as to amount to negligence as a matter of law. Plaintiff's testimony indicates that the speed of his vehicle was reduced after he sighted defendant's truck and before the collision. Whether he failed to apply his brakes, and if not, whether such failure amounted to contributory negligence under the circumstances of the case, were questions for a jury.

The evidence in this case presented questions of fact for jury consideration not only in regard to defendant's negligence but also in respect to the exercise of due care by the plaintiff. The jury resolved both questions in favor of the plaintiff and we cannot say that its verdict was manifestly wrong.

In this case the plaintiff had presented evidence which with all reasonable inferences therefrom would have warranted a reasonable jury in finding the defendant guilty of negligence which was a proximate cause of the accident and also that the plaintiff was not guilty of contributory negligence. The presiding justice properly denied defendant's motion for a directed verdict and his motion for judgment notwithstanding verdict.

The entry will be

Appeal denied.

DONALD O. NEAL AND ALICE N. NEAL

vs.

RUSSELL BOWES

Cumberland. Opinion, April 4, 1963.

Liability. Compensation. M. R. C. P. 46. Exceptions.

A full and fair opportunity for trial must be made available to every litigant; but the delays, expense and harassment occasioned by inattention to procedural rules which are indispensable to the attainment of circumspect and efficient justice must be precluded.

Before jury retirement, the trial court must extend a reflective opportunity to redress or dissipate any error or prejudice induced by instuctions communicated or neglected.

Although formal exceptions are unnecessary, a party must still make known at the time of the ruling the actions he wants or his objection to the action taken and the grounds therefor.

All appellate review is by appeal, and any claimed error to which adequate objection was made is open to the aggrieved party on appeal.

Court will not review questions of law to which no objection is made unless plaintiff demonstrates prejudice or error of sufficiently harmful gravity as to render exceptional remedy appropriate.

ON APPEAL.

Plaintiff appeals the denial of a motion for a new trial and errors by the presiding justice in instructing the jury. Appeal denied.

Peter Kyros, for Plaintiffs.

*Lawrence P. Mahoney, f*or Defendant.

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

SULLIVAN, J. Defendant was operating a motor vehicle which struck and injured the plaintiff, Donald O. Neal, who instituted this action for compensation. There was a trial by jury and a verdict for the defendant. Plaintiff appeals.

Plaintiff asserts that the justice below erred:

1. In refusing to grant plaintiff's motion for a new trial;

2. In instructing the jury as follows:

   (a) That in order to find for the Plaintiff the Defendant's negligence must have been the sole proximate cause of the accident;

   (b) That it was the duty of the Plaintiff as a pedestrian to look and see what there was to be seen.

Plaintiff protests that the jury instructions were misleading, contrary to the evidence and constituted in their effect a directed verdict for the Defendant.

Plaintiff avers that it was prejudicial error for the justice to have refused the following instruction requested by the plaintiff:

> "You are instructed that if a highway is icy and slippery by reason of snow and the condition of the highway is such that driving a vehicle at a certain speed is likely to cause such vehicle to skid upon the application of its brakes and crash into cars or pedestrians, or a person having alighted from his car, that such a rate of speed would be unlawful."

The record must, of course, disclose that such a request was in fact addressed to the presiding justice.

The case at bar is concerned with an incident or occurrence on December 20, 1961. There is credible testimony

in the evidentiary record substantiating and confirming the following particularized account of what transpired.

Plaintiff after dark parked his unlighted 4 door sedan beside his residence and on the public street. Burke, a neighbor, stationed his car "cater-corner" and close by on the opposite side of the street. Parking space available to both men was unlimited on both sides of the way. Snow had fallen that day and had been plowed. There were high snow banks. The street was lighted. Between the 2 parked vehicles there was sufficient clearance for the passage of only one automobile because of the snow bankings. 400 feet away the defendant turned the street corner and drove onto the street. The way was straight and unobstructed in both directions. Defendant's car was 22 feet in length, its lights were illuminated and the brakes were adequate. Upon entrance to the street defendant had noticed the 2 parked automobiles. His speed was 15 to 20 miles per hour. From the corner and for some of the distance along the street defendant found the street surface slushy with a covering of soft but not slippery snow. The street surface between the 2 stationary cars was extremely icy or hard-packed in contrast to the surface back, towards the corner. In fact so slippery was that area between the parked cars that the defendant later fell down while merely standing there upright and motionless. When defendant had progressed within 3 or 4 car lengths of the plaintiff's car or within 80 feet, the plaintiff got out of the left front door of his vehicle. Defendant jammed on his brakes. Plaintiff opened wide his rear left door, leaned and reached in, to gather up some groceries. The doors of plaintiff's car measured 30 inches in width. Defendant's front skidded to his left on the slippery surface, his rear swerved to the right. Then his rear skidded to his left and his front to his right. Defendant's right front fender struck the left rear of the Burke car. Defendant's left rear scraped the plaintiff's car and inferentially

knocked the plaintiff to the ground. When defendant's car came to a halt his left tail pipe was against or near plaintiff's car. His right front fender was touching the rear left fender of the Burke car and defendant's car completely blocked all traffic in both directions. The plaintiff received painful injuries. Immediately after the collisions plaintiff lay to the right of the defendant's car and defendant could not pass around the car to the plaintiff. Defendant adjudged it to be doubtful that there was sufficient room for him to operate his car between the 2 parked automobiles after plaintiff had opened his car door —even had defendant not skidded. It was during defendant's skidding that plaintiff was opening his rear door. Defendant did not sound his horn. Plaintiff had never noticed the defendant until the latter was some 3 car lengths away. References of witnesses to a court chalk, now unavailable, for the purpose of positioning relatively the Burke car and plaintiff's car are understandably thwarting.

Objective attention to this testimony reviewed cannot fail to verify that a defense verdict attributable to it and predicated upon it can not be effectively assailed because of any demonstrable bias, prejudice or mistake. *Shannon* v. *Dow,* 133 Me. 235, 240.

If accredited by the jury as trustworthy and authentic there was evidence to supply classical properties for a finding of contributory negligence. The denial of plaintiff's motion for a new trial was proper.

The record in the instant case recites affirmatively that, at the conclusion of the trial justice's charge to the jury, he asked:

"Are there any requests or instructions?"

Each counsel replied:

"No, Your Honor."

R. S., c. 106, § 14 as amended by P. L., 1959, c. 317, § 76, provides in pertinent part:

> "For all purposes for which an exception has heretofore been necessary in civil cases, it is sufficient that a party, at the time the order or ruling of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor. If a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him. - - - - -"
>
> See, also, Rule 46, Maine Rules of Civil Procedure, 155 Me. 545.
>
> "It is to be noted that although formal exceptions are unnecessary, a party must still make known at the time of the ruling the actions he wants or his objection to the action taken and the grounds therefor. - - -
>
> "- - - All appellate review is by appeal, and any claimed error to which adequate objection was made is open to the aggrieved party on appeal." Maine Civil Practice, Field and McKusick, P. 392.

The record nowhere discloses that plaintiff's counsel requested any instruction which was refused by the justice presiding or remonstrated against any instruction given.

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Op-

> portunity shall be given to make the objection out of the hearing of the jury."
> Rule 51 (b), M. R. C. P., 155 Me. 549.
>
> "As already stated in connection with Rule 46, the magic word 'exception' is not necessary to have rights as to alleged errors in the charge. It is necessary, however, to make clear one's objections and the grounds for them before the jury retires. On appeal a party cannot rely upon an error not specifically called to the trial court's attention so as to give a fair opportunity to correct it."
> Maine Civil Practice, Field and McKusick, P. 418.

This court has the obligation to require an observance of its promulgated rules. A full and fair opportunity for trial must be available to every litigant. But the delays, expense and harassment occasioned by inattention to procedural rules which are indispensable to the attainment of circumspect and efficient justice must be precluded. Plaintiff's assigned grievances with respect to judicial instructions transmitted to the jury or refused are not before this court. Before jury retirement economy, efficacy, deference, propriety and justice all dictate that the trial court be extended a reflective opportunity to redress or dissipate any error or prejudice induced by instructions communicated or neglected.

A painstaking consideration of the record in this case and of plaintiff's motion has decided us that the plaintiff has failed to demonstrate prejudice or error of such sufficiently harmful gravity as to render permissible or appropriate an exercise of the exceptional remedy defined in *Pierce* v. *Rodliff*, 95 Me. 346, 348; *Johnson* v. *Parsons*, 153 Me. 103, 110. This court has quite comprehensively indicated and delimited the circumstances and occasions coercive or compelling enough to justify the sustaining of an appeal because of error of law in the denial of a motion for a new trial in those instances where jury instructions given or refused at the trial in the court below are the asserted

grievances and no objections to the controversial charge or refusal to instruct were indicated at the trial.

> "In the instant case no exceptions (objections) were taken (made known, etc.) to such claimed omissions. However, this Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions (objections) were not taken (made known, etc.) - - - - - "

> "Such review, however, is not compatible with best practice, and although there be error in an instruction, when no exception is taken, (objection made known, etc.) a new trial either on appeal or motion should not be granted unless, as stated in the above cited cases, 'error in law - - - - - was highly prejudicial - - - - - and well calculated to result in injustice,' or 'injustice would otherwise inevitably result,' or 'the instruction was so plainly wrong and the point involved so vital - - - - - that the verdict must have been based upon a misconception of the law,' or 'When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled - - - - -' We consider the foregoing applicable as well to an omission as to an erroneous instruction where no exception is taken. We hold that the case at bar does not come within the exceptions to the general rule."
> *State* v. *Smith,* 140 Me. 255, 285, 286.

The sentence last quoted above is applicable here.

The mandate must be:

Appeal denied.

KENNETH HUDSON, INC.,
D/B/A HUDSON BUS LINES
vs.
ERNEST H. JOHNSON
STATE TAX ASSESSOR

HUDSON BUS LINES, INC.
vs.
ERNEST H. JOHNSON
STATE TAX ASSESSOR

Kennebec. Opinion, April 12, 1963.

Taxation. Assessments. Due Process. Statute.

On an appeal from a tax assessment, the Superior Court is not limited to the examination of questions of law, and the appellant is afforded an opportunity to present evidence and arguments which he considers to be important.

Statute does not require the State Tax Assesesor, at the time of making an assessment, to give the taxpayer notice of the basis for that assessment; it is sufficient if the taxpayer is fully advised of such basis at the time the appeal period began to run.

In the absence of a claim that assessment covered a period not authorized by statute, it is not material to the issues to determine whether the assessment is an arbitrary assessment or a deficiency assessment.

The taxpayer who fails to follow the statutory provisions must take the risk of the consequences.

ON APPEAL.

The issue in both cases is the sufficiency of assessment notice. Appellants appeal decision of presiding justice ruling as to the validity of assessments. Appeal denied.

Frank E. Southard, for the Appellants.

Ralph W. Farris, Asst. Atty. Gen.,
John Benoit, Asst. Atty. Gen., for the State.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision.

SIDDALL, J. On appeal. These cases involve identical issues of law and were argued together. Both Appellants are corporations engaged in local passenger bus business in Maine. On November 7, 1960, the Appellee made an assessment of sales and use tax, interest, and penalty against the Appellant, Kenneth Hudson, Inc. and gave notice to it in the following form:

STATE OF MAINE BUREAU OF TAXATION

State House, Augusta, Maine

ASSESSMENT OF SALES AND USE TAX, INTEREST AND PENALTIES

To:

Kenneth Hudson, Inc.
d/b/a Hudson Bus Lines
Attn: Kenneth Hudson, Pres.
70 Union Street
Medford, Massachusetts

Reg. No. 50907

Date November 7, 1960

Pursuant to (Sec. 19) of the Maine Sales and Use Tax Law, I hereby assess against you, tax, interest, and penalties in the following amounts for the period February 1, 1959 to September 30, 1960.

Sales Tax	Use Tax	Interest	Penalties	Total
$- - -	$2188.00	$182.98	$10.00	$2380.98

This assessment is in addition to any sales tax, use tax, interest and penalties already paid with respect to the above period. Demand is hereby made upon you for immediate payment of the above stated amount.

If you desire the Assessor to reconsider this assessment, your written petition must be made within 15 days from the date of receipt hereof.

A similar assessment was made against the Appellant, Hudson Bus Lines, Inc. covering the period from October 1, 1958, to September 31, 1960, and the total assessment with interest and penalties amounted to $2081.10. Following an oral reconsideration hearing the Appellee found the assessment of tax, interest and penalty in each case was correct. The Appellants then appealed to the Superior Court, and after hearing without a jury the presiding justice found for the Appellee in each case and dismissed the appeals.

The only issue before us is the sufficiency of the assessment notice. The Appellants claim that the assessment in each case is insufficient and void because it fails to include information in regard to the basis of the assessment.

Every person subject to a use tax is required to file a report with the tax assessor. R. S., 1954, Chap. 17, Sec. 14.

> "If any person shall fail to make a report as required, the tax assessor may make an estimate of the taxable liability of such person from any information he may obtain, and according to such estimate so made by him, assess the taxes, interest and penalties due the state from such person, give notice of such assessment to the person and make demand upon him for payment, but no such assessment can be made after 6 years." R. S., 1954, Chap. 17, Sec. 19, as amended.

> "After a report is filed under the provisions of this chapter, the assessor shall cause the same to be examined, and may make such further audits or investigations as he may deem necessary and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under this chapter, he shall assess the taxes and interest due the state, give notice of such assessment to the person liable, and make demand upon him for payment but no such assessment can be made after 2 years." R. S., 1954, Chap. 17, Sec. 20 as amended.

R. S., Chap. 17, Sec. 32 provides that any person against whom an assessment has been made may petition the state tax assessor for a reconsideration of the assessment within 15 days after notice of the assessment shall have been given. The amount of the assessment becomes final if no petition for reconsideration is filed within the time limit. If a petition is filed and a request for a hearing is made, the assessor shall grant the petitioner an oral hearing and shall give him 10 days' notice of the time and place thereof. The assessment upon reconsideration becomes final at the expiration of 30 days if no appeal is taken therefrom. R. S., 1954, Chap. 17, Sec. 33 as amended provides for an appeal to the Superior Court within 30 days after notice of decision upon reconsideration.

There appears to be a disagreement between counsel in respect to whether the assessment notices were given under Sec. 19 or Sec. 20. However, in the absence of a claim that the assessment covered a period not authorized by statute, we do not consider it material to the issues in these cases to determine whether the assessment was an arbitrary assessment or a deficiency assessment. The same requirements in regard to sufficiency are present under either section.

> " 'Notice and opportunity for hearing are of the essence of due process of law.' *Randall v. Patch,* supra, 118 Me., on page 305, 108 A., on page 98; *Re: John M. Stanley,* supra, 133 Me., on page 95, 174 A., 93; *York Harbor Village Corporation v. Fred H. Libbey et al.,* 126 Me., 537, 539, 140 A., 382. The taking of property without notice and opportunity for hearing violates both the fourteenth Amendment and Section 6 of Article I of the Constitution of Maine, unless the taking constitutes a valid exercise of the police power." *Jordan* v. *Gaines,* 136 Me. 291, 294, 295.

> "It is not essential to due process of law that the taxpayer be given notice and hearing before the

value of his property is originally assessed, it it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined." *McGregor* v. *Hogan,* 263 U. S. 234, 237.

"That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection." *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, 537.

"Notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process of law if he has an opportunity to question the validity or the amount of such tax or assessment, either before that amount is finally determined or in subsequent proceedings for its collection. 1 Cooley, Taxn. 3d ed. 60; *Palmer v. McMahon,* 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324." *Maxwell* v. *Page,* 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155, 159.

"In matters of taxation, due process requires that after such notice as may be appropriate, the taxpayer has opportunity to be heard as to the validity of the tax and the amount thereof, but it does not demand opportunity for judicial review prior to the inauguration of efforts to collect a tax, or an opportunity for hearing upon each successive step in the tax proceedings. The due process requirement is satisfied if there is opportunity to question the validity or amount of a tax either before that amount is determined or in subsequent proceedings for its collection and enforcement. It is sufficient if the party assessed has a single opportunity to be heard before some impartial tribunal with respect to the validity and amount of the tax

> before it is conclusively established against him, and his property subjected to the lien thereof, with opportunity to present evidence and arguments which he deems important. The owner, if he has notice and an opportunity to be heard either before or after the tax lien is fixed on his property, has due process of law." 51 Am. Jur., Sec. 732, p. 673, 674.

The proceedings in these cases are somewhat similar to those in income tax assessment cases. U. S. Code Annotated, Internal Revenue Code Section 6212 provides that if the Secretary determines that there is a deficiency in respect to any tax imposed by subtitles A or B (income and gift taxes) he is authorized to send notices of such deficiency to the taxpayer by registered mail. Section 6213 provides that within a designated time after the notice of deficiency is mailed, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. In the case of *Commissioner of Internal Revenue* v. *Stewart,* 186 F. (2nd) 239, 24 A. L. R. (2nd) 793, a 30 day letter was issued by the collector and addressed to the taxpayer on February 9, 1948. No schedules or other basis for imposing additional taxes were enclosed with that letter. On February 19 another letter was mailed in which was enclosed a report showing the basis for the deficiency. The taxpayer contended that the deficiency notice was invalid because it contained no information of how the collector arrived at the alleged deficiency. The court said:

> "The taxpayer also contends that the deficiency notice was invalid because it contained no particulars or explanations of how the Collector arrived at the alleged deficiencies. No particular form of notice is required by Section 272 (a) of the Code. We are of the opinion that the notice in the present case was sufficient where it fairly advised the taxpayer that the Commission has determined a deficiency, gave the taxpayer the amounts thereof and the years involved, and the taxpayer was fully

> advised, as shown by his petition filed with the Tax Court, of the reasons forming the basis for the Commissioner's action. *Commissioner v. Forest Glen Creamery Co.* supra, 7 Cir, 98 F2d 968, 971; *Olsen v. Helvering* supra, 2 Cir, 88 F2d 650, 651; *Ventura Consolidated Oil Fields v. Rogan* 9 Cir. 86 F2d 149, 153. In *Olsen v. Helvering,* supra, the Court said '. . . the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough.' "

The Appellants call our attention to the case of *Viator* v. *State Tax Commissioner* (Miss.), 5 So. (2nd) 487. Additional sales tax assessments were made by the chairman of the State Tax Commission. In that case the court held that the additional assessment and the grounds for making it must be disclosed by the order made thereon. In that case the judicial review "was confined to the examination of questions of law or appearing on the face of the record and proceedings." Here, the powers of the Superior Court on appeal are not limited to the examination of questions of law, and the appellant is afforded an opportunity to present evidence and arguments which he considers important.

The appellants in these cases call our attention to the serious consequences arising from the failure to apply for a reconsideration and to appeal to the Superior Court. We are well aware of these consequences, but the taxpayer who fails to follow the statutory procedure must take the risk incident thereto.

The appellant in neither case claims that it was not advised of the basis for the assessment before the reconsideration hearing or before the appeal hearing. The sole contention is that the notice of assessment did not contain information of the basis for the tax. The taxpayers were given an opportunity for a full hearing on appeal to the Superior Court. In order to properly present evidence in that court to combat the assessments the taxpayer must

have been fully advised of the basis for the assessment. It is desirable that this information be given before the reconsideration hearing, and the decision of the presiding justice indicates this to be a fact. It is *necessary* that the taxpayer be advised of this basis before the beginning of the appeal period, in order that he may have the necessary information to properly set forth the issues in the case on appeal. We do not have the benefit of the evidence taken out before the presiding justice. The presiding justice noted in his decision in each case that audits were made of the appellant's books and a discussion was had with company officials and the appellee or a representative of his office. In respect to the reconsideration hearing, we quote from his decision in each case as follows: "There was a reconsideration of the entire audit at the request of the taxpayer which was granted, and pursuant to Section 32 of the Maine Sales and Use Tax the appellants and the Tax Assessor discussed the entire matter and the details thereof."

The reconsideration decision in each case appears to fully advise the appellant of the reason for the assessment, and to give it the necessary information to prepare its appeal. No claim is made to the contrary. The appeal to the Superior Court in each case indicates that the basis for the tax assessment was fully understood.

The statute does not require the State Tax Assessor, at the time of making an assessment, to give the taxpayer notice of the basis for that assessment. It is sufficient if the taxpayer is fully advised of such basis at the time the appeal period began to run. We are satisfied from the record in these cases that this was done. The constitutional requirement of due process was thereby satisfied. We do not determine the formality with which this information must be given in cases in which the circumstances differ from those disclosed in these cases.

The presiding justice properly ruled that the assessment in each case was valid.

The entry in each case will be

Appeal denied.

GRAZIELLA LOWELL

vs.

MAINE EMPLOYMENT SECURITY COMMISSION, ET AL.

Kennebec. Opinion, April 22, 1963.

Unemployment. Benefits. Statutes.

To obtain unemployment benefits, a claimant must establish that he is eligible for such benefits and that he is "able to work and available for work."

A claimant who refuses suitable work is disqualified for benefits under the employment security act.

Time of unemployment and prospects for returning to original job do not make job recommended by Commission unsuitable to claimant.

ON APPEAL.

Claimant appeals that the disqualification from benefits for refusal to accept work under Sec. 15 - III was an error of law. Appeal denied.

Fales and Fales,
by *Roscoe H. Fales,* for the Plaintiff.

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

SITTING: WILLIAMSON, C. J., SIDDALL, SULLIVAN, MARDEN, JJ. WEBBER AND TAPLEY, JJ., dissenting.

WILLIAMSON, C. J. This is an appeal from a decree of the Superior Court sustaining a decision of the Maine Employment Security Commission disqualifying the appellant claimant from benefits under the Employment Security Act. R. S., c. 29.

In our consideration of the appeal we are governed, as was the Superior Court, by Sec. 16-IX, reading in part:

> "In any judicial proceeding under this chapter, the findings of the commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."
>
> "The Commission's findings of fact, when supported by any credible evidence, are conclusive. Judicial review is limited to the correction of errors of law. When the Commission decides facts contrary to all of the credible evidence in the case, it has committed an error of law. . . When no dispute as to the facts exists or is possible upon all the evidence, the question becomes one of law." *Dubois et al* v. *M. E. S. C.*, 150 Me. 494, 505, 114 A. (2nd) 359.

The Commission in deciding (with one commissioner dissenting) "that the claimant refused to accept an offer of work for which she was reasonably fitted within the meaning of Section 15-III of the Employment Security Law," adopted the findings of fact of the Appeal Tribunal.

Turning to the record of the Appeal Tribunal, the decision disqualifying the claimant from benefits was based on the following findings of fact:

> "The claimant is a woman, 57 years of age, unemployed at the time of hearing (June 8, 1961). She last worked in a local shoe manufacturing establishment (defendant Wood & Smith Shoe Co.) as a repairer up to March 24, 1961, when she was separated due to lack of work. On this job

her average earnings on piece rates were $50 to $55 a week.

"She filed initial application for employment security benefits in the current benefit year, effective April 2, 1961. She thereafter reported and filed weekly claims.

"On May 18, 1961 the claimant was referred to a local shoe shop (Belgrade Shoe Co.) for work as a repairer at an hourly rate of $1.25. The claimant contacted the employer, discussed the job, but did not accept as she preferred to wait until she might be recalled by a former employer. With this former employer as a repairer, she had worked on piece rate and claims to have earned well over $1.25 an hour. As of the date of hearing the claimant had expectations of returning to this former employer sometime in the early part of July.

"The claimant is classified occupationally as a blemish remover and inspector (boot and shoe industry.)"

In the record of the evidence taken before the Chief Appeals Referee, we read:

(Referee)

"Q Now — you (claimant) stated here on the 24th day of May: 'I was referred to a job opportunity on 5-18-*51*. I had an interview for this job on 5-18-61. I talked with the floor lady about the job. The job paid $1.25 an hour. I told the floor lady that I wanted to go back to Clark Shoe to work. She would not hire me when she found out I wouldn't stay if offered work at Clark Shoe. I went to Clark Shoe on 5-23-61. I was told they would call me as soon as work was available.' End of statement. "And — you could have gone to work for Belgrade Shoe as a repairer?

"A Yes, but like I said, they won't hire me for a month or five weeks.

"MRS. LOWELL: (Cont) Like Mrs. Madore told me — when — to fix up you know, the insurance and other things, you know, that there is no sense to it. I got my mind to go to Clark Shoe. I make good money there, I use to make good money - -

"REFEREE MEAGHER: How much did you make an hour there?

A Two or three dollars an hour. You, see, piece work, see? That's why I'm use to make pretty good. That's why I wanted to go back there. You know that when you work most all your life on piece work, you don't feel to work for $1.15 or $1.20. You know, like I do that Clark Shoe is a good place — good over there.

"Q How long have they been closed down now?

"A I use to work at a time at Clark — there was two Clarks — I was in Clark No. 2 when they closed. I was a stretch repairer there.

"Q You haven't worked for Clark Shoe since when?

"A Last November, I think. I think it was November. Or October - -

"Q Well — that's the whole story, is it? As to why you didn't get work - -?

"A Yes, that's the truth."

In the Superior Court "the Defendant stipulated that the statement made by the (claimant) to the prospective employer was without malice on her part, and that she probably did not act as she did, solely for the purpose of preventing a job offer being made."

The claimant urges that no offer of a job was made, and therefore the disqualification for benefits from refusal to accept work under Sec. 15-III was an error of law.

To obtain benefits a claimant must establish; first, eligibility (Sec. 14), and second, that he is not disqualified

(Sec. 15). Under Sec. 14-III it is required that the claimant "is able to work and is available for work."

Sec. 15-III read at the time the case arose in part:

> "**Sec. 15. Disqualification for benefits.**—an individual shall be disqualified for benefits:
>
> * * * * * * * * *
>
> "**III. Refused to accept work.** If he has refused to accept an offer of suitable work for which he is reasonably fitted . . . the disqualification shall begin with the week in which the refusal occurred and shall continue for the duration of the period of unemployment during which such refusal occurred.
>
> "**A.** In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."

The amendment in Laws 1961, c. 361, § 6 does not affect the case.

We are here concerned with *disqualification* and not *eligibility*. For our purposes the claimant did not lack eligibility under Sec. 14-III. The Commission did not so find. The question is whether the claimant, otherwise being eligible for benefits, became disqualified therefor from refusal to accept suitable work. The Commission placed its decision firmly on disqualification under Sec. 15. *Krauss* v. *A. & M. Karagheusian, Inc.* (N. J.), 100 A. (2nd) 277.

We examine the conditions in Sec. 15-III.

(1) "If he has refused to accept an offer of suitable work." We are satisfied that the finding of a refusal to

accept an offer of work was supported by evidence. Whether the work was "suitable" we will later discuss.

In brief, there was an opening for a repairer at Belgrade Shoe. The job was permanent insofar as any job may be so considered. The claimant was interested in the job only for a few weeks until an opening at Clark Shoe at a higher wage should appear.

With this condition attached, the offer of the job to the claimant was withdrawn. It is entirely accurate to say that Belgrade Shoe made no offer of a job with the condition of severely limited life expectancy attached thereto by the claimant. This, however, does not deny that a job was offered permanent in nature in distinction from temporary employment for a few weeks, and was refused by the claimant.

There is nothing unusual in the situation here disclosed. The claimant simply did not choose to accept a job as a repairer without making known her intention to leave when a hoped for job at higher pay might become open within a few weeks. Under these conditions the Belgrade Shoe lost interest in the claimant and withdrew its offer of a job.

No job is permanent, of course, in an absolute sense. Belgrade Shoe attached no condition to its offer of employment and doubtless would not have been surprised had the claimant given up a job as repairer to return to a former employer at a higher wage. This possibility is quite different from a condition attached to the proposed employment that the claimant presently plans to leave within a few weeks. Understandably the Belgrade Shoe did not wish to employ the claimant under these conditions.

(2) "For which he is reasonably fitted." There is no doubt of the claimant's fitness. She was an experienced repairer.

(3) Was the work offered "suitable" as measured by Sec. 15-III (A)? There was no risk to health, safety and morals. Physical fitness, prior training, experience, and distance of work from her residence did not affect in the slightest the suitability of a repairer's job with Belgrade Shoe in comparison with the repairer's job held in several factories by the claimant.

There are left of criteria to determine whether the Belgrade Shoe job was suitable: (1) prior earnings, (2) length of employment, and (3) prospects for securing local work in her customary occupation, i.e., as a repairer.

The rate per hour offered by Belgrade Shoe was less the claimant says than she expected to earn at piecework with Clark Shoe. There is no indication that the offered hourly wage was not in line with wages in the industry generally or that it was a depressed wage. The difference in estimated income was not so great as to make the repairer's job at Belgrade Shoe unsuitable for the claimant.

The claimant had been unemployed since March 24, 1961. The Belgrade Shoe job was refused on May 18, 1961. The hearing of the Appeals Tribunal, whose findings of fact were adopted by the Commission, was held on June 8, 1961. The claimant then had no more than a hope of employment in early July, not with Wood & Smith Shoe Co., her most recent employer, but with a former employer Clark Shoe.

The Commission was entirely justified in considering the time of unemployment and the prospects for the desired piecework job at Clark Shoe did not render the Belgrade Shoe job unsuitable under the circumstances.

In *Hallahan* v. *Riley* (N. H.), 45 A. (2nd) 886, the New Hampshire Court, noting that mending was skilled work and burling was not, said:

> "It should be pointed out in the first place that the question of the suitability of the work offered in a

given case is one of fact and the determination of that fact in the present case cannot be attacked in this proceeding if it is sustained by competent evidence. The test to be applied in determining suitability of work is not left to speculation." (Stating the criteria found in our Sec. 15-III (A)).

* * * * * * * * *

"In other words, while a woman may be justified in refusing as unsuitable, work offered to her immediately after her separation from her job, the situation may change after the lapse of a considerable time during which she has remained unemployed. Work which was unsuitable at the beginning of her unemployment may become suitable when consideration is given to the length of unemployment and the prospects of securing her accustomed work. Although the applicant may continue to refuse jobs paying a lower rate of compensation, she must do so at her own expense rather than at the expense of the unemployment fund. The cushion of security between jobs provided by the statute was not designed to finance an apparently hopeless quest for the claimant's old job or a job paying equal wages. What length of time should be regarded as sufficient to require this result is again a question of fact with which we have no concern. The statute specifically requires that consideration be given to the factor of length of unemployment. No limitation upon the weight which shall be attached to this factor is to be found in the law."

Cf *Corrado* v. *Director,* 325 Mass. 711, 92 N. E. (2nd) 379.

Availability under Sec. 14-III is interwoven with refusal to accept suitable work under Sec. 15-III. The refusal is a reason for disqualification for benefits of a claimant otherwise eligible and may warrant the inference of non-availability, i.e., that the claimant is no longer genuinely attached to the labor market. It is not necessary, however, in light of the precisely stated ground of the Commission's decision upon disqualification that we consider the question

of availability. Illustrative cases on "availability" presenting analogous situations are: *Goings* v. *Riley* (N. H.), 95 A. (2nd) 137; *Swanson* v. *Minneapolis-Honeywell Regulator Co.* (Minn.), 61 N. W. (2nd) 526; *Corrado* v. *Director, supra; Farrar* v. *Director,* 324 Mass. 45, 84 N. E. (2nd) 540, 543; Annot. 25 A. L. R. (2nd) 1077; 165 A. L. R. 1382.

The purpose of the Employment Security Act was well stated by Justice Brennan, then of the New Jersey Supreme Court and now of the Supreme Court of the United States, in *Krauss* v. *A. & M. Karagheusian, Inc., supra,* at p. 281:

> "The Unemployment Compensation Act provides social insurance, for the common good as well as in the interest of the unemployed individuals, against the distress of involuntary unemployment for those individuals who have ordinarily been workers and would be workers now but for their inability to find suitable jobs. [Cited cases omitted] The provisions for eligibility and disqualification are purposed to preserve the fund for the payment of benefits to those individuals and to protect it against the claims of others who would prefer benefits to suitable jobs. The basic policy of the law is advanced as well when benefits are denied in improper cases as when they are allowed in proper cases."

The claimant chose to refuse an offer of suitable work. The Commission so found on credible evidence. The penalty is disqualification for benefits under the Act.

The entry will be

Appeal denied.

WEBBER, J. (DISSENTING)

I reach a contrary result on the undisputed facts. In my view this claimant made herself available for work within the meaning of the statute but was never actually offered employment which she refused. I take it that no one questions that this claimant or any employee not under special contract for a fixed term could leave a job at any time in order to accept other employment. This is an absolute right which this claimant possessed. She could have accepted a job offer at Belgrade knowing that the offer was available only to persons who intended to remain until laid off and she could at the same time have harbored the secret intention of leaving the job the minute a better opportunity presented itself. In effect she would then have been deceiving Belgrade by her silence. I cannot agree that the statute requires deception from one who would qualify for benefits. All that she did was to announce candidly and honestly her intention to retain and exercise the right to leave the job for a better position when and if such a position became available. On the other hand, all that Belgrade had available for her was conditional employment, the condition being that she forfeit or agree not to exercise her right to accept a better job offer. Belgrade had a perfect right to limit its employment opportunities and to hire only persons interested in contracting for a long term, but in so doing it did not make the claimant the kind of an offer that the statute required that she accept. There is no suggestion in the evidence that if an unconditional offer of employment had been made, the claimant would have rejected it. Obviously, if she had done so, she would have forfeited her right to benefits. This is not a case in which the claimant is herself improperly attaching conditions to her acceptance of an unconditional offer of employment. Neither is there any question of her good faith.

In *Reger* v. *Administrator* (1946), 132 Conn. 647, 46 A. (2nd) 844, the claimant was the wife of a serviceman and there was uncertainty as to the length of time she would remain in the area. Many employers were unwilling to offer her employment for this reason. The court said at page 846:

> "The other phase of the question is concerned with the reliance placed by the commissioner in his decision upon the fact of the impermanence of the plaintiff's stay in Ozark. This involves the effect of a person's inability to get work owing to the unwillingness of employers to hire her because of the probable transient or temporary nature of her sojourn in the community, a reason not inherent in the general labor situation. 'Where employers refuse or are reluctant to hire an individual, suitable job opportunities which the individual is qualified to perform and which he is able, willing, and ready to accept may nonetheless exist. Such refusal to hire a worker does not of itself render the work usuitable or prevent him from legally performing the work. Accordingly, refusal of employers to hire married women * * *, individuals beyond a certain age * * *, or members of minority groups * * *, should not render unavailable individuals in any of such groups who are otherwise available. * * * While employers, for what they think is in their best interests, or for any reason, may refuse to hire any worker, such refusal should not affect the availability of workers whom they refuse to hire, unless such refusal is required by law.' Freeman, 55 Yale L.J. 123, 133. That employers would not employ servicemen's wives because of the uncertainty of the length of time they would remain in the area was not a material factor in determining whether the plaintiff was available for work."

I recognize but am not persuaded by a series of cases decided in Pennsylvania in which benefits were refused be-

cause the claimant would not agree to continue the employment if there should be a later recall by a former employer. The court felt that this was indicative of *bad faith* on the part of the claimant. *Baker* v. *Unemployment Comp. Bd. of Review* (1960), 193 Pa. Super. 460, 165 A. (2nd) 103; *Trabold* v. *Unemployment Comp. Bd. of Review* (1960), 191 Pa. Super. 485, 159 A. (2nd) 272.

In the instant case, if Belgrade had offered the claimant employment provided she would execute a written contract to continue in that employment for at least five years unless sooner discharged or laid off by the company, I doubt if it would be seriously contended that a refusal to accept the employment on those terms would bar the claimant from benefits. I see no difference in principle. Although no fixed term was involved, it is apparent that Belgrade was at the moment only interested in hiring persons who would commit themselves in advance to long term employment. This claimant did not belong to the class of employees for whom Belgrade had jobs available at that time. It is for that reason that no offer of employment was made to her which she could either accept or reject. I would sustain the appeal.

TAPLEY, J., joins in this opinion.

AUTOMATIC CANTEEN COMPANY OF AMERICA

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, May 10, 1963.

Use Tax. Constitutional Law. "Use."

The exercise of any right or power over leased equipment within the state by the owner will subject such equipment to a use tax under the statute, and such taxation is constitutional.

ON APPEAL.

This case, presented on an agreed statement of facts, is an appeal from the assessment of a use tax, by the State tax assessor. Remanded for entry of decision denying the appeal.

Berman, Berman, Wernick, and Flaherty,
by Sidney W. Wernick and John J. Flaherty,
for Plaintiff.

Ralph W. Farris, Sr.,
John W. Benoit, Asst. Attys. Genl., for Defendant.

SITTING: WILLIAMSON, C. J., SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision. TAPLEY, AND WEBBER, JJ., dissenting.

WILLIAMSON, C. J. This appeal from a use tax assessed by the State Tax Assessor is before us on report from the Superior Court. Sales & Use Tax Law, R. S., c. 17, §§ 4, 33; Rule 80 B (a) (d) Maine Rules of Civil Procedure.

The tax assessed amounted with penalties and interest to $14,896.87, covering the period from May 1, 1955 to

April 30, 1961. The pertinent provisions of R. S., c. 17 are:

> "**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 . . . "
>
> "**Sec. 2. Definitions.**—. . . '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 main issue is whether the appellant has exercised within the State any right or power over its vending machines incident to its ownership. If so, a tax is imposed on such use. We have no concern with "storage" or "other consumption" under Sec. 4. Further, the appellant, the purchaser of the machines outside the State, has paid no sales or use tax thereon in any other jurisdiction. Sec. 12. The appellant also asserts the unconstitutionality of the statute.

The appellant is engaged in the business of selling, as a wholesaler, merchandise such as candy, chewing gum, cigarettes, soft drinks, etc. to be dispensed in automatic vending machines known as canteens. The vending machines which dispense the merchandise are owned by the appellant and are leased to distributors who purchase from the appellant the merchandise which is dispensed by the machines.

Within Maine the appellant does not own, lease or maintain any office, place of distribution or any other type of place of business or have any regular employees or agents. It conducts an interstate business by entering into franchises and lease agreements creating independent contractor distributors.

The affidavit of the appellant filed under Sec. 33 stating its reasons of appeal, reads in part, as follows:

"That the reasons of appeal by the plaintiff, Automatic Canteen Company of America which are, at the same time, its reasons for bringing the complaint to initiate said appeal, are as follows:

A. Under the Maine Sales and Use Tax law, as amended, no tax of any kind, whether sales tax or use tax, is imposed upon the petitioner, Automatic Canteen Company of America, by virtue of the circumstances of the petitioner's activities regarding distributors in Maine, said circumstances being, essentially, the following:

1. Automatic Canteen Company of America, a Delaware corporation, hereinafter sometimes called The Company, is engaged in the business, *inter alia,* of leasing coin-operated vending machines.

2. Certain franchised operators, who operate within the State of Maine, and who are herein called Distributors, use vending machines which are leased to them by The Company.

3. Under the terms of their lease agreements with The Company, the Distributors, in return for the payment of rentals, are entitled to use said vending machines in the operation of their trade, to wit: the selling of goods at retail through vending machines.

(4) The vending machines leased by The Company to its Maine Distributors are purchased by The Company from without Maine and shipped by of *(sic.)* for The Company to the Distributors in Maine.

(5) The aforesaid lease agreements are entered into and executed in The Company's home office in Chicago, Illinois. Rental payments are remitted directly to Chicago by The Distributors.

(6) Once the vending machines have been directed to the Distributors by The Company, the Distributors are free to place said machines in any location, subject only to geographic limita-

tions, of their choosing, without the direction or other action upon the part of The Company.

(7) The operation of the leased vending machines is under the complete control of the Distributor, who is responsible only for the loss or damage (over ordinary wear and tear) of the machines.

(8) The Company exercises no right or power over the vending machines within the State of Maine.

(9) Under substantially the same facts as the above, it was held in *Trimount Coin Machine Co. vs. Johnson,* 124 A. 2d 753, that the lessor was not liable for the use tax on the machines leased to operators in Maine. Hence, in the present case, there is no tax liability and, the above mentioned use tax, interest and penalties are not validly or properly assessed and are illegal.

In B, C, and D, after first stating that "under all the facts and circumstances that are relevant and applicable to the operations of the Automatic Canteen Company of America, to the extent that they relate to the State of Maine (the use tax, interest, and penalties) assessed against (the appellant) . . ." the reason is stated in these words: In B "are illegal, unauthorized and unwarranted;" In C "are not authorized by any of the provisions of the Maine Sales and Use Tax law, and are, therefore, illegal and invalid";

In D "constitute a violation of the Constitution of the United States and, in particular, the Commerce Clause of the United States Constitution, in that the Tax Assessor of the State of Maine is purporting to assess and impose a tax upon interstate commerce, thus exercising a prerogative which the Federal Constitution reserves exclusively to the Federal Congress and denies to the various States."

The lease provides:

"11. Additional Consideration. The initial and period rental charges herein provided for Can-

> teens, as set forth in Exhibit 'A' attached hereto, do not constitute adequate consideration for the use of such Canteens by the Distributor, and it is understood that the Company is dependent in a large measure on income which it may receive from the sale of merchandise through its Canteens."
>
> "23. Cancellation for Inefficient Operations. The Distributor agrees to operate the business herein described within the above territory in an efficient manner and to use and lease from the Company within such territory that number of Canteens which should be used within that territory under efficient and aggressive management . . ."

Mr. Arnold, Assistant Treasurer of Automatic Canteen Company, testified both in person and through affidavit. We quote in part from the affidavit:

> "That while it is true that representatives of Automatic Canteen have visited its franchised distributors, located within the State of Maine upon diverse occasions, the purpose of such visits was *not* the inspection of the vending machines leased by Automatic Canteen but rather a review of the entire method of operation conducted by said franchised distributors and the offering of constructive criticism with the view of increasing the efficiency of the distributors, to the end that their total business would be increased thereby and that they would therefore wish to lease additional vending machines from Automatic Canteen. Specifically, the representatives of Automatic Canteen review with the distributor such items as his methods of record keeping, his frequency of mechanical service and his administrative procedures. These visits do not operate in any way to relieve the distributor of his primary responsibility for the maintenance and care of the vending machines leased to him by Automatic Canteen."

The witness also testified in substance that the machines were shipped into the State usually by common carrier;

that the rentals were paid by check sent to Chicago; that the merchandise which was used in the machines was ordered by the distributor from Chicago, by letter or by the use of an order form; that the Chicago office of Automatic Canteen then sent the orders to the suppliers or manufacturers of the products which were then shipped directly from them to the distributors, and that the relationship of the Automatic Canteen Company to its distributors is that of a candy and cigarette wholesaler. Counsel for the appellant, in speaking of the visits mentioned in the appellant's affidavit, asked:

"MR. WERNICK: How frequent have those visits mentioned in your affidavit been?
"THE WITNESS: Ordinarily about once a year.
"Q. Do you know how many men have come in?
* * * * * * * * *
"THE WITNESS: I don't know for sure. Two, I believe.

"MR. WERNICK: Is that two on each of the yearly visits?
"A. Two on each of the visits.

"Q. Now, are you familiar with what those men do when they come into Maine?
"A. In a general way, yes.

"Q. Directing your attention particularly to any records that they make, would you please explain what those records are and what the purpose of them is?
"A. They review the operations of a particular distributor with respect to his service, his stockroom, his business methods, prepares recommendations to correct any faults that he might have observed in the distributor's business operations, submits the recommendations to an official of the company who generally will write to the distributor involved and send him a copy of the individual's report.

"Q. And what is the purpose of this report?
"A. The purpose is to see that the distributor is

maintaining good business practices so that his business will improve and, consequently, Automatic's through its sale of products to the distributor will also increase.

"Q. When you say 'sale of products,' are you referring to the business of selling the merchandise?
"A. The merchandise, yes.

"Q. In the machines?
"A. In the machines.

"Q. Do these men who come in have anything to do with the repair of the machines?
"A. No, they do not.

"Q. Who handles all repairs to the machines themselves?
"A. The distributor's employees.

"Q. Are these men who come in on behalf of Automatic Canteen in any way concerned with the location of the machines?
"A. No.

"Q. Are the records which they prepare in any way directed to ascertaining where those machines are, or is that immaterial to them?
"A. That is immaterial to them.

"Q. Are the records in any way concerned with the information as to how much repair work is done by the distributor with regard to the machines? I think that can be answered 'Yes' or 'No' first.
"A. No.

"Q. Do you wish to explain that further?
"A. Yes. The individuals who come in observe the condition of the machines and recommend to the particular distributor that he should keep them in better shape, or if some of them are inoperative he puts that in his report to the effect that his maintenance has been sloppy, or something like that.

"Q. And what is the purpose of that information?
"A. We want clean, working machines on location to increase the sale of candy, cigarettes and

so on, and to protect the name of Automatic Canteen Company of America. We don't like to have dirty, unsightly vendors out.

"Q. But it in no way pertains, as I understand it, to any interest you have in repairing machines?
"A. No.

"Q. That is the primary responsibility of the distributor, is that correct?
"A. Yes.

"Q. And you have nothing to do with the repair of the machines, or the maintenance of them?
"A. None.

"Q. I think that is all."

The appellant urges that the instant case cannot be distinguished from *Trimount Coin Machine Co.* v. *Johnson,* 152 Me. 109, 124 A. (2nd) 753. With this view we do not agree. In *Trimount* the court said, at p 113:

"From the agreed statement it appears that the petitioner has done nothing with respect to the machine within the State of Maine either before or since making the lease. We conclude, therefore, that the petitioner has not exercised in this State any right or power over the property within the statutory definition of 'use.'

"Our decision is based upon and limited strictly to the facts set forth in the agreed statement. At what point a lessor or owner does exercise a right or power in this State under the statute we do not here consider or determine, except that there has been no such exercise in this State on the facts before us."

Here we have evidence of *acts* by the appellant within Maine—facts not present in *Trimount* or in *South Shoe Machine Co., Inc.* v. *Johnson, State Tax Assessor,* 158 Me. 74, 188 A. (2nd) 353. The employees of the appellant Automatic Canteen Company of America coming into Maine were interested in and had duties in connection with the canteens as well as the merchandise sold therein. The

appellant has a vital interest in the efficient operation of the silent salesmen. The acts of its employees in Maine bore upon whether the lessee or distributor was carrying out the terms of the lease.

We conclude that the appellant has exercised such right and power over its vending machines incident to its ownership that it is subject to the use tax.

In light of the use of the vending machines within the State, the tax does not violate the Federal Constitution. *Hunnewell Trucking, Inc.* v. *Johnson, State Tax Assessor,* 157 Me. 338, 172 A. (2nd) 732.

The tax was lawfully assessed. The entry will be

Remanded for entry of decision denying the appeal.

TAPLEY, J.

DISSENTING OPINION

I do not concur with the reasoning or the result in the majority opinion. I do agree, however, that the principles of law applicable to the instant case are set forth in *Trimount Coin Machine Co.* v. *Johnson,* 152 Me. 109 and *South Shoe Machine Co., Inc.* v. *Johnson,* 158 Me. 74, 188 A (2nd) 353.

The majority opinion correctly presents the issue:

> "The main issue is whether the appellant has exercised within the State any right or power over its vending machines incident to its ownership."

The majority of the court finds:

> "The employees of the appellant Automatic Canteen Company of America coming into Maine were interested in and had duties in connection

with the canteens as well as the merchandise sold therein. The appellant has a vital interest in the efficient operation of the silent salesmen. The acts of its employees in Maine bore upon whether the lessee or distributor was carrying out the terms of the lease."

Thus the majority conclude:

"- - - - that the appellant has exercised such right and power over its vending machines incident to its ownership that it is subject to the use tax."

"The use and possession of the property in Maine in its entirety is, and at all times has been, in the lessee or customer by virtue of the lease. - - - - - There is, of course, no use tax arising under any theory of the Act from the purchase of the machine outside of Maine or *from the lease written in Massachusetts.* Until the machine reached the State of Maine there was no action whatsoever within the State with respect to the property owned by the petitioner." (Emphasis supplied.) *Trimount Coin Machine Co.* v. *Johnson, supra.*

According to the terms of the lease in the case at bar, the distributor is required to install, inspect, repair, operate and maintain the vending machines. He has control over the machines until he breaches his contractual responsibility and the lessor seeks to enforce its rights under the lease.

"The mere existence of certain rights or powers in the owner-lessor reserved by the lease would not suffice to subject him to taxation if he failed to or refrained from exercising any such right or power in Maine." *South Shoe Machine Co., Inc.* v. *Johnson, supra.*

The representatives of the company, according to the undisputed evidence, were present in Maine for the prime purpose of reviewing and reporting the overall canteen business of the distributor in the sale of the products.

While here they observed the condition of the machines because sloppy maintenance could affect the sale of merchandise.

In my opinion, when representatives of the company came to Maine to review the merchandising business conducted by the distributor in the sale of its products and, while present in Maine, they, incidental to the main purpose of their visit, made visual observation of the vending machines, they did not by so doing exercise any right or power over them.

According to my view of the facts, in light of the applicable statutory language, I am led to the conclusion the Legislature never intended that a mere visual observation of the machines, unaccompanied by some affirmative act taken in accordance with the terms of the lease, would be an exercise of right or power incident to their ownership.

I would sustain the appeal.

Webber, J., joins in this opinion.

ALLISON RUNNELLS
vs.
MAINE CENTRAL RAILROAD

Cumberland. Opinion, May 10, 1963.

Negligence. Railroad. Due Care.

Although the violation of a statute may give a right of action to one who is injured thereby, it does not, unless expressed or implied, give a right of action to one who is guilty of contributory negligence.

One may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrong doer the label of a nuisance.

When the basis of nuisance is negligence, contributory negligence bars recovery.

Contributory negligence is a defense against a nuisance based upon negligence.

ON APPEAL.

The sole issue of this appeal is the "correctness of law of the instructions of the presiding justice that contributory negligence of the plaintiff would be a bar to her recovery under all counts of the complaint." Appeal denied.

Jerome Daviau, for Plaintiff.

Pierce, Atwood, Allen and McKusick,
by Jotham D. Pierce and Horace A. Hildreth, Jr.,
for Defendant.

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

WILLIAMSON, C. J. On appeal. This case arises from a collision between an automobile operated by the plaintiff

and the defendant's train at a grade crossing at which the defendant had failed to maintain a warning sign in violation of statute. R. S., c. 45, § 73. The jury found for the defendant. By stipulation the sole issue on appeal is "the correctness of law of the instructions of the presiding justice that contributory negligence of the plaintiff would be a bar to her recovery under all counts of the complaint; . . ."

There is no substantial disagreement between the parties upon the facts insofar as they bear upon the validity of the instructions to the jury. The collision occurred at the Alden Street railroad crossing in Waterville shortly after six o'clock on the evening of January 21, 1957. The plaintiff, as she approached the College Avenue crossing, observed a blinking red light warning of an oncoming train. She then intended to turn to her right on Ash Street and thence cross the railroad at the Chaplin Street crossing where to her knowledge there was a flagman. By error she turned to her right on Maple Street, not Ash Street, and thence without stopping came upon the Alden Street crossing. After passing over five tracks, her car was struck on the sixth track by defendant's locomotive as it was coming in for a scheduled stop at the Waterville Station only a short distance from the crossing. Alden Street, although it was never formally accepted as a town way, was treated as such for purposes of the case and thus the signboard statute, below, was applicable.

R. S., c. 45, insofar as we are here interested, reads:

> "**Sec. 73. Signboards maintained at grade crossings; bell on engine and when rung.**—Every railroad corporation shall cause signboards with the words 'Railroad Crossing' distinctly painted on each side thereof in letters plainly legible, to be placed and constantly maintained at the side of highways and town ways where they are crossed at grade by such railroads, on posts or other struc-

tures, in such position as to be easily seen by persons passing upon such ways; . . ." (with provisions for sounding whistles and ringing bells under certain conditions).

"**Sec. 74. Neglect of § 73; damages.**—For unnecessarily neglecting to comply with any provision of the preceding section, the corporation forfeits not more than $500. Any person, whose duty it is to open or close such gates for the passage of an engine or traveler on a way, neglecting to do so forfeits not more than $50. The corporation is liable for damages for its neglect to comply with these provisions, or for the neglect of any agent or for the mismanagement of an engine, to be recovered in an action on the case by the person damaged thereby."

The presiding justice in his charge to the jury summarized the plaintiff's case as follows:

"In this case, as you will see by the plaintiff's writ and as you have heard from the attorneys in argument, there are really three theories under which the plaintiff seeks to hold the defendant liable and responsible for her injuries."

* * * * * * * * *

"In the first place — Perhaps I don't have these in the correct order, but in the first place, the plaintiff says that there is a statute, a law passed by the Legislature, which required a railroad corporation to erect a signpost to warn travelers of the fact that a crossing is near at every point where a town way or highway crosses the railroad track, and this statute makes the railroad liable to a person who is injured as a result if it does not have this signpost erected. That is the first theory.

"The second theory is that the crossing without a sign or without such protection as the plaintiff argues it should have is a nuisance — that is a word I will explain to you — and because it is a nuisance, the plaintiff says that the defendant is liable for maintaining that nuisance there. And,

> thirdly, the plaintiff says that the defendant was negligent and that as a result of that negligence the plaintiff was injured."

After discussing the three different theories the presiding justice continued:

> "So, now you see that the distinction between the three theories of the plaintiff isn't turning out to be very important from the standpoint of my charge to you because I am charging you that under whichever theory you consider — whichever one of those three theories — the conduct of the defendant fails to measure up to the standard required by law; so, under the theory of the statute I spoke of, the defendant didn't comply with the statute; under the theory of the nuisance, the defendant did commit a public nuisance; under the theory of negligence, the defendant was negligent at law in so far as it didn't have that signpost there."
>
> * * * * * * * * *
>
> "So, now, repeating perhaps, under whichever of the three theories you are considering, the question is, the conduct of the defendant not having been sufficient to meet the requirements of law, you have only to decide, first, was this conduct of the defendant that I speak of the proximate cause of the injury which the plaintiff received, and, secondly, was the plaintiff herself entirely free from any negligent conduct which in any way contributed to her injuries."

In light of the statement of the theories on which the case was tried made by the presiding justice and to which no objection was made, we need not examine the pleadings to ascertain whether the theories are there adequately set forth.

Counsel for the defendant in their brief accurately say:

> "For purposes of this appeal we must assume that in considering each of the Plaintiff's counts the jury found that:

"A. Defendant's (1) negligence, (2) commission of a nuisance, and (3) violation of statutory duty, were each a proximate cause of the Plaintiff's injury; and

"B. Plaintiff's own negligence was a proximate cause of the injury."

The parties stipulated that "There was sufficient evidence to support a jury's finding that the Plaintiff was guilty of contributory negligence if the court's instructions to the jury regarding contributory negligence were correct as a matter of law."

The third theory stated by the presiding justice was neither more nor less than the theory of the every day action for tort with freedom from contributory negligence on the part of the plaintiff as an essential element. No claim otherwise is made by the plaintiff.

The first and second theories are directly related to the violation of the signboard statute, and do not fall into entirely separate compartments. The plaintiff urges that her contributory negligence does not bar recovery: first, under the signboard statute, and second, for damages arising from a public nuisance characterized by the plaintiff as an absolute nuisance.

First theory: Sections 73 and 74, *supra,* do not, in our view, remove the bar of contributory negligence. The signboard statute was designed to establish at least minimum standards of safety in the maintenance and use of railroad grade crossings. It does not follow, however, that the plaintiff claiming damage is thereby released from a duty to use due care on his part. We may compare motor vehicle laws governing highway traffic.

The language of the statute does not require the interpretation sought by the plaintiff. Unless such meaning is clearly apparent, there is no sound reason to permit re-

covery to one whose negligence has contributed to his injury.

> "**Contributory negligence under statutory claims.** The rule forbidding a recovery for negligence where a plaintiff has contributed to the injury by his own fault, is generally held applicable to causes of action given by statute.
>
> "Under a statute giving a right of action for all damages sustained or injury suffered 'by reason' or 'in consequence' of neglect to do some act, the ordinary rule as to contributory negligence is not excluded from the operation of the statute. In such case, the practical construction given to the statute is that the injury is not suffered by reason or in consequence of the defendant's neglect, but rather in consequence of the plaintiff's want of ordinary care to avoid exposure to the injury. Thus, where a statute requires railroad companies to ring bells when approaching a highway crossing, or keep a flagman stationed there, or use other means to warn travelers, and making them liable to another person who suffers injury by reason of their omission to use such means, contributory negligence is a good defense." 1 Shearman and Redfield on Negligence § 79.
>
> "**Contributory negligence—Violation of statutory duty.**—There are many modern statutes requiring the performance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is suggested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of a statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute explicitly abrogates the rule of the common law. Principle and authority, as we believe, require the conclusion that, although the violation of a statute may give a right of action to one who is injured thereby, it does not, unless expressly or by necessary implication, so declared, give a right of ac-

> tion to one who is himself guilty of contributory negligence." 4 Elliott on Railroads (3rd ed.) § 1882.

See also *Dart* v. *Pure Oil Co.* (Minn.), 27 N. W. (2nd) 555, 559; 65 C. J. S., *Negligence,* § 130c; 74 C. J. S., *Railroads,* § 726; 75 C. J. S., *Railroads,* § 947.

No Maine cases involving violation of the signboard or like statutes removing contributory negligence as a bar to recovery have come to our attention. *Flood* v. *Belfast & Moosehead Lake R. R. Co.,* 157 Me. 317, 321, 171 A. (2nd) 433 (failure to ring bell or blow whistle); *Borders* v. *Boston & Maine Railroad,* 115 Me. 207, 98 A. 662 (absence of gate man); *Wadsworth* v. *Marshall,* 88 Me. 263, 34 A. 30 (statute requiring quarry man to give notice of explosion); *Hooper* v. *B. & M. R. R.,* 81 Me. 260, 267, 17 A. 64 (open gates unattended); *State* v. *B. & M. R. R. Co.,* 80 Me. 430, 443, 15 A. 36 (open gates unattended); *Wilder* v. *Maine Central,* 65 Me. 332 (fencing); *Perkins* v. *Eastern and B. & M. Railroad Co.,* 29 Me. 307 (fencing). See also *Webb* v. *Portland & Kennebec Railroad Company,* 57 Me. 117 (contributory negligence at grade crossing); *Fay* v. *Boston & Maine Railroad,* 338 Mass. 531, 156 N. E. (2nd) 24 (violation of traffic law by plaintiff motorist); *Weir* v. *New York, New Haven & Hartford R. R. Co.,* 340 Mass. 66, 162 N. E. (2nd) 793 (whistle); *Johnson* v. *Chicago & N. W. R. Co.* (S. D.), 38 N. W. (2nd) 348, 351 (signboard); *Sanders* v. *Charleston & W. C. Ry. Co.* (S. C.), 77 S. E. 289 (signboard).

Examples of absolute liability with contributory negligence eliminated by plain statutory language are *Excelsior Co.* v. *Railroad Co.,* 93 Me. 52, 44 A. 138 (fire caused by locomotive), and *Hussey* v. *King,* 83 Me. 568, 22 A. 476 (dog bite).

Second theory: We have assumed that the railroad crossing without the required warning sign was a public

nuisance. The main argument of the plaintiff is that contributory negligence does not prevent her recovery inasmuch as the nuisance was absolute and not grounded on negligence.

In *McFarlane* v. *Niagara Falls,* 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1, the plaintiff stumbled on a projection in the sidewalk. Chief Judge Cardozo, in an opinion often cited, said at p. 3:

> "If danger there was, then also there was nuisance, though nuisance growing out of negligence. Nuisance as a concept of the law has more meanings than one."

and again at p. 4:

> "Confining ourselves now to the necessities of the case before us, we hold that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance."

We need not, nor do we, attempt to determine precisely where a line may be or ought to be drawn between nuisances characterized as absolute nuisances and negligence nuisances. Difficulties involved in the application of an absolute nuisance test are illustrated in *Beckwith* v. *Town of Stratford* (Conn.), 29 A. (2nd) 775.

This is a typical grade crossing case. The differences between the nuisance here and, let us say, a nuisance created by offensive odors are obvious. R. S., c. 141, § 6. We are considering the rights and duties of the traveler on the public way and the railroad in the reasonable and efficient use of facilities lawfully available to each. We are satisfied that the basis of the nuisance here is negligence, and that contributory negligence therefore bars recovery.

The principle that contributory negligence is a defense against a nuisance based on negligence is found in the leading case of *Butterfield* v. *Forrester,* 11 East, 60, 103 Eng. Reprint, 926, 19 Eng. Rul. Cas. 189 (1809), in which the defendant had created a nuisance in placing a pole across a highway. The plaintiff, injured in riding into the obstruction, was held to a duty of due care. "A party," said Lord Ellenborough, C. J., "is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it if he do not himself use common and ordinary caution to be in the right. . . One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Our Maine cases are uniform to the same effect. *Daniel* v. *Morency,* 156 Me. 355, 165 A. (2nd) 64 (gasoline filler pipe in sidewalk); *Palleria* v. *Farrin Bros. & Smith,* 153 Me. 423, 140 A. (2nd) 716 (ditch in street); *Larson* v. *N. E. Tel. & Tel. Co.,* 141 Me. 326, 44 A. (2nd) 1, noted in 73 A. L. R. (2nd) 1393 (contributory negligence not in issue; action by owner for damages caused by excavation in street to his automobile while in the possession of and operated by a bailee); *Benson* v. *Titcomb,* 72 Me. 31 (steam engine); *Dickey and Wife* v. *Maine Telegraph Company,* 43 Me. 492, 496 (wire across highway). See also *Brown* v. *Alter,* 251 Mass. 223, 146 N. E. 691; *McKenna* v. *Andreassi,* 292 Mass. 213, 197 N. E. 879; *Taylor* v. *City of Cincinnati* (Ohio), 55 N. E. (2nd) 724; 39 Am. Jur., *Nuisances,* § 200; Harper and James, Torts, § 1.28, § 22.8 at p. 1225, and § 22.9; Prosser, Torts, § 70, pp. 389, 399 on absolute nuisance, § 74, p. 423 on contributory negligence; Seavey, Nuisance: Contributory Negligence and other Mysteries, 65 Harv. L. Rev. 984 (1952); Annot. 73 A. L. R. (2nd) 1378.

The principles we have here approved do not unduly burden the traveler. Among the circumstances to be considered and weighed in finding due care or negligence are, of course, a failure of the railroad to give warning by signboard, or whistles, or bells, or other appropriate means. The railroad owes a duty of due care to the traveler crossing its tracks and the traveler in turn must act with due care under the circumstances.

The entry will be

Appeal denied.

OPINION

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

* * * * * *

QUESTIONS PROPOUNDED BY THE SENATE IN AN ORDER DATED MAY 14, 1963 ANSWERED MAY 23, 1963

SENATE ORDER PROPOUNDING QUESTIONS

STATE OF MAINE

In Senate
May 14, 1963

WHEREAS, on January 8, 1963, certain petitions were presented to the Secretary of State under the provisions of Article IV, Part 3, Section 18 of the Constitution of the State, to initiate an Act to Authorize the Construction of a

Causeway Connecting Cousins Island with Littlejohns Island and a bridge and causeway connecting Littlejohns with Chebeague Island at an estimated cost of $3,000,000. A true copy of said petition is attached hereto, marked Exhibit A, and incorporated herein; and

WHEREAS, after due consideration of said petitions and the signatures thereon the Committee on Judiciary reported that there were 34,183 valid signatures on said petitions and that a total of 29,273 valid signatures were required under the provisions of the Constitution, and, therefore, there were a sufficient number of valid signatures and that the proposed Act be submitted to the electors of the State at the next regular or special election; and

WHEREAS, both branches of the 101st Legislature have accepted the report of said Committee and the Secretary of State has been instructed as aforesaid; and

WHEREAS, doubts now exist and questions have arisen as to the propriety of the Legislature's accepting the petitions which contain the initiation of a bond issue as proposed in said petitions and doubt now exists and questions have arisen as to the constitutionality of the initiation of a bond issue as proposed; and

WHEREAS, it appears to the Senate of the 101st Legislature that the following are important questions of law and that the occasion is a solemn one, be it therefore

ORDERED, that in accordance with the provisions of the Constitution of the State that the Justices of the Supreme Judicial Court are hereby respectfully requested to give the Senate their opinion on the following questions:

1. Is Article IX, Section 14, of the Constitution of Maine an exclusive method of issuing bonds?

2. Is it constitutional to initiate a bond issue under the provisions of Article IV, Part 3, Section 18 of the Constitution of Maine?

(Cole)
Name: (signed) William R. Cole

County: Waldo

In Senate Chamber
May 14, 1963
READ AND PASSED
Chester T. Winslow
Secretary

A true copy.
Attest:
Chester T. Winslow
Secretary of the Senate

EXHIBIT A

STATE OF MAINE

To the Legislature of the State of Maine:

In accordance with Section 18 of Article IV, Part 3rd of the Constitution, the undersigned electors of the State of Maine qualified to vote for Governor, residing in the Town of XXXXX In said state, whose names appear on the voting list of said TOWN as qualified to vote for Governor, hereby respectfully propose to the Legislature for its consideration the following entitled bill:

"AN ACT to Authorize the Construction of a Causeway Connecting Cousins Island with Littlejohns Island, and a Bridge and Causeway Connecting Littlejohns with Chebeague Island.

Preamble. Two-thirds of both houses of the Legislature deeming it necessary in accordance with Section 14 of Article IX of the Constitution.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. State Highway Commission authorized to construct a causeway and bridge. The State Highway Commission is authorized to construct a causeway from Cousins to Littlejohns Island and a bridge and causeway from Littlejohns to Chebeague Island, in the Towns of Cumberland and Yarmouth, in the County of Cumberland, with necessary highway approaches thereto, at an estimated cost of $3,000,000. The cost of said bridge, with the highway approaches thereto, shall be taken and appropriated from the proceeds of bonds issued under authority of this act.

Sec. 2. Toll bridge. . . . . .

Sec. 3. Treasurer of State to issue bonds. . . . . .

Sec. 4. Records of bonds issued to be kept by State Auditor and Treasurer. . . . . .

Sec. 5. Sale, how negotiated; proceeds appropriated. . . . . .

Sec. 6. Proceeds of bonds not available for other purposes; must be kept from other funds. . . . . .

Sec. 7. Interest and debt retirement. . . . . .

Sec. 8. Disbursement of bond proceeds. . . . . .

Sec. 9. Contingent upon ratification of bond issue. No action shall be taken or liability incurred under this act unless and until the people of Maine shall have ratified the issuance of bonds in behalf of the State at such time and in such amounts as set forth in this act for the purpose of building a toll bridge from Chebeague to Littlejohns Island and causeway from Littlejohns to Cousins Island in the Towns of Cumberland and Yarmouth.

Referendum for ratification. The aldermen of cities, the selectmen of towns and the assessors of the several plantations of this State are empowered and directed to notify the inhabitants of their respective cities, towns and plantations to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of Senators and Representatives, at the next general or special state-wide election, to give in their votes upon the acceptance or rejection of the foregoing act, and the question shall be: "Shall a bond issue be ratified in an amount not to exceed $3,000,000 as set forth in 'An Act to Authorize the Construction of a Causeway Connecting Cousins Island with Littlejohns Island, and a Bridge and Causeway Connecting Littlejohns with Chebeague Island?'"

The inhabitants of said cities, towns and plantations shall indicate by a cross or check mark placed within a square upon their ballots their opinion of the same, those in favor of ratification voting "Yes" and those opposed to said ratification voting "No" and the ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings, and return made to the office of the Secretary of State in the same manner as votes for Governor and Members of the Legislature, and the Governor and Council shall count the same and if it appears that a majority of the inhabitants voting on the question are in favor of the act, the Governor shall forthwith make known the fact by his proclamation, and the act shall become effective in 30 days after the date of said proclamation.

Secretary of State shall prepare ballots. The Secretary of State shall prepare and furnish to the several cities, towns and plantations ballots and blank returns in conformity with the foregoing act, accompanied by a copy thereof."

There follow "INSTRUCTIONS REGARDING INITIATIVE AND REFERENDUM PETITIONS COMPILED

BY THE SECRETARY OF STATE IN ACCORDANCE WITH SECTION 166 OF CHAPTER 3-A OF THE REVISED STATUTES," place for signatures, and clerk's certificate, and verifying petitioner's certificate.

ANSWERS OF THE JUSTICES

To the Honorable Senate of the State of Maine:

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on May 14, 1963.

QUESTION (1): Is Article IX, Section 14, of the Constitution of Maine an exclusive method of issuing bonds?

ANSWER: We answer in the affirmative on the assumption that the question is intended only to relate to bonds to be issued under that part of Art. IX, Sec. 14, reading: ". . . and excepting also that whenever two-thirds of both houses shall deem it necessary, by proper enactment ratified by a majority of the electors voting thereon at a general or special election, the legislature may authorize the issuance of bonds on behalf of the state at such times and in such amounts and for such purposes as approved by such action; . . . "

In so saying, we direct attention to the fact that bonds may be issued in aid of industrial development as provided by Art. IX, Sec. 14-A of the Constitution of Maine, or by further amendment to the Constitution pursuant to the authority of Art. X, Sec. 4 thereof.

QUESTION (2): Is it constitutional to initiate a bond issue under the provisions of Article IV, Part 3, Section 18 of the Constitution of Maine?

ANSWER: We answer in the negative.

In so saying we assume that by its use of the word "initiate" in the question, the Senate contemplates an effectuation of a bond issue by a proposal of a bill therefor by the electors to the Legislature for its consideration, followed by an automatic submission to referendum in event the proposal fails of enactment without change, all as provided by Art. IV, Part Third, Section 18 of the Constitution of Maine. Art. IX, Section 14 of the Constitution effectively intervenes to prevent the submission to referendum of a proposal of a bill for the issuance of bonds of the nature described in our Answer to Question (1) until "two-thirds of both houses shall deem it necessary" and until there shall have been "proper enactment." Art. IX, Section 14 is as binding upon the people as upon the Legislature.

Dated at Augusta, Maine, this 23rd day of May, 1963.

Respectfully submitted:

ROBERT B. WILLIAMSON
DONALD W. WEBBER
WALTER M. TAPLEY
FRANCIS W. SULLIVAN
CECIL J. SIDDALL
HAROLD C. MARDEN

STATE OF MAINE
vs.
(3810) CLEMENT H. DESCHAMBAULT

York. Opinion, May 17, 1963.

False Pretenses. Indictments. Contracts.

A mere expression of opinion will not suffice to support a criminal prosecution for cheating by false pretenses; there must be a direct and positive assertion negating the truth of the alleged false pretenses.

"When a representation embraces no details or particulars, it should not be relied on."

A respondent can be compelled to answer only to an indictment which charges him clearly and explicitly with having made false pretenses as to matters of fact, which are directly and positively alleged not to be true. (See R. S., Chap. 133, § 11, as amended for statutory exception not pertinent here.)

Test of false pretenses is not that defendant obtained property fron. which one cheated was induced to part by false representation; it is sufficient if property is delivered to someone other than the one cheated, whoever may be benefited thereby. R. S., 1954, Chap. 133, § 11.

ON EXCEPTIONS.

The respondent makes exceptions to the overruling of a demurrer to an indictment charging the statutory crime of cheating by false pretenses. Exceptions sustained.

John J. Harvey, County Attorney, for State.

Charles W. Smith, for Defendant.

SITTING: WEBBER, SULLIVAN, SIDDALL, JJ. DUBORD, J., sat at argument, but retired before rendition of decision. WILLIAMSON, C. J., and TAPLEY, J., dissenting.

WEBBER, J. On exceptions. The respondent's demurrer to an indictment intended to charge the statutory crime of cheating by false pretenses was overruled below. The respondent contends that the indictment is fatally defective.

We are concerned here only with so much of the indictment as purports to allege the false pretenses and the negation of the truth thereof. Those portions recite that the respondent "did falsely pretend to (the complainant) that he (the respondent), the duly elected and qualified Mayor of the City of Biddeford, Maine, for the year 1960, and ex officio, by virtue of his office, a member of the Board of Education for the City of Biddeford, Maine, and also a member of the Biddeford High Building Committee, which last mentioned Committee was charged with the responsibility of making all arrangements in contracting for the construction of a new Biddeford High School in Biddeford, Maine, had through the color of his office, *been one of the persons responsible for the said* (complainant) *to obtain the contract* for the building and construction of the said new Biddeford High School for the City of Biddeford, Maine, and that *for services rendered by him,* for and in behalf of the said (complainant), the said (respondent), *in his said capacity* as aforesaid, *for all the work he had performed with respect thereto, should have and receive the sum of $12,000.00 for use in his political campaign;* whereas, in truth and in fact, the said (respondent), in his said capacity as the duly elected Mayor, ex-officio member of the Board of Education and member of the new Biddeford High Building Committee *did not, by virtue of his office or otherwise, influence the action of the Board of Education and Biddeford High Building Committee* resulting in the said (complainant) obtaining the contract for the construction of the new Biddeford High School Building, * * *." (Emphasis supplied.)

The guiding principles are set forth in the leading case of *State* v. *Paul,* 69 Me. 215, 217. A mere expression of opinion will not suffice to support a criminal prosecution for cheating by false pretenses. There must be a "direct and positive assertion" negating the truth of the alleged false pretenses.

We are concerned here only with the italicized portions of the indictment as above set forth. Whether or not the respondent was "one of the persons responsible" was a matter of opinion rather than fact. It reflected the judgment and conclusion of the speaker upon a matter as to which opinions might well differ. The representation smacks of political puffing. It falls far short of the requirement that the pretenses must relate to facts. The indictment is in no way strengthened by the additional italicized phrases. Whether the respondent rendered any unspecified services or performed any work which was of value to the complainant, and more particularly of the value of $12,000, was certainly more a matter of opinion than of fact. There is included no recitation as to what comprised the "services" or "work performed." As was stated in *State* v. *Paul, supra,* at page 217: "The terms are indefinite. What one man would regard as valuable another might not. Where the representations embraced no details or particulars they should not be relied on."

The indictment is fatally defective in another respect. The attempted negation that the respondent "did not by virtue of his office or otherwise, influence the action of the Board * * * and * * * Committee" is not a "direct and positive assertion" negating the truth of the pretenses. The respondent is not charged with having pretended that he influenced the action of any Board or Committee. There is here no denial that the respondent was "one of those responsible" or that he "rendered services" or "performed work." If the respondent had done no more than vote for

the letting of a contract to the complainant, he might in his own opinion have been "one of those responsible," rendering valuable service to the complainant without otherwise influencing the action of his fellow board members. We cannot supply the requisite collision between the alleged false pretenses and the negation of the truth thereof "by any intendment, argument or implication." *State* v. *Paul, supra,* at page 118; see *State v. Perley,* 86 Me. 427, 431; *State* v. *Beattie,* 129 Me. 229, 232.

For the purposes of this case it can be said that the respondent can be compelled to answer only to an indictment which charges him clearly and explicitly with having made false pretenses as to matters of fact, which facts are directly and positively alleged not to be true. (See R. S., Chap. 133, Sec. 11, as amended for statutory exception not pertinent here).

For all of the foregoing considerations the entry must be

Exceptions sustained.

WILLIAMSON, C. J. (DISSENTING OPINION)

I would hold the indictment sufficient in law and overrule the exceptions.

Serious problems raised by demurrers to indictments for cheating by false pretenses under R. S., c. 113, § 11 are evidenced in three cases decided this day; namely, *State* v. *Deschambault* (3811), *State* v. *Binette,* and the instant case. The difficulties have arisen, as I see it, not from differing views upon the general principles of law but from their application to the indictments before us.

In reaching the conclusion that the indictment is sufficient, I have in mind the following reasons:

First: Common ordinary words in an indictment carry their common ordinary meaning. Technical words, of course, receive their technical meaning and words defined by statute, their statutory definition. *State* v. *Maine State Fair Assn.*, 148 Me. 486, 96 A. (2nd) 229; 42 C. J. S., Indictments and Informations, § 107.

The fullest protection is required for the accused. The impossible, however, is not demanded of the State in the use of words setting forth the charge of a criminal offense. The governing principle is simply stated: the meaning of the indictment must be clear. What then is the clear meaning of the charge against the defendant?

The defendant asserts that the alleged pretense "embraces no details or particulars and is indefinite and not sufficient to be relied upon." The bite of the pretense is that the mayor had been one of the persons responsible for Plante obtaining a building contract from the Biddeford High School Building Committee and had rendered services and performed work for Plante with respect to the contract.

In reading the indictment I note the phrases "responsibility of" and "responsible for." The Building Committee "was charged with the responsibility of making all arrangements in contracting for the construction of a new Biddeford High School. . . ." "Responsibility of" here means the duty and the power to make the required arrangements including contracts. No one could misinterpret the meaning of the indictment with reference to the Building Committee.

Turning to the pretense that the defendant "had . . . been one of the persons responsible for" Plante obtaining a contract, I consider "responsible for" used in the sense of causing or bringing about a certain result, in brief, of influencing the Committee. "Responsible": answerable as

the primary cause, motive, or agent whether of evil or good: creditable or chargeable with the result." Webster's Third New International Dictionary (1961). There is then the pretense that the defendant as mayor and member of the Board of Education and of the Building Committee influenced the Committee in its decision to enter into the contract with Plante. It is equally clear in my opinion that services rendered and work performed for the benefit of Plante describe alleged action designed to influence the Committee.

The portion of the pretense to the effect that the defendant should receive $12,000 for use in his political campaign is a statement of opinion and not of fact. A court is not thereby foreclosed in its interpretation of the meaning of the alleged facts from considering the crystal clear opinion of the value allegedly placed thereon by the defendant himself.

To say that the words of the alleged pretense could reasonably mean simply that the defendant had been a member of the Committee and had rendered services or performed work within the proper exercise of his public trust, would render the language of the indictment meaningless. Surely the State did not seek to indict the defendant for pretending he was a member of the Building Committee.

To summarize, I conclude that the defendant is plainly and unmistakably charged with falsely pretending that he influenced the Building Committee in making a school building contract with Plante.

Second: The defendant attacks the indictment on the ground that the alleged false pretense states an opinion only and not a fact.

The pretense was not that the defendant *had influence* with the Committee *at the time* the pretense was made, but

that *prior thereto* he had *exerted influence.* "Responsible for," "services rendered," "all the work he had performed," sufficiently describe the process or act of influencing the Committee. The pretense was not allegedly made as a matter of opinion but as of fact. In *State* v. *Albee,* 152 Me. 425, 132 A. (2nd) 559, we held that a claim by the accused of influence to secure a favorable disposition of a criminal charge was a representation of existing fact. That the *fact* here was in the past, does not alter its character from fact to opinion.

I set aside the alleged statement that the defendant should receive $12,000 for use in his political campaign. At most, the defendant is thereby charged with giving his opinion upon the value of his services and work in influencing the Committee. Nothing more by way of fact is thus added to the pretense. The opinion has, however, weight in establishing the meaning of the pretense as stated.

Third: The defendant contends that the alleged false pretense was incapable of defrauding anyone. The test of whether the pretense deceived is a question of fact for the jury. Common prudence on the part of the one allegedly defrauded is not required. *State* v. *Mills,* 17 Me. 211.

The statute is designed to protect the weak, the ignorant, and the foolish. The folly of Plante, if such be the fact, would not protect the respondent. The State and the defendant are the only parties to the cause. *State* v. *Albee, supra; Commonwealth* v. *O'Brien,* 172 Mass. 248, 52 N. E. 77; 2 Wharton's Criminal Law, § 1493; 2 Bishop on Criminal Law, § 433 *et seq.*

I do not exclude the possibility that an alleged false pretense may be so weak and unconvincing that as a matter of law no manner of proof could establish the element of fraud. In this instance I would leave the issue to the jury.

Lastly: The defendant submits the negating clause is insufficient. From the indictment above we read that the defendant did not "influence the action." I am satisfied for the reasons under First that the indictment in the pretense charged the exertion of influence, and therefore that the truth of the pretense is plainly denied.

As the court has pointed out, we are called upon to consider only the sufficiency of certain portions of the indictment.

Tapley, J., concurs in dissenting opinion.

STATE OF MAINE

vs.

(3811) CLEMENT H. DESCHAMBAULT

York. Opinion, May 17, 1963.

False Pretenses. Indictments. Contracts.

The want of a direct and positive allegation, in the description of the substance, nature or manner of the offense cannot be supplied by any intendment, argument or implication whatever. The charge must be laid positively, and not informally or by the way of recital merely.

The pretense must relate to a past event; a past event is an existing fact.

One who enters into a contract with a municipal officer does so at the peril of the officer's authority; however, it does not mean that a municipal officer may with impunity deceive others as to the extent of authority granted to him by the municipality.

A pretense or representation of authority may well be a pretense or representation of fact.

ON EXCEPTIONS.

The respondent makes exceptions to the overruling of a demurrer on an indictment for cheating by false pretenses. Exceptions overruled.

John J. Harvey, County Attorney, for Plaintiff.

Charles W. Smith, for Defendant.

SITTING: WILLIAMSON, C. J., SULLIVAN, SIDDALL, JJ. WEBBER and TAPLEY, JJ., dissenting. DUBORD, J., sat at argument, but retired before rendition of decision.

WILLIAMSON, C. J. This indictment for cheating by false pretenses brought under R. S., c. 133, § 11, is before us on exceptions to the overruling of defendant's demurrer. The indictment reads in part:

Alleged False Pretense

"... that Clement H. Deschambault ... designedly, by false token and with intent to defraud, ... in his official capacity as Mayor of the City of Biddeford, Maine, did pretend that he was authorized by the City of Biddeford, Maine, to purchase for and receive articles of merchandise on behalf of the City of Biddeford, Maine; and, on said seventeenth day of October, 1961, the said Clement H. Deschambault, with intent to defraud, did falsely pretend to one Philip Sanborn, President and General Manager of the Saco Brick Company, a corporation duly created and existing under the laws of the State of Maine, for the purpose of inducing the Saco Brick Company, by Philip Sanborn, its President and General Manager, to sell and deliver three hundred forty-three feet of eight inch transite pipe of the value of six hundred and seven dollars and twenty-three cents to the City of Biddeford, Maine, for use thereof

by the City of Biddeford, Maine, in Bernard Avenue, so-called, in said City of Biddeford, Maine, he, the said Clement H. Deschambault representing to the said Philip Sanborn that as Mayor of said City of Biddeford, Maine, he, the said Clement H. Deschambault, was authorized to make such purchase of the transite pipe, as aforesaid, and would see to it that the Saco Brick Company would be paid therefor by the City of Biddeford, Maine; which said false pretenses were believed to be true and were relied upon by the said Philip Sanborn, President and General Manager of the Saco Brick Company, duly authorized; . . ."

Negating Clause

". . . whereas in truth and in fact the said Clement H. Deschambault was not authorized in his official capacity as Mayor of the City of Biddeford, Maine, to enter into an agreement with the Saco Brick Company, by its President and General Manager, Philip Sanborn, for the purchase of three hundred forty-three feet of eight inch transite pipe and to receive the same for use in behalf of the City of Biddeford, Maine, whatsoever, all of which the said Clement H. Deschambault, then and there, well knew, . . ."

The pertinent part of the statute reads:

"Whoever, designedly and by any false pretense or privy or false token and with intent to defraud, obtains from another any money, goods or other property, . . . with intent to defraud, . . . is guilty of cheating by false pretenses and shall be punished. . ." (R. S., c. 133, § 11.)

In approaching the discussion of the sufficiency of the indictment, we have in mind the general rules stated below. "All the authorities upon criminal pleading agree that the want of a direct and positive allegation, in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument or implication

whatever. *Com.* v. *Shaw,* 7 Met. c. 57. The charge must be laid positively, and not informally or by way of recital merely. 1 Archib. Crim. Pr. & Pl. 87. 2 Hawk. c. 25, § 60. See *Morse* v. *Shaw,* 124 Mass. 59." *State* v. *Paul,* 69 Me. 215, 217.

> "**Generally.**—In conformity with rules relative to indictments and informations generally, an indictment for obtaining property by false pretenses is sufficient if the language used is such that it designates the person charged and indicates to him the crime of which he is accused. An indictment is not invalidated by the fact that it charges the several acts constituting the offense to have been committed by the defendant in some particular capacity. Such an allegation may be treated as surplusage. An indictment for false pretenses must, however, have that degree of certainty and precision which will fully inform the accused of the special character of the charge against which he is called on to defend and will enable the court to determine whether the facts alleged on the face of the indictment are sufficient in the contemplation of law to constitute a crime, so that the record may stand as a protection against further prosecution for the same alleged offense." 22 Am. Jur., *False Pretenses,* § 90.

Our court in *State* v. *Kerr,* 117 Me. 254, 103 A. 585, approved the general rule above stated then found in substantially the same language in Ruling Case Law. *State* v. *Ward,* 156 Me. 59, 158 A. (2nd) 869; *State* v. *Small,* 156 Me. 10, 157 A. (2nd) 874; *State* v. *Osborne,* 155 Me. 391, 156 A. (2nd) 390; *State* v. *Strout,* 132 Me. 134, 167 A. 859.

The pretense must relate to an existing fact or a past event. Indeed, a past event is an existing fact — D-Day in 1944 is a fact today. *State* v. *Albee,* 152 Me. 425, 132 A. (2nd) 559; *State* v. *Paul,* 69 Me. 215; *State* v. *Stanley,* 64 Me. 157; *Commonwealth* v. *Drew,* 19 Pick. 179; 35 C. J. S., *False Pretenses,* §§ 6, 8; 3 Underhill's Criminal Evidence,

§ 790 (5th ed.); 22 Am. Jur., *False Pretenses*, § 15; 2 Wharton's Criminal Law, § 1439 (12th ed.); Bishop on Criminal Law, § 415 (6th ed.).

We are not concerned with the 1961 amendment bringing promises within the cheating by false pretenses statute. R. S., c. 133, § 11, as amended Laws 1961, c. 40. That portion of the pretense wherein the defendant "would see to it that the Saco Brick Company would be paid therefor by the City of Biddeford," is promissory in nature and looks toward the future. In the absence of an allegation that the defendant did not intend that the city should pay, the promise does not come within the amendment.

The mayor is charged in substance with saying, "I have authority to purchase certain material for the city," when in fact he had no such authority. The defendant urges that the misstatement of authority by the defendant was a misrepresentation of law and not a false pretense of existing fact. He relies heavily upon *State* v. *Vallee*, 136 Me. 432, 12 A. (2nd) 421, in which the court said, at pp. 444, 446:

> "The third indictment against the respondent is for cheating by false pretenses. It is drawn under R. S. Chapter 138, Sec. 1 [now R. S. c. 133, § 11]. So far as it is necessary to consider the allegations of the indictment, it, in effect, charges that for the purpose of inducing Alfred St. Pierre, an employee of the County of Androscoggin, to pay him the sum of $5, the respondent, falsely pretending that in his capacity as a County Commissioner, he had the 'individual right and authority to release the said Alfred St. Pierre from his contract of employment for the County of Androscoggin', and thereby St. Pierre was deceived and induced to pay said sum to retain his job."
>
> * * * * * * * * *
>
> "The indictment contains no allegation that the County Commissioners had undertaken to delegate to the respondent the right and authority to

> determine, according to his own judgment, whether the employment of St. Pierre should be continued or terminated. The averment is simply 'that he *had* the individual right and authority to release the said Alfred St. Pierre.' The respondent is entitled to know, not by implication or intendment, but by direct averment, whether he is accused of misrepresenting the law or of misstating a fact. As set out in the indictment, it is limited to a misstatement of the law.
>
> "The indictment for cheating by false pretenses is held to be insufficient."

In *Thompson* v. *Phoenix Insurance Co.,* 75 Me. 55, relied upon in *Vallee,* the court held that a statement of the extent of coverage of a policy was a statement of law, or if not of law, then of opinion. In either event, it was not a fact on which to ground deceit. The *Thompson* case does not, it will be noted, touch directly on our question relating to a pretense of authority.

The rule is clearly settled that one who enters into a contract with a municipal officer does so at peril of the officer's authority. *Portland Tractor Co., Inc.* v. *Inhabitants of Anson,* 134 Me. 329, 186 A. 883, and cases cited. It does not follow, however, that a municipal officer, as here allegedly the mayor, may with impunity deceive others as to the extent of authority granted to him by the municipality. The one allegedly cheated may have relied on the statement of the officer that he was so authorized as a statement of fact. In our view a pretense or representation of authority may well be a pretense or representation of fact. 2 Bishop on Criminal Law (6th ed.), § 441; 35 C. J. S., *False Pretenses,* § 12. We are convinced that there should be no different rule with reference to public officers. We are not disposed to follow *Vallee* insofar as it holds otherwise.

The defendant contends that since the charge is that the city and not the defendant obtained the material, the in-

dictment does not state the offense. The test is not, however, that the defendant obtained the property from which the one cheated was induced to part by the false representation. It is sufficient if the property is delivered to some one other than the one cheated, whoever may be benefited thereby. *Commonwealth* v. *Langley,* 169 Mass. 89, 47 N. E. 511; *Commonwealth* v. *Harley,* 7 Met. 462; 25 C. J., *False Pretenses,* § 34; 35 C. J. S., *False Pretenses,* § 25.

The sufficiency of the indictment is the only issue before us. Indeed, we have been called upon only to consider the sufficiency of certain portions of the indictment. We have no concern whatsoever with guilt or innocence.

Does the indictment state a charge of cheating by false pretenses clearly to the end that the defendant may defend himself and may plead judgment thereon in a future prosecution for the same offense? We answer in the affirmative. The indictment is sufficient in law.

The entry will be

Exceptions overruled.

WEBBER, J. (DISSENTING)

I cannot agree with the result reached by the court. In *State* v. *Vallee,* 136 Me. 432, 444, the allegation of the pretense was simply that the respondent "had the individual right and authority to release." The court found this allegation insufficient and defective because it failed to indicate directly whether the pretended right and authority arose as a matter of law or as the result of a vote of the county commissioners. The court said at page 446:

> "The respondent is entitled to know, not by implication or intendment, but by direct averment,

> whether he is accused of misrepresenting the law or of misstating a fact."

If no more than an opinion as to a matter of law is expressed, no crime is committed.

The issue in the instant case is whether or not the allegation of pretense meets the test thus imposed. The indictment charges in part that the respondent "in his official capacity as Mayor of the City of Biddeford, Maine, did pretend that he was authorized by the City of Biddeford, Maine, to purchase," and again that the respondent "as Mayor of said City of Biddeford, Maine, * * * was authorized to make such purchase." While the first quoted portion in its use of the words "was authorized by the City of Biddeford" tends to suggest a vote and delegation of authority and thus a matter of fact, the second quoted portion tends with equal force to suggest that the authority is vested in the Mayor by virtue of his office and thus to assert a matter of law. The allegation of pretense *in toto* therefore fails to inform the respondent by direct averment and with that clarity which is required by *Vallee*. I am persuaded that *Vallee* does no more than to impose reasonable requirements designed to protect a respondent in making his defense and asserting a claim of double jeopardy in event of a later prosecution. I see no occasion for overruling *Vallee* and would sustain the demurrer.

Tapley, J., joins in this dissent.

STATE OF MAINE
vs.
RAOUL J. BINETTE

York. Opinion, May 17, 1963.

False Pretenses. Indictments.

A mere expression of opinion will not suffice to support a criminal prosecution for cheating by false pretenses.

ON EXCEPTIONS.

The respondent makes exceptions to the overruling of a demurrer to an indictment charging the statutory crime of cheating by false pretenses. Exceptions sustained.

John J. Harvey, County Attorney, for Plaintiff.

Charles W. Smith, for Defendant.

SITTING: WEBBER, TAPLEY, SIDDALL, JJ. WILLIAMSON, C. J., and SULLIVAN, J., dissenting. DUBORD, J., sat at argument, but retired before rendition of decision.

WEBBER, J. On exceptions. A demurrer to an indictment was overruled by the justice below. The indictment, intended to charge the crime of cheating by false pretenses (omitting the formal portions thereof), employs the following language:

> "(The respondent) did falsely pretend to one, Lucien M. Bourque, that he, the said Raoul J. Binette, the duly elected and qualified City Clerk of the City of Biddeford, Maine, for the year 1960, had, through the color of his office, been one of the persons who had worked very hard to get the new Biddeford High School project started, and that he would like to have something to compensate him for the work that he *and others* had done for

> him with reference to the school project, in his said capacity, as aforesaid, and that he should have and receive moneys as a donation for the Democratic Party; whereas, in truth and in fact, the said Raoul J. Binette, in his said capacity as City Clerk of the City of Biddeford, Maine, by virtue of his office or otherwise, did not, in any respect, do anything to aid or assist the said Lucien M. Bourque with reference to the school project, nor did he perform any services with reference to any of the Committees in charge of building the new High School to entitle him to be compensated for the work that he *and others* had done for him, the said Lucien M. Bourque, to obtain any work for site preparation in preparing the ground for the new Biddeford High School, all of which the said Raoul J. Binette, then and there, well knew; * * *." (Emphasis ours.)

There follow the requisite allegations of belief and reliance by the complainant and his subsequent payment of money. Only the sufficiency of the above-quoted portion of the indictment is in issue here.

We are satisfied that the indictment fails to charge the crime of cheating by false pretenses. Since the ordinary affairs of business involve so many instances of difference of opinion, or the understandable over-appraisal of the value of one's own efforts or the desirability of one's own product, our court has wisely imposed rather strict requirements as to both pleading and proof whenever false pretenses are charged. To do otherwise might open a veritable Pandora's box of both civil and criminal cases which, though devoid of merit, would clutter the dockets of our several courts. One who prosecutes a meritorious claim of cheating by false pretenses experiences no great difficulty in setting forth understandably and with reasonable precision the false pretenses of fact relied upon and the negation thereof.

The indictment here fails to meet the test. In the first place we are dealing with the solicitation of political contributions, an activity not infrequently accompanied by some form of political puffing. We are not convinced that the vague and indefinite inducements to make such a contribution in the instant case were capable of deceiving or defrauding anyone. It is apparent that the first portion of the recital of alleged false pretenses charging that the respondent "had, through the color of his office, been one of the persons who had worked very hard to get the new Biddeford High School project started" is nowhere negated. This leaves only that portion which relates to "the work that he *and others* had done for him with reference to the school project." (Emphasis supplied.) This language partakes more of innuendo than direct allegation, but in any event too many questions remain unanswered. What was meant by "work" as used in this context? Is the "work" referred to the same "work" previously described as being involved in getting the project started? If so, there is no denial that some such "work" was done. In the opinion of the speaker, efforts to get the project started initially might ultimately have accrued to the benefit of the complainant since he did obtain a contract. The word "work" itself in this context, otherwise undefined, is more an expression of opinion than of fact. Conceivably one situated as was the respondent might consider even the most trifling effort to speak a good word for the complainant as political "work" as that word is frequently used in political circles. It is important to note that the pretense alleged is that the "work" had been done by the respondent *"and others."* For aught that appears it may have been what these "others" did that induced the complainant to make a political contribution. *It is nowhere denied that "others" did "work" for the complainant with reference to the school project.* We cannot over-emphasize the necessity of requiring a precise and unambiguous recital of *facts*

falsely pretended to be true and an equally precise negation of the truth of those *facts*. The law may reasonably require that persons making party contributions in lively anticipation of future favors recognize and disregard all forms of political puffing.

The entry will be

Exceptions sustained.

SULLIVAN, J. (DISSENTING)

By indictment the respondent has been accused of the crime of cheating by false pretenses. R. S. (1954), c. 133, § 11. He demurred to the indictment. The trial justice overruled the demurrer. Respondent excepts to that ruling.

The indictment in presently essential text reads as follows: (partition of clauses, ours)

> " - - - - that Raoul J. Binette - - - feloniously designedly and with an intent to defraud, did falsely pretend to one LUCIEN M. BOURQUE, that he, the said Raoul J. Binette, - - - Clerk of the City - - - had through the color of his office, been one of the persons who had worked very hard to get the new Biddeford High School project started,
>
> and
>
> that he would like to have something to compensate him for the work that he and others had done for him with reference to the school project, in his said capacity, - - - - - and
>
> that he should have and receive moneys as a donation for the Democratic Party;
>
> whereas in truth and in fact,
>
> the said Raoul Binette, in his said capacity as City Clerk - - - by virtue of his office or otherwise, did not in any respect, do anything to aid or assist the

said Lucien M. Bourque with reference to the school project,

nor did he perform any services with reference to any of the Committees in charge of building the new High School to entitle him to be compensated for the work that he and others had done for him, the said Lucien M. Bourque, to obtain any work for the site preparation in preparing the ground for the new Biddeford High School,
all of which the said Raoul J. Binette, then and there, well knew,

which said false pretenses were believed to be true, and relied upon by the said Lucien M. Bourque,

and

he was thereby deceived and induced to pay over and deliver and did, then and there, pay over and deliver to the said Raoul J. Binette, the following sums of money, - - - - - and the said Raoul J. Binette, thereby solely and by means of said false pretenses, as aforementioned, did, then and there, feloniously, designedly and with the intent to defraud, obtain from the said Lucien M. Bourque, at the various times, dates and in the amounts, as aforementioned, a sum of money - - - of the property of said Lucien M. Bourque - - - "

R. S., c. 133, § 11, as pertinent here, is as follows:

"Whoever, designedly, and by any false pretence or privy or false token and with intent to defraud, obtains from another any money, goods or other property, - - - - - is guilty of cheating by false pretences and shall be punished - - - - "

The indictment inceptively narrates that the respondent falsely pretended to Lucien M. Bourque that the respondent:

" - - - had - - - been one of the persons who had worked very hard to get the new Biddeford High School project (planned undertaking) started."

Nevertheless the indictment fails to negate directly and specifically and as false, the foregoing "pretense." The imputation is thus unendowed with the properties of a legal incrimination and is legally annulled. *Rex* v. *Perrott,* 2 Maule & Selwyn, 379; *Pattee* v. *State,* 109 Ind. 545, 10 N. E. 421, 422; *Burnley* v. *Commonwealth* (Ky.), 117 S. W. (2nd) 1008; *People* v. *Cooper,* 229 N. Y. S. 748, 750; *Campfield* v. *State* (Ohio), 103 N. E. (2nd) 661; Wharton's Criminal Law, 12th ed., Vol. 2, § 1493, P. 1765; 35 C. J. S., *False Pretenses,* § 42, c, P. 874; Beale, Criminal Pleading & Practice, § 196, P. 214.

The indictment charges the respondent with having falsely pretended to Bourque as a fact that work had been done by the respondent and others for Bourque with reference to the school project. This latter representation so attributed to the respondent the indictment does specifically and directly assert to be false:

> " - - - - in truth and in fact, the said Raoul Binette - - - did not in any respect, do anything to aid or assist the said Lucien M. Bourque with reference to the school project - - - - "

The indictment by this stated pretense of work done by the respondent for Bourque with reference to the school project, by the direct negation of the truth of such pretense and by those allegations leveled after the clause, "all of which the said Raoul J. Binette, then and there well knew," etc., present in passing clarity and in legal sufficiency and with adequate protection against double jeopardy an accusation that the respondent had violated the statute prescribing cheating by false pretenses.

> " - - - - a single false pretence properly alleged in the indictment, and proved as laid, is sufficient to warrant a conviction - - - " *Com.* v. *Morrill,* 8 Cush. 571, 574.

The respondent assails the validity of the indictment in that it avers that Binette's solicitation of money was made upon behalf of the political party and not for his own pecuniary benefit and because the indictment neither represents nor indicates that Binette became personally enriched. Respondent's contention is to no purpose or avail. The gravamen of the offense imputed would be unaffected by proof that the respondent or the political party was the actual beneficiary. *Commonwealth* v. *Harley,* 7 Met. 462, 466; *Commonwealth* v. *Langley,* 169 Mass. 89, 95, 47 N. E. 511; 35 C. J. S., *False Pretenses,* § 25. I would overrule the exceptions.

Williamson, C. J., joins in this opinion.

PUBLIC FINANCE CORPORATION
vs.
PURITAN CHEVROLET, INC.

Androscoggin. Opinion, May 24, 1963.

Damages. Trover. Conversion. Contracts.

Damages in an action of trover are determined as of the date of conversion.

A price stipulated in a sales contract entered into in good faith is some evidence of market value.

ON APPEAL.

The defendant appeals the findings of the lower court as to the fair market value of the vehicle in question. Appeal denied.

William Cohen, for Plaintiff.

Roscoe Fales, for Defendant.

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

TAPLEY, J. On appeal. This is an action of trover wherein the plaintiff seeks damages for the alleged conversion of a Pontiac automobile. The case was tried before a single justice without the intervention of a jury. The justice below found for the plaintiff in the sum of $495.00, judgment being entered for this amount and costs. The defendant appealed from this final judgment. The only point of appellant's appeal is "The Court erred in finding that the fair market value of the vehicle in question was $495.00." In order for the appellant to prevail it must show that the findings of the justice were clearly erroneous, Rule 52, M. R. C. P. (155 Me. 463).

The justice below made his findings on the basis of a "Stipulation of Facts" which reads:

> "The parties hereto stipulate the facts as follows:
>
> "On May 5, 1960, Paul Varle was the owner of one 1954 Pontiac automobile which was then subject to a duly recorded mortgage to Public Finance; there is due to Public Finance the sum of $656.00 on said mortgage. On May 5, 1960 Paul Varle sold the 1954 Pontiac to Puritan Chevrolet as a down payment on another vehicle. He was allowed $495.00 on the 1954 Pontiac as a trade-in allowance, according to the copy of the original invoice hereto attached as Exhibit A. On June 30, 1960 Puritan Chevrolet sold the 1954 Pontiac Automobile to a third party for $65.00 cash, plus sales tax, according to the copy of the original invoice hereto attached as Exhibit B.
>
> "Public Finance contends that under the authority of Giguere vs Bisbee Buick, 152 Maine, 177, Puritan Chevrolet is liable to Public Finance for $495.00.

> "Puritan Chevrolet contends that it is liable only for the fair market value of the automobile, namely $65.00, there being no privity of contract between the parties hereto as in the Bisbee case."

This "Stipulation of Facts" contains all the evidence submitted, both as to liability and damages.

Counsel for the plaintiff contends that the trade-in allowance of $495.00 for the 1954 Pontiac is sufficient evidence of market value to sustain damages in that amount, while defense counsel argues that the court was in error as the Pontiac was sold by the defendant for $65.00 and that this was the true measure of damages. We have in this case a factual situation where the defendant, Puritan Chevrolet, Inc., on May 5, 1960, in effect, paid $495.00 for the vehicle and on June 30, 1960, approximately two months later, sold it for $65.00. No other evidence bearing on the issue of market value was offered.

Damages in an action of trover are determined as of the date of conversion which, in the instant case, is May 5, 1960. *Jeffery* v. *Sheehan,* 135 Me. 246; *Amey, et al.* v. *Augusta Lumber Company,* 128 Me. 472.

A price stipulated in a sales contract entered into in good faith is some evidence of market value. *Pinet* v. *New Hampshire Fire Insurance Co.,* 126 A. (2nd) 262 (N. H.).

> "While there is some authority to the contrary, the prevailing doctrine is that evidence of the price obtained at a private sale of the property is admissible, either for plaintiff or defendant on the question of the value of the goods." 89 C. J. S.—Trover and Conversion—Sec. 130 (2).

The value of the vehicle must be found as of May 5, 1960, being the time of conversion, and not on June 30, 1960, when it was sold by the defendant. Puritan Chevrolet, Inc., the defendant, when it took the car as a trade-in, considered it to have a value of $495.00. This is the only

evidence in the case from which market value may be found as of May 5th, being the date of conversion. The position taken by the defendant that the market value of the car was $65.00 on June 30, 1960 is inconsistent with the well-grounded and etablished rule of damages in a conversion case of this type.

Plaintiff's counsel relies strongly on *Giguere* v. *Bisbee Buick Co., Inc.*, 152 Me. 177. The *Giguere* case is distinguishable from the case at bar. In *Giguere,* Bisbee Buick Co., Inc. was to sell the trade-in car "for the best price that you can obtain." Under these circumstances the obtaining of the best price available was the result of a contractual relationship and would not necessarily reflect the market value. In the instant case there was a definite and specific trade-in allowance of $495.00.

The justice below was not in error in his findings.

Appeal denied.

JENNIE MARY VENTRESCO
vs.
FRANKLIN BUSHEY

Somerset. Opinion, May 28, 1963.

Testimony. Bastards. Illegitimacy. Evidence

Both husband and wife may testify as to the husband's non-access to his wife and as to facts which tend to prove that access was impossible.

Presumption that child conceived during wedlock is legitimate is not conclusive.

Illegitimacy must be proved beyond a reasonable doubt.

Woman, whose child was conceived during wedlock but was born after her divorce, could maintain bastardy proceedings against alleged father of child.

ON REPORT.

Defandant's motion for a summary judgment is on report for a determination upon the pleadings and an agreed statement of facts. Motion for summary judgment denied. Case remanded for further proceedings in accordance with this opinion.

Carl R. Wright, for Plaintiff.

Thomas J. Guilfoyle, for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, SULLIVAN, JJ. DUBORD, J., sat at argument but retired before rendition of decision. TAPLEY and SIDDALL, JJ., dissenting.

WEBBER, J. By her complaint in bastardy the plaintiff accuses the defendant of being the father of her child alleged to have been begotten on or about April 22, 1960. The defendant has filed his motion for summary judgment

which is now reported for our determination upon the pleadings and an agreed statement of facts. The facts agreed upon are as follows:

> "It is stipulated and agreed by counsel of both parties hereto that one Jennie Mary Allain, the Plaintiff in this Complaint, and one Ernest Alfred Allain were married on July 25, 1959 in Madison, Maine; that since August, 1959, to date, said Ernest Alfred Allain has been continuously stationed as a member of the armed forces outside the territorial limits of the United States, to wit in England; that since August, 1959, to date, said Jennie Mary Allain has been continuously within the territorial limits of the United States, to wit in the State of Maine; that said Jennie Mary Allain, the Plaintiff in this Complaint, filed a Complaint for Divorce dated February 2, 1960 against said Ernest Alfred Allain; that a divorce from the bonds of matrimony was granted Jennie Mary Allain, the Plaintiff in this Complaint, against Ernest Alfred Allain on June 9, 1960, by the Presiding Justice of the Somerset County Superior Court, and that in said decree said Jennie Mary Allain had her name changed to Jennie Mary Ventresco; that Jennie Mary Ventresco and Jennie Mary Allain are one and the same person; that on January 22, 1961 Dwayne Anthony Ventresco, a son, was born alive in Skowhegan, Maine, said Jennie Mary Ventresco being the mother thereof, and that said child was conceived during the time the said Jennie Mary Allain was married to the said Ernest Alfred Allain; that said conception was not the result of artificial insemination."

It may be seen at once that the child was conceived at a time when the complainant was a married woman but so separated from her husband as to render it impossible for him to have been the father of her child.

The defendant asks that we adopt what may be termed the Florida rule and hold that the complainant may not

institute filiation proceedings under these circumstances. In 1955 the New Jersey court had occasion to interpret the law of Florida pertinent to this issue. *Kowalski* v. *Wojtkowski,* 19 N. J. 247, 116 A (2nd) 6. A divided court concluded that a child, conceived while the mother was married but born after her divorce was granted, must be conclusively presumed to be legitimate under the common law of Florida in any proceeding instituted by the mother. The court was satisfied that in Florida the mother cannot illegitimate her child conceived or born during wedlock but the husband or reputed father is not subject to such disability. Mr. Justice Brennan, dissenting, carefully reviewed the authorities and concluded that the presumption is not conclusive under the common law of any jurisdiction including Florida. But in 1960 the District Court of Appeal in Florida confirmed the judgment of the New Jersey court by holding unequivocally that a mother is not permitted to have a child which has been conceived in wedlock declared to be illegitimate. *Sanders* v. *Yancey* (1960), 122 So. (2nd) (Fla. Dist. Ct. App.) 202; *Illgen* v. *Carter* (1960), 123 So. (2nd) (Fla. Dist. Ct. App.) 368. See *Gossett* v. *Ullendorff* (1934), 114 Fla. 159, 154 So. 177. Although expressions used by courts in a few instances may tend to raise some doubt as to what rule might be followed if the issue were squarely presented, it is our impression that the Florida rule has not been adopted elsewhere unless by statutes with which we are not here concerned. See Annot. 53 A. L. R. (2nd) 572, 580.

In Maine the statute gives standing to institute bastardy proceedings to "a woman pregnant with a child, which, if born alive, may be a bastard, or who has been delivered of a bastard child." R. S., Chap. 166, Sec. 23. Although a married woman in Maine has been subject to a testimonial restriction with respect to the non-access of her husband, her standing to institute bastardy proceedings has not been

questioned. *Hubert* v. *Cloutier,* 135 Me. 230. The presumption is not conclusive. See *Mitchell* v. *Mitchell,* 136 Me. 406. The leading case of *In Re Findlay* (1930), 253 N. Y. 1, 170 N. E. 471, holding that the presumption is rebuttable, stated the law which obtains in almost all jurisdictions. We are therefore satisfied that this complainant is not precluded from instituting a bastardy complaint. Since this is the only ground advanced by the defendant in support of his motion for summary judgment we could perhaps deny the motion without further discussion, but issues are presented by the agreed statement which will certainly affect the course of litigation and which should properly be here considered and resolved.

As already noted, the stipulation of the parties recites facts which conclusively demonstrate that it was physically impossible for the former husband of the complainant to have been the father of the child involved in these proceedings. Yet that stipulation is in part the statement of the complainant and if she is legally barred from testifying as to facts tending to prove non-access by her husband, it could be asserted with some force that the agreed statement cannot properly be received. This brings us directly to a reconsideration of the testimonial restriction imposed by *Hubert* v. *Cloutier,* 135 Me. 230 (cited *supra*). After holding that the presumption of legitimacy, although "one of the strongest and most persuasive known to the law," can nevertheless be rebutted, the court turned to a consideration of the required proof of non-access by the husband. The court said at page 231: "In 1777, Lord Mansfield laid down the rule in England that the testimony of neither husband nor wife could be admitted to show non-access by the husband, if the result would be to bastardize issue born after marriage. 'It is,' he said, 'a rule founded in decency, morality, and policy.' * * * This doctrine has since been followed in England and by the vast majority

of courts in this country." After noting that the Mansfield rule has been criticized by Dean Wigmore, but without discussion of the reasons therefor, the court concluded that "by and large the enforcement of it is politic." The court added: "The application of it prevents many unseemly contests over the legitimacy of children, and tends to keep inviolate those marital confidences, the disclosures of which arouse only disturbing suspicion and prove nothing." Since the application of the rule in the instant case obviously results in the suppression of the truth and the working of a manifest injustice, we feel compelled to reexamine the rule, its origin and the reasons advanced for its support, in order to determine whether it should be continued in effect.

Wigmore, 3d Ed., Vol. VII, Secs. 2063 and 2064, fully sets forth the historical origin and development of the rule. Until 1777 the common law had required only that in filiation proceedings the uncorroborated testimony of a married woman would not suffice to charge a respondent with paternal responsibility. The restriction stemmed from the interest of the husband in the outcome since a favorable result would relieve him of support. In 1777 the Mansfield utterance was offered gratuitously and unnecessarily as a dictum in an action of ejectment. It was so stated, however, as to be applicable in all cases and, as already noted, it contained the now famous and oft quoted vindicating phrase, "decency, morality and policy." Wigmore carefully examines the validity of these criteria and points out manifest inconsistencies. While it is termed indecent for the wife to testify that her husband lived for four years in St. Louis while she resided in New York as proof of the impossibility of access, no indecency is discovered in admitting her testimony that she lived in adultery with a third party for four years. Dean Wigmore's summation states: "The truth is that these high sounding 'decencies'

and 'moralities' are mere pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law. There never was any true precedent for the rule: and there is just as little reason of policy to maintain it."

Our review of the authorities suggests that although a majority has adhered to the rule, those courts which have subjected it to critical examination and taken account of the unjust results which flow from it have rejected it for most persuasive reasons. In the leading case of *Moore* v. *Smith* (1937), 178 Miss. 383, 172 So. 317, the issue was whether or not the husband or wife could testify to facts disclosing that they were so separated by time and space that he could not have had access to her when the child was begotten. After analyzing carefully the Mansfield dictum, the court concluded that the importance of the search for truth clearly outweighed any policy considerations here present—and that in fact and in truth decency, morality and justice would be best served by admitting the evidence. In reliance upon the reasoning in *Moore,* the Colorado court repudiated the Mansfield dictum. *Vasquez* v. *Esquibel* (1959), 346 P. (2nd) (Colo.) 293; see *Nulman* v. *Cooper* (1949), 120 Colo. 98, 207 P. (2nd) 814. In a vigorous and persuasive dissenting opinion in *State* v. *Sargent* (1955), 118 A. (2nd) (N. H.) 596, 599, Kenison, C. J. noted that the wife and mother is the person most likely to know the truth, that no modern text supports the Mansfield dictum, that McCormick on Evidence (1954) Sec. 67 terms the rule an "eccentric incompetency" which some courts have "wisely rejected," and that the Uniform Reciprocal Enforcement of Support Law provides a contrary rule. The New Jersey court in *Loudon* v. *Loudon* (1933), 168 A. (N. J.) 840, 841, a divorce action, repudiating the Mansfield dictum, expressed its preference for a rule "founded on truth, reason and justice." The court continued: "A

rule of law which has existed in our mother country for over 150 years and has been adopted and followed in so many of our sister states would ordinarily strongly recommend itself for our favorable consideration. But the fact that the rule is based on a foundation that is unsound and leads to the suppression of the truth and the defeat of justice takes from it the customary traditional and precedential justification urging its adoption. * * * A law which compels such a conclusion (Against what seems to be the truth) is not only impotent and embarrassing, but is a law which, despite its tradition and universality, was never justified and should not be followed." In *Lynch* v. *Rosenberger* (1926), 121 Kan. 601, 249 P. 682, with respect to the right of the wife to testify to non-access, the court reasoned that the very essence of evidence is to "make clear or ascertain the truth" and asserted that "the best obtainable evidence should be adduced." Dean Wigmore's critique was quoted at length and with evident approval. Although doubt was cast on the position of the Kansas court in *Martin* v. *Stillie* (1929), 129 Kan. 19, 281 P. 925, a dictum in *Bariuan* v. *Bariuan* (1960), 186 Kan. 605, 352 P. (2nd) 29, leads us to conclude that *Lynch* reflects the present attitude of the Kansas court toward the Mansfield dictum. Reaching like results are *Yerian* v. *Brinker* (1941), 35 N. E. (2nd) (Ohio Ct. App.) 878; *Peters* v. *Dist. of Columbia* (1951), 84 A. (2nd) (D. C.) 115; *Murphy* v. *Dist. of Columbia* (1952), 85 A (2nd) (D. C.) 805; *In Re McNamara's Est.* (1919), 181 Cal. 82, 183 P. 552; *Mathews* v. *Hornbeck* (1927) 80 Cal. App. 704, 252 P. 667. Although the Minnesota court construed a statute as permitting the wife to testify to non-access by her husband, it indicated by dictum its approval of the Wigmore condemnation of the Mansfield rule. *State* v. *Soyka* (1930), 181 Minn. 533, 233 N. W. 300.

Under some circumstances courts which adhered to the Mansfield dictum have been compelled to reach results which were inconsistent with the reasons given as the basis for the rule. In *Monahan* v. *Monahan,* 142 Me. 72, a divorce was sought on the ground of adultery. The only evidence of adultery came in the form of an admission by the wife to witnesses that her child was a bastard. The court held that the evidence could properly be received since the issue was adultery and not illegitimacy. Yet as a practical matter the status of the child was involved since no court would be likely to order the husband to make support payments for the child on such evidence. The court said in effect that proof that a wife has given birth to a bastard child is alone sufficient to prove her adultery even though it cannot prove that the child is a bastard. It seems quite unnecessary to resort to absurd and illogical reasoning in order to preserve an arbitrary rule of law which never had a logical foundation in the first place. Certainly if "decency, morality and policy" afford reason for the bar under any circumstances, they should with equal force bar the testimony admitted in *Monahan.*

In Massachusetts by statute a married woman is competent to testify in a bastardy proceeding as to "relevant matters, including * * * the parentage of the child." *Commonwealth* v. *Kitchen* (1937), 299 Mass. 7, 11 N. E. (2nd) 482. Yet the court in the absence of statute would adhere to the Mansfield dictum under some circumstances. Nevertheless, as in *Monahan* v. *Monahan, supra,* the court would permit a witness to relate the admission of a wife that her husband was not the father of her child where the issue was her adultery. *Sayles* v. *Sayles* (1948), 323 Mass. 66, 80 N. E. (2nd) 21.

In a bastardy proceeding brought in Illinois by a married woman, the husband was permitted to testify as to non-access. Holding this to be error in accordance with

the Mansfield dictum, the court noted that although the wife by statute may testify to non-access, the husband is yet barred by the common law rule. The court argued in support of its holding that the husband might otherwise be relieved of the support of the child and that burden would then fall upon the public. *People* v. *Dile* (1931), 347 Ill. 23, 179 N. E. 93. We are not persuaded that the public treasury should be protected by foisting upon a husband the support of a child obviously not his own.

In *Kennedy* v. *State* (1915), 117 Ark. 113, 173 S. W. 842, the court after reciting nearly all of the reasons commonly advanced for adherence to the Mansfield dictum, nevertheless concluded that the wife could properly have testified to facts tending to prove that access by her husband at all material times was impossible. The court apparently would limit the application of the Mansfield restriction to her direct testimony that her husband did not in fact have access. We fail to perceive how "decency, morality and policy" are satisfied in the one case and not in the other. Nor do we perceive how the child is greatly benefited by a rule which affords him protection from the tragic truth in one case but not in the other.

We are satisfied that the devastating criticism by Dean Wigmore finds ample support when one examines the results of adherence to it. The manifest inconsistencies which have defied resolution by those courts which have thus far followed the rule demonstrate fully that it has persisted overlong. We do not lightly cast aside a rule of evidence which has never before been challenged by our court. But in the face of facts such as are apparent in the instant case where blind adherence to an illogical doctrine can result in the "suppression of the truth and the defeat of justice," we are constrained to reconsider and abolish the rule. We now hold that both husband and wife may testify both as to his non-access to her and as to facts

which tend to prove that access was impossible. To the extent that *Hubert* v. *Cloutier,* 135 Me. 230, stands for a contrary result, it is hereby overruled. It naturally follows that the agreed statement in the instant case which substitutes both for the testimony of the complainant and the admission of the respondent as to the essential fact of non-access by the husband may properly be received in evidence.

This opinion should not be concluded without some reference to the quality and quantum of proof required to dissipate the presumption of legitimacy. It is, as we have noted, a disputable presumption. We held in *Hinds* v. *John Hancock Ins. Co.,* 155 Me. 349, 364, that such presumptions are not themselves evidence but serve the procedural purpose of shifting the burden of going forward with evidence. They persist "until the contrary evidence persuades the fact finder that the balance of probabilities is in equilibrium." They then disappear and serve no further purpose. The presumption of legitimacy because of its great strength as a matter of policy has always been considered as requiring special treatment. It is no ordinary presumption. Courts have employed many phrases in assessing the requirements to be met by the party who is faced with the necessity of proving illegitimacy. It has often been said that the evidence must be "clear and convincing," and even "conclusive." Mr. Justice Cardozo in *In Re Findlay* (1930), 253 N. Y. 1, 170 N. E. 471 (cited *supra*), said that the presumption would not fail "unless common sense and reason are outraged by a holding that it abides." This phrase was quoted with approval in *Parker et al., Applts.,* 137 Me. 80, 82. In *Re Jones* (1939), 8 A (2nd) (Vt.) 631, the court likened this presumption to the presumption of innocence and concluded that it was accompanied by a substantive rule of law fixing the quantum of proof necessary to prove illegitimacy, i.e. beyond a

reasonable doubt. Other courts have determined that proof beyond a reasonable doubt is required. *Commonwealth* v. *Kitchen* (1937), 299 Mass. 7, 11 N. E. (2nd) 482 (cited *supra*); *Estate of McNamara* (1919), 181 Cal. 82, 183 P. 552 (cited *supra*); cf. *In Re Rogers' Estate* (1954), 30 N. J. Super. 479, 105 A. (2nd) 28, 31. Wisconsin has fixed this quantum of proof by statute. *In Re Aronson* (1953), 263 Wis. 604, 58 N. W. (2nd) 553. A writer in 33 H. L. Rev. 306, 308, suggests that proof beyond a reasonable doubt is the desirable quantum. "It is believed that this test is the most desirable one, for it not only carries out the policy of the law, but also provides a standard with the use of which the courts are familiar. Its universal adoption would make for simplification and certainty in an important social matter." The writer of the article is in accord with the Vermont court in suggesting that there is present not merely an ordinary disputable presumption but a substantive rule of law fixing the burden of proof upon one who would attack legitimacy. We are satisfied that the adoption of this evidentiary requirement will afford proper protection to children whose legitimacy is attacked and will provide a definable quantum of proof which is familiar to both Bench and Bar.

The entry will be

Motion for Summary Judgment denied. Case remanded for further proceedings in accordance with this opinion.

TAPLEY, J. DISSENTING OPINION

The majority opinion of this court has now declared that the presumption of legitimacy may be rebutted by the declarations, admissions or testimony of the mother as to

the non-access of her husband, therefore making it legally possible for the mother (in this case) to bastardize her own child. The majority of the court speaks in the following language:

> "We do not lightly cast aside a rule of evidence which has never before been challenged by our court. But in the face of facts such as are apparent in the instant case where blind adherence to an illogical doctrine can result only in the 'suppression of the truth and the defeat of justice,' we are constrained to reconsider and abolish the rule. We now hold that both husband and wife may testify both as to his non-access to her and as to facts which tend to prove that access was impossible."

This plaintiff, whose husband was serving in the armed forces outside the territorial limits of the United States, became pregnant with child and in a bastardy action charged the defendant, Franklin Bushey, with being the father of the child. She entered into an agreed statement of facts, the effect of which was to rebut the presumption of legitimacy and thereby bastardize her own child. This court has now said, by abolishing the Lord Mansfield Rule, that she legally may do so. I do not agree with this decision.

The weight of authority stands on the side of the Lord Mansfield Rule.

> "The rule first laid down by Lord Mansfield that on grounds of public policy neither husband nor wife should be permitted to bastardize a child born in lawful wedlock by testifying to their own non-access with one another has been criticized by eminent authority, and has been expressly repudiated by at least one court, (n) but, in the absence of a statute to the contrary, is none the less established law in most jurisdictions - - - ." (n) *Loudon* v. *Loudon,* 168 A. 840 (N. J.) 97 C. J. S.—Witnesses—Sec. 90 (a).

Many of the decisions of the appellate courts state sound reasons why the Rule is important to a well regulated society and therefore should be retained.

The reasoning of the Massachusetts Supreme Court is persuasive:

> "The rule has been based on reasons of decency and policy, especially because of the effect it may have upon the child, who is in no fault. The policy of the rule has been severely criticized. See Wigmore on Ev. Secs. 2063, 2064. But it has been too long settled in this commonwealth to be changed by judicial decision.
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> - - - - - - -
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> "The libellee contends that to admit the evidence of her statement to the probation officer would be a circumvention of the Lord Mansfield rule. This we do not accept. The rule, where applicable, relates to the competency of a husband and a wife as witnesses as to nonaccess, and never has served to prevent the introduction of such evidence through other witnesses. Whatever its intrinsic soundness, it should not operate in a case to which a wife is a party to exclude her admission of extramarital intercourse. In England, where the rule originated, and where it has relatively recently been affirmed by a divided decision of the House of Lords (Russell v. Russell, (1942), A. C. 687), the libellee's admission in the present case would be received to prove adultery, but not to prove the illegitimacy of the offspring. - - - - - Our conclusion has the fullest support from a recent decision of the Supreme Judicial Court of Maine. Monahan v. Monahan, Me., 46 A. 2d 706." *Sayles* v. *Sayles,* 80 N. E. (2nd) 21, 22, 23 (Mass.).

The late Justice Thaxter, a former learned and scholarly member of this court, who wrote the opinion in *Hubert* v. *Cloutier,* 135 Me. 230, 231, 232, observed with sound reasoning as follows:

"The complainant at the time the child was conceived and born was a married woman; and the presumption is that such child born during wedlock is the child of her husband and legitimate. In early times in England such presumption was held to be conclusive, if the wife had issue while the husband, not being impotent, was within the four seas, that is, within the jurisdiction of the King of England. Co. Litt., 244; Rolle's Abr., 358, tit. Bastard; Matter of Findlay, 253 N. Y., 1, 170 N. E., 471, 472; 7 Am. Jur., 636. The rigor of such doctrine has now given way to reason; and it is held that such presumption can be rebutted. It is, nevertheless, as Cardozo, Ch. J. says in Matter of Findlay, supra, 'one of the strongest and most persuasive known to the law' and 'will not fail unless common sense and reason are outraged by a holding that it abides.' Proof of the mother's adultery is not in itself sufficient to rebut it. - - - - -

"In the case now before us it was accordingly necessary for the complainant to prove non-access by her husband. The only evidence of any weight on this point is her own testimony to the effect that she and her husband had not lived together for two years. Without such evidence her case would fall. The respondent objected to its introduction. We think his objection was well taken.

"In 1777, Lord Mansfield laid down the rule in England that the testimony of neither husband nor wife could be admitted to show non-access by the husband, if the result would be to bastardize issue born after marriage. 'It is,' he said, 'a rule founded in decency, morality, and policy.' Goodright, ex dem. Stevens v. Moss, Cowp., 591. This doctrine has since been followed in England and by the vast majority of courts in this country. - - - - -

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"The rule which we feel must be applied to this case has been criticized by very eminent authority. 4 Wigmore on Evidence, 2 ed., 381, et seq. It was,

> however, promulgated by Lord Mansfield, a very great and an essentially practical judge. It has been followed because it has appealed to the sober common sense of subsequent generations. Cases may be cited, real or suppositious, where it may work a hardship. The question, however, is not what may be the bearing of the rule on a particular problem, but whether by and large the enforcement of it is politic. The application of it prevents many unseemly contests over the legitimacy of children, and tends to keep inviolate those marital confidences, the disclosures of which arouse only disturbing suspicion and prove nothing."

In Pennsylvania, *In Re Finks Estate,* 21 A (2nd), 883-889, the court said:

> "It has become part of the substantive law of evidence in this state that the proofs necessary to rebut a presumption of legitimacy must be of the highest order - - - . In fact, in pursuit of a well established public policy, we have gone so far as to hold consistently that non-access cannot be testified to by either husband or wife in order to overcome the presumption of legitimacy."

The Nebraska Court, in *Zutavern* v. *Zutavern,* 52 N. W. (2nd) 254, 260, had this to say on the subject:

> " - - - - that the presumption of legitimacy of a child born in lawful wedlock may not be rebutted by any information, the source of which is either the husband or the wife; and that all testimony of the husband and wife which has a tendency to prove or disprove legitimacy is incompetent. There is no doubt as to the existence of this rule of law. It was proclaimed more than a century ago in England and has been adopted and applied by many courts of this country. It is the rule in Nebraska."

In holding that a husband or wife are incompetent witnesses to rebut the presumption of legitimacy, the Pennsylvania Court reasons thusly:

> "In order to successfully rebut the presumption of legitimacy, the evidence of non-access or lack of sexual intercourse or impotency must be clear, direct, convincing and unanwerable - - - - . Moreover, *our public policy is so firmly established and so strong* that the courts have repeatedly declared that 'non-access cannot be testified to by either the husband or wife in order to overcome the presumption of legitimacy.' " *Cairgle* v. *American Radiator & Standard Sanitary Corp., et al.*, 77 A. (2nd) 439, 442. (Emphasis supplied.)

The Lord Mansfield Rule has been applied for approximately 150 years and no rule of evidentiary law would survive this long unless its purpose was consistent with the sound principles of a good and honorable society. I am mindful of the necessity, in the administration of the law, that under some circumstances long established precedents must be overruled and new ones established in order to satisfy and conform to changed conditions. This I believe to be worthy and proper procedure. According to my view, the abolishment of the Mansfield Rule does not come within this category.

The rule laid down in the majority opinion allows either spouse to testify with reference to non-access. It is applicable to cases in which the husband and wife have resided in the same community as well as to those in which they have been separated by long distances. The evidentiary requirement under the rule set forth in the majority opinion is one of strictness. Nevertheless, the door will be opened to a great variety of legal controversies, characterized by Justice Thaxter in *Hubert* v. *Cloutier, supra,* as "unseemly contests," over the legitimacy of children, which will in a vast majority of cases under those strict evidentiary rules result in no benefit to any litigant, but which will in all cases affect the lives and happiness of innocent children. I feel that the underlying reasons for the rule as set forth

in *Hubert* v. *Cloutier, supra,* are as convincing today as they were when expressed in that opinion.

Justice Cardozo characterized the presumption as "one of the strongest and most persuasive known to the law." It has been so described by many eminent jurists. There must be, and there is, sound reasoning and support behind such a strong presumption.

There is much in the presumption of legitimacy that sustains the dignity of the person and tends to preserve and strengthen the moral fiber of society. It should not be allowed to be destroyed by the mother of the child — the child for whom this strong and important presumption was created to protect.

When a mother, as in this case, testifies in a court of law, either as a witness or through the medium of an agreed statement of facts, that her child is a bastard, it does something adversely to the fine and more noble sensibilities of people and to the decency and morality of the community. Such procedure does violence to public policy.

I have given some thought to the argument that if the mother is not permitted to testify that an injustice will be done to her husband. That injustice can be minimized, if not entirely dissipated, by the introduction of evidence other than that of the wife which can be readily obtained, destroying the presumption and thereby testifying to the fact that he is not the father of the child.

For the reasons I have set forth, I am unable to concur with my fellow members of the court and, therefore, respectfully dissent.

Siddall, J., joins in dissent.

HAROLD SAWTELLE
vs.
CHASE TRANSFER CORPORATION

Cumberland. Opinion, May 29, 1963.

Conjecture and Surmise. Damages. Negligence. Verdict.

Conjecture and surmise, alone will not sustain a verdict for the plaintiff.

Unless a plaintiff can show a violation of a duty, owed to him by a defendant, his verdict cannot stand.

ON APPEAL.

The plaintiff appeals the granting of a judgment *n.o.v.* Appeal denied.

Philip S. Bird, for Plaintiff.

Verrill, Danna, Walker, Philbrick, and Whitehouse, by John A. Mitchell, for Defendant.

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

WEBBER, J. At the close of all the evidence in this negligence case, the defendant offered a motion for a directed verdict based upon a failure of proof. Decision thereon was reserved under the provisions of M. R. C. P., Rule 50 (b) and the case was submitted to the jury. After the return of a verdict favorable to the plaintiff a motion by the defendant for judgment *n.o.v.* was granted. The plaintiff appeals.

The evidence most favorable to the plaintiff discloses that on June 3, 1957 the plaintiff was involved in an accident in which he suffered injuries to his person. An experienced operator employed by the Northeast Paving Co., he was

engaged in loading a motorized roller onto a lowbed trailer owned and operated by the defendant. The area was muddy and slippery. A temporary ramp of blocks and planks was thrown up on a flat area and was successfully used by one Bowen, also a roller operator employed by Northeast, to load his roller onto a trailer operated by the defendant. The defendant then moved another trailer into position at the ramp and the plaintiff commenced his loading operation. He drove in low speed well up the ramp and then stopped and backed down and away from it. The plaintiff determined on his first attempt that boards should be placed on the floor of the trailer in such a position as to prevent the rollers of his vehicle from dropping into an opening in the floor of the trailer made to accommodate its rear tires. Boards were then placed in position and the plaintiff, seated upon his roller, satisfied himself "that it was safe to go onto that trailer." He then made his second run and as the roller started up the ramp the plaintiff was assisted by an employee of the defendant who from a position on the body of the trailer guided him forward by means of hand signals. As the front roller reached the top of the ramp or had passed onto the rear of the trailer floor, the vehicle tilted and skidded or shifted sharply to the left and tipped over, landing on its side. As the roller started to slide or shift, the plaintiff put the machine into reverse gear and jumped clear.

The cause of the accident is unknown. There is no evidence of any negligence on the part of the defendant. There is no suggestion that the defendant knew or ought to have known of any condition which was not equally obvious to the plaintiff. If the employee of the defendant who was giving hand signals could have seen some condition under the front roller which was not visible to the plaintiff in his position in the driver's seat, there is no hint as to what that condition might have been. There is no evi-

dence of broken or defective boards or planks or of any change in the conditions from the time the plaintiff started his second run to the moment when the vehicle tipped over. The plaintiff was familiar with the performance of his vehicle and had performed a loading operation on many prior occasions. He exercised an independent judgment and choice as to whether or not to proceed with the operation. Whether the plaintiff's heavy machine under climbing power merely skidded sideways on wet planking or metal is a matter of pure conjecture. Plaintiff has failed to show that a violation of a duty owed to him by the defendant was a proximate cause of his injury. Conjecture and surmise alone will not sustain a verdict for the plaintiff. *Jordan* v. *Portland Coach Company,* 150 Me. 149, 158.

Appeal denied.

LOUIS NADEAU
vs.
STATE OF MAINE

York. Opinion, May 29, 1963.

Appointment of Counsel. Due Process.

In the absence of the "preliminary and indispensable fact" of indigence, a presiding justice has no occasion to consider appointment of counsel.

The fact that a defendant was illiterate does not ipso facto establish such limited mental competence as to require a finding that he had no ability to elect to proceed on his own.

ON APPEAL.

This is an appeal from the dismissal of a writ of error *coram nobis* and affirmation of judgment for the State. Appeal denied.

Donald P. Allen, for Plaintiff.

John W. Benoit, Asst. Atty. Gen'l, for State.

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

MARDEN, J. On appeal from the dismissal of a writ of error *coram nobis,* and affirmation of judgment for the State.

The petitioner-appellant Louis Nadeau was convicted of the crime of murder at the January 1950 Term of the York County Superior Court and was sentenced to mandatory imprisonment for life. By an undated document which was subscribed and sworn to on March 19, 1962 he applied for a writ of error *coram nobis* alleging a denial of his constitutional right to a fair and impartial trial and the benefit of "due process of law"; that a confession was obtained from him by force; that because of his fear of police violence he did not reveal this alleged coercion to his attorney at the time of trial; that through the same fear of violence he was prevented from testifying in his own defense; that "the lawyers he has hired have only taken the few dollars your petitioner has been able to obtain and done nothing"; and that previous attempts through post conviction processes to obtain justice had been unsuccessful "because your petitioner does not understand law or how to draw a proper petition." This petition was filed with the Superior Court in York County and the State seasonably answered and moved to dismiss as to those issues which had been decided at the trial on the homicide charge, and on subsequent post conviction proceedings. Constitutional issues remained which had not been previously considered. At some time during the period between the filing of the petition and the September 1962 Term of the Superior Court for York

County, counsel for the petitioner entered an appearance. The date of this entry does not appear in the record.

By letter dated September 12, 1962 to the Chief Justice of this court purporting[1] to be written by the petitioner, he complains of having had no hearing on his petition and continues "I have an attorney but he is not representing me in this action, and has indicated he does not want to. This action was filed pro se and that is the way it remains to this date, I would appreciate that a date certain be set for hearing in this matter." This letter was forwarded by the Chief Justice to the presiding justice at the September 1962 Term of the Superior Court for York County then in session and the office of the Attorney General in cooperation with the petitioner and the court prepared a writ of error *coram nobis* and the necessary order of notice thereon dated October 12, 1962 returnable on October 15, 1962, within the September Term.

There was other correspondence purportedly signed by Mr. Nadeau to the presiding justice of the Superior Court at York County, the very proper purpose of which was to obtain an assignment for hearing on his petition.

Counsel, who, at some time after the filing of Mr. Nadeau's petition, had entered an appearance for Mr. Nadeau, wrote the Clerk of Courts of York County under date of November 2, 1962 that his appearance was withdrawn prior to the September 1962 Term and that the presiding justice and Attorney General's office were so advised.

Mr. Nadeau appeared before the court on October 15, 1962 for himself and from the extracts transcribed from that hearing we have the following colloquy:

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[1] The word "purporting" is used for it later developed that Mr. Nadeau was illiterate, could not read and could write only his name. At the hearing later discussed a sample of Mr. Nadeau's signature was taken and made a part of the record, from which we conclude, that the original petition for the writ of error, some of the correspondence referred to, and his motion to proceed as a pauper were in fact signed by him.

"THE COURT: You don't have an attorney.

"THE PETITIONER: No. That is right.

"THE COURT: And you indicated to me in your letter that you did not wish the services of an attorney and you were going to present your own case, so I will explain to you how you can do that, Mr. Nadeau. * * * ."

Hearing was held on the merits of the writ of error resulting in a decree of October 18, 1962 ordering a dismissal of the writ and affirming judgment for the State.

By letter dated October 21, 1962 purportedly written by Mr. Nadeau an appeal from this dismissal was claimed. By paper undated, but subscribed and sworn to on October 22, 1962, petitioner filed a motion to proceed *"in forma pauperis"* on his appeal; that a record of the hearing on the writ of error be furnished him without costs; and that counsel be appointed to prosecute the appeal, to which motion was attached an affidavit of indigence. By decree of the Superior Court dated October 29, 1962 the presiding justice determined that the petitioner was indigent, that the appeal was filed in good faith, and appointed counsel to represent him.

Contents of the record on appeal were designated and from the nine points raised on the appeal, error on the part of the presiding justice is claimed because no counsel was appointed for the petitioner for his hearing on the writ of error in the light of petitioner's illiteracy and the court's alleged failure to determine petitioner's competence to waive his right to court appointed counsel and to represent himself.

While the presentation of the case to this court was briefed on constitutional issues we do not find that constitutional questions are reached.

At no stage in the proceeding prior to the appeal which brings the case to us was any representation made by the petitioner-appellant that he was financially unable to employ counsel.

> "That the petitioner is a pauper within the intent of *in forma pauperis* proceedings is plainly a preliminary and indispensable fact. Without such a finding there is no reason to consider in this or any other type of proceeding whether counsel or other assistance should be supplied by the State without expense to the petitioner." *Brown, Petr.* v. *State,* 153 Me. 512, 513; 138 A. (2nd) 462.

During a portion of the period during which his petition was pending he had counsel of record and when it was determined by the presiding justice that that counsel was no longer prosecuting Mr. Nadeau's petition, the presiding justice was entirely justified in accepting the petitioner's letter of September 12, 1962 that "This action was filed pro se and that is the way it remains to this date." At no time prior to this appeal did Mr. Nadeau ask for the appointment of counsel and assuming that we now conclude that he was in fact illiterate, that fact so assumed does not ipso facto establish such limited mental competence as to require a finding that he had no ability to elect to proceed on his own. From the record he did so elect. See *Pike, Petr.* v. *State,* 152 Me. 78, 82; 123 A. (2nd) 774.

Because of the absence of the "preliminary and indispensable fact" of indigence the presiding justice would have had no occasion to consider appointment of counsel.

We reach no constitutional questions.

A point not raised in the petitioner's application for writ of error but arising out of the hearing requires comment. According to the decree of the Superior Court to which appeal was taken, — the abstracted record being silent on this point, petitioner testified that following his arrest and dur-

ing his interrogation the County Attorney was present and "gave him to understand" that he, the County Attorney, was acting as petitioner's attorney, and that the County Attorney made certain representations to the petitioner which, it is implied, encouraged or prompted the petitioner to make the confession, which was later used against him. In this connection and as supporting proof that the County Attorney was present at the time and place the petitioner alleges, the petitioner questioned the County Attorney as to a certain telephone call which the County Attorney made from the room or within earshot of the room in which Mr. Nadeau was being questioned. We infer, again from the decree, that the County Attorney's reply to this was not responsive, and the question was not pressed.

The day following the hearing, — still interpreting the decree, the County Attorney appeared before the presiding justice and stated that "he had since realized that the petitioner had apparently overlooked the fact that he hadn't learned whether" the County Attorney had in fact made such a telephone call and he, the County Attorney, felt that in fairness to the petitioner he should inform the court that although he had no recollection of making such a call it was very likely that he may have done so. The presiding justice declared in his decree that the evidence adduced before him failed to establish any misrepresentation to the petitioner relative to the position occupied by the County Attorney, that the petitioner never at any time claimed that he was in any way harmed by any misunderstanding as to the County Attorney's position unless it may have affected his confession, the validity of which confession was adjudicated at the trial on the principal charge and that the statement by the County Attorney on the day following the hearing had no significance inasmuch as the County Attorney admittedly was present during a portion of the time and at the place of petitioner's interrogation.

If the subject of the post-hearing ex parte statement possibly could have prejudiced the rights of Mr. Nadeau, he would be entitled to a new hearing. The obvious purpose of the inconclusive questioning was to support an admitted fact, and as such was of no legal significance.

Appeal denied.

JOHN D. DUNCAN, APPL'T

vs.

WALTER F. ULMER, COMMISSIONER OF INSTITUTIONS AND/OR MENTAL HEALTH & CORRECTIONS

Knox. Opinion, June 11, 1963.

Constitutional Law. Statutes. Prisons.
Administrative Transfer. Due Process.

A legislative act is presumed to be constitutional and this presumption remains until its repugnancy clearly appears or is made to appear beyond a reasonable doubt.

The burden of proof is on the party asserting the unconstitutionality of a statute.

A prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law.

The physical segregation of the convict from society and the discipline required within the prison represent "due process" for society.

The administrative transfer of a prisoner from one institution to another within the state, without a hearing to determine the justification for such a transfer is neither a denial of due process nor failure to extend equal protection of the law.

Intrastate administrative transfer of a prisoner is not a trespass on judicial power.

Intrastate administrative transfer within the official discretion of one person is not constitutionally offensive.

Equal protection constitutionally does not mean that every person faced with an administrative transfer from any institution to any other must be processed alike.

A convict is not entitled to a transfer whereby he might confer with attorneys or to be visited by relatives. Being transferred away from family friends and legal counsel is violative of no constitutional rights.

Transfer from one institution to another, perhaps of greater security or sterner discipline is not cruel and unusual punishment.

Any good time earned by the petitioner while in federal physical custody will, by Maine, be credited consistently with the Maine law, to the minimum term of his indeterminate sentence.

A prisoner shall be subject to the terms of his original sentence as if he were serving the same within the confines of the Maine State prison, not because entitlement to "good time" is a part of the sentence for it is not, but because the prisoner is being held on behalf of the State of Maine and is entitled to good time under the Maine law as an incident to his legal custody by the State of Maine.

ON APPEAL.

This case is on appeal for a declaration as to the constitutionality of statute under which petitioner was transferred to a federal prison. Held, that certificate upon which transfer of prisoner was initiated was invalid, and transfer by virtue of such certificate was in error, where the certificate was unsigned. Appeal sustained as to point VII, case remanded for entry of a declaratory judgment decree in accordance with opinion.

Louis Scolnik,
G. Curtis Webber, for Plaintiff.

John W. Benoit, Ass't Atty. Gen'l., for State.

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

MARDEN, J. On appeal. By a petition under the Uniform Declaratory Judgments Act (Sections 38-50, Chapter 107, R. S., 1954) petitioner seeks to have the constitutional validity of Section 32-A of Chapter 27 of the Revised Statutes of 1954 (1961 Cum. Supp.)[1] (hereinafter termed

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[1] "**Sec. 32-A. Transfer of prisoners to federal penal institution.**—Any person committed to the state prison whose presence may be seriously detrimental to the well-being of the state prison or who willfully and persistently refuses to obey the rules and regulations or who is considered an incorrigible inmate may, upon written certification from the warden to the commissioner of institutional service, be transferred to a federal penal or correctional institution, provided the commissioner of institutional service approves and the attorney general of the United States accepts such application and transfer.

"The commissioner of institutional service is hereby authorized to contract with the attorney general of the United States or such officer as the congress may designate under the provisions of Title 18, section 5003 of the United States Code, and acts supplementary and amendatory thereof, in each individual case for the care, custody, subsistence, education, treatment and training of any prisoner transferred under the provisions of this section. The contract shall provide for the reimbursement of the United States in full for all costs or other expenses involved, said costs and expenses to be paid from the appropriation for the operation of the state prison. The warden shall affix to said contract a copy of the mittimus or mittimuses under which the prisoner is held and the same along with the contract of transfer shall be sufficient authority for the United States to hold said prisoner on behalf of the state of Maine.

"Any prisoner transferred under this section shall be subject to the terms of his original sentence or sentences as if he were serving the same within the confines of the Maine state prison. Nothing herein contained shall deprive such prisoner of his rights to parole or his rights to legal process in the courts of this state."

U. S. C. A., Title 18, § 5003

"**§ 5003. Custody of State offenders.** (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: **Provided,** That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

"(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

"Section 32-A") determined and if that Section be found invalid that the respondent be enjoined from continuing the confinement of the petitioner outside the State of Maine, and such other relief as law and justice requires.

The pleadings establish the following facts. On October 10, 1956 plaintiff was found guilty in the Superior Court at its October Term in Knox County of attempting to escape from the Maine State Prison and for that violation in due course was sentenced and committed to that institution to serve not less than 8 years and not more than 16 years.

On March 18, 1957 Allan L. Robbins, Warden of the Prison, purported, under Section 32-A to certify to N. U. Greenlaw, then Commissioner of the Department of Institutional Service,[2] that a transfer of plaintiff to a federal penal or correctional institution was in order, as a result of which the Commissioner, also under the provisions of Section 32-A, entered into a contract with the Director of the Bureau of Prisons (of the United States) whereby plaintiff was transferred on May 21, 1957 "by officers employed by the State of Maine" from the Maine State Prison to the United States Penitentiary at Atlanta, Georgia. On July 7, 1958 plaintiff was transported "by officers employed by the United States Department of Justice" to the United States Penitentiary at Alcatraz, California. By reference petition dated March 12, 1962 and seasonably filed with the Superior Court for Knox County, plaintiff attacked the validity of his transfer into federal custody, issue was joined

"(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentences imposed. Added May 9, 1952, c. 253, § 1, 66 Stat. 68."

[2] Now Walter F. Ulmer, respondent.

by pleadings on behalf of the State, upon motion dated March 30, 1962 addressed to the presiding justice of the Superior Court, leave was extended plaintiff to proceed "*in forma pauperis*" and to a decree entered by the Superior Court upholding the constitutionality of Section 32-A, the jurisdiction and sovereignty of the State of Maine, and denying plaintiff's petition, plaintiff appeals.

Counsel were appointed by this court to represent the plaintiff on his appeal. Plaintiff and his counsel filed independent briefs and the issues raised are here considered in composition.

The action of the State is challenged in the words of the petitioner upon the following grounds:

I. Section 32-A, "is unconstitutional because it permits punitive action in the nature of transfer of place of confinement other than that designated by the commitment without first affording the prisoner a hearing as required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of Maine."

   A. Transfer to a federal penitentiary substantially impairs the rights of a state prison inmate in the following respects:

      1. Alienation from family and friends.
      2. Impossibility of conferring with counsel.
      3. Unavailability of legal materials.
      4. Impairment of opportunity to obtain parole.
      5. Application of more onerous rules regarding "good time".
      6. Impairment of right to commutation and pardon.
      7. Imposition of a "badge of infamy".

B. To afford hearing and notice to an inmate as a prerequisite to transfer to a federal prison would not substantially affect the rights of the state or the public.

C. Legislative omission of provisions for hearing and notice in Section 32-A unconstitutionally discriminates against appellant since such procedural safeguards are afforded to other prisoners similarly situated.

II. Section 32-A, "is unconstitutional because it grants judicial power to an administrative officer in violation of Article VI, Section 1 of the Constitution of Maine."

III. "That the contract drawn pursuant to * * * Section 32-A, * * * violates the appellant's rights under the Constitution of the United States and the State of Maine because of a clause in said contract not included in Section 32-A."

IV. Section 32-A, "is unconstitutional as to the appellant by reason that it does not authorize the confinement of the appellant in (any) penal institution outside the jurisdiction and sovereignty of the State of Maine as defined in Chapter 1, Section 1, Revised Statutes of Maine; that such confinement outside the territorial jurisdiction of the State of Maine is in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States."

V. Section 32-A, "does not by its terms authorize the transfer of the appellant from the Federal penal institution to which he was originally committed to another."

VI. Section 32-A, "does not by its terms authorize that the appellant may be transported in the sole custody of Federal officers and/or State of

Maine officers outside the jurisdiction and sovereignty of the State of Maine as defined in Chapter 1, Section 1, Revised Statutes of Maine."

VII. "The appellant's confinement to Alcatraz is in violation of Article I, Section 9, of the Constitution of Maine and the Eighth Amendment to the Constitution of the United States which prohibit cruel and unusual punishment."

VIII. "That the certification required by * * * Section 32-A, * * * to the appellee from the Warden, Maine State Prison was not complied with, within the meaning of Section 32-A when upon request of the warden to appellee it was stated in the certification that it was not 'feasible, nor safe,' to keep appellant in the Maine State Prison."

When the record and briefs reached this court, plaintiff's point VIII was not supported by the record, inasmuch as the certificate to which he referred, was not embodied therein. A copy of the document appeared as an appendix to the plaintiff's personally prepared brief and under the authority of Rule 75 (h) M. R. C. P. this court, by stipulation of counsel, corrected the omission.

While it is the decision of this court that the plaintiff's immediate problem is solved by examination of a non-constitutional question, with a view of obviating later consideration we decide the constitutional questions raised.

At this point it is well to record a reminder that petitioner's process challenges Section 32-A in its abstract application; that by its terms it is offensive to the Constitutions of Maine and the United States.

The record limits us to the allegations which are admitted, — either expressly or by failure to deny, in the pleadings. Beyond that no evidence is recorded that Sec-

tion 32-A as applied to *him*, petitioner, has *resulted* in the prejudice which he represents to be inherent in the law. We are testing Section 32-A as a law.

The burden of proof is on the petitioner. 11 Am. Jur., Constitutional Law, § 132.

A legislative act is presumed to be constitutional and this presumption remains until its repugnancy clearly appears, or is made to appear beyond a reasonable doubt. *State* v. *Snowman*, 94 Me. 99, 110, 46 A. 815; *Laughlin* v. *City of Portland*, 111 Me. 486, 490, 90 A. 318; *State* v. *Lawrence*, 197 S. E. 586 (N. C. 1938), certiorari denied 305 U. S. 638, 59 S. Ct. 105.

CONSTITUTIONAL QUESTIONS OF "DUE PROCESS" AND "EQUAL PROTECTION"

These questions raised in three of petitioner's eight points center, according to petitioner, upon the fourteenth amendment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of Maine.[3] The reference section in the Maine constitution does not apply.

In considering the applicability of the "due process" clause of the fourteenth amendment to the federal constitution to the plaintiff's situation, we study it in the light of the following considerations.

Of the basic rights enumerated in the United States Constitution the one with which we are here dealing is the right to "liberty" unhandicapped except by "due process

[3] The federal constitution prohibits any State depriving any person of life, liberty or property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws, and what the plaintiff contends is its counterpart in the constitution of Maine provides that "in all criminal prosecutions" the accused shall not be deprived "of his life, liberty, property or privileges but by judgment of his peers or the law of the land."

of law." It is extremely difficult, if not impossible, to formularize it.

> " * * * (U)nlike some legal rules (it) is not a technical conception with a fixed content unrelated to time, place and circumstances. * * * (I)t cannot be imprisoned within the * * * limits of any formula." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 71 S. Ct. 624, 643. (Concurring opinion.)

Our fourteenth federal constitutional amendment although voiced nearly 100 years ago, governs and must be applied to contemporary problems; interpretations change with the passage of time. In 1871 it was declared that a convicted felon "has, as a consequence of his crime not only forfeited his liberty, but all of his personal rights except those which the law in its humanity accords to him." *Ruffin* v. *Commonwealth,* 62 Va. (21 Gratt.) 790, 796.

Today there is a growing recognition that "a prisoner retains all the rights of an ordinary citizen except those expressly, *or by necessary implication,* taken from him by law." (Emphasis added.) *Coffin* v. *Reichard,* 143 F. (2nd) 443, 445 (6th Cir. 1944). We honor this juristic approach.

The necessity on the one hand and the difficulty on the other of reconciling these conflicting factors has been recognized and expressed by a Federal Court which concluded that "(t)here must be some middle ground between these extremes." *U. S. ex rel. Yaris* v. *Shaughnessy,* 112 F. Supp. 143 (S. D. N. Y. 1953).

These two metaphysical poles are likewise fully recognized in text law where in speaking of liberty "it has been said to embrace every form and phase of individual right that is not necessarily taken away by some valid law *for the common good.* * * * (I)t is deemed to embrace the right of men to be free in the enjoyment of * * * (his) faculties

* * * subject only to such restraints as are necessary *for the common welfare.*" (Emphasis added.) 11 Am. Jur., Constitutional Law, § 329, Pages 1134, 1135.

At the same time the law recognizes reality and the fact that those persons charged with the administration of a prison, wherein resides by commitment a segment of the State's population which has been unwilling or unable to meet its obligations to an orderly society, varying as individuals from the one-time offender to the sociopath, have a grave responsibility within and on behalf of the Executive branch of government (Chapter 27, §§ 1, 27, R. S., 1954). The management, control, and maintenance of the physical plant and its inmates and, hopefully, rehabilitation of the latter inherently require a supervisory atmosphere which, of necessity, withdraws from the prisoner many privileges and, in instances, authorizes the transfer of those inmates who do not adjust to its program. These withdrawals, these restrictions are "for the common welfare." These restraints, both the physical segregation of the convict from society and the discipline required within the prison, represent "due process" for society. Governmental "fair play" (*State* v. *Munsey,* 152 Me. 198, 201, 127 A. (2nd) 79) must be exercised for the benefit of all. This responsibility dictates reluctance on the part of courts to interfere with penal control and management. See Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (May 1962). See also *McBride* v. *McCorkle,* 130 A. (2nd) 881, 885 (under notes 3-5) (N. J. 1957) and *Price* v. *Johnston,* 334 U. S. 266, 68 S. Ct. 1049, 1060 (headnotes 14, 15).

Searches by the courts to find and describe the "middle ground" mentioned in *Yaris* have not been infrequent and the constitutional issues which plaintiff raises have been judicially considered.

The administrative transfer of a prisoner from one institution to another within the State, without a hearing to determine the justification for such transfer, is neither a denial of due process (*Sheehan* v. *Superintendent of Concord Reformatory,* 150 N. E. 231, 233 (Col. 2) (Mass. 1926); *Uram* v. *Roach,* 37 P. (2nd) 793, 795 (Col. 1) (Wyo. 1934); *Ex parte Zienowicz,* 79 A. (2nd) 912, 917 (under headnotes 6, 7) (N. J. 1951); *Long* v. *Langois,* 170 A. (2nd) 618, 619 (Col. 2) (R. I. 1961); and *Duncan* v. *Madigan,* 278 F. (2nd) 695, 696 (9th Cir. Ct. App. 1960) certiorari denied 81 S. Ct. 1096, re-hearing denied 81 S. Ct. 1675)[4] nor failure to extend equal protection of the law (*People* v. *Scherbing,* 209 P. (2nd) 796, 799 (under headnotes 4, 5-7) (Dist. Court of Appeal Cal. 1949); *Bozzi* v. *Myers* 140 A. (2nd) 375, 376 (Pa. 1958); and *Duncan, supra*).

Intrastate administrative transfer of a prisoner is not a trespass on judicial power. *State ex rel Kelly* v. *Wolfer,* 138 N. W. 315, 317 (under headnote 4 p. 319) (Minn. 1912); *Sheehan, supra,* P. 233 (Col. 2); *Uram, supra,* p. 795 (Col. 2); *Mellot* v. *State,* 40 N. E. (2nd) 655, 657 (Ind. 1942); *Moffett* v. *Hudsbeth,* 198 P. (2nd) 153, 154 (Kan. 1948); *Scherbing, supra,* p. 799 (under headnotes 4, 5-7); *Ex parte Burns,* 202 P. (2nd) 433, 436 (under headnote 9) (Okla. 1949); *Zienowicz, supra,* p. 917 (under headnote 8); *Marsh* v. *Cavell,* 131 A. (2nd) 81, 82 (Pa. 1957); *The People ex rel Latimer* v. *Randolph,* 150 N. E. (2nd) 603, 605 (under headnotes 3-5) (Ill. 1958); and *Long, supra,* p. 619 (under headnote 2). See also *Green* v. *Robbins,* 158 Me. 9; 176 A. (2nd) 743.

[4] John D. Duncan convicted of a criminal offence in Maine and held at Alcatraz Federal Prison pursuant to a contract under U. S. C. A. Title 18, § 5003 and our Section 32-A, attacked § 5003 as unconstitutional.

Intrastate administrative transfer within the official discretion of one person is not constitutionally offensive. *Ex parte White,* 77 A. (2nd) 818 (N. J. County Ct. Law Div. 1950); *Zienowicz, supra; The People of the State of New York ex rel Sacconanno* v. *Shaw,* 164 N. Y. S. (2nd) 750 (S. Ct. App. Div. 1957); *Latimer, supra; Commonwealth ex rel Reed* v. *Maroney,* 168 A. (2nd) (Superior Ct. Pa. 1961); and *Long, supra.*

Additional courts, without discussion, have held that an intrastate administrative transfer poses no constitutional question. *Sheehan, supra,* p. 234; *Moffett, supra,* p. 154 (under headnote (1); *Ex parte White, supra,* p. 820; *Duncan, supra;* and *People* v. *Shaw, supra.* Generally see also 26 Am. Jur., Houses of Correction, § 7; 15 Am. Jur., Criminal Law, § 555; 41 Am. Jur., Prisons and Prisoners, § 6; 72 C. J. S., Prisons, § 19b. Page 876.

Some of the authorities cited above have made it a point in opinion that the statutory provisions in their states for administrative transfer were "as much a part of the sentence as if it (provision for transfer) had been extended at length on the record of the court." *Sheehan, supra,* p. 233 (Col. 2). To the same effect *Mellot, supra,* p. 657 (under headnote 3); *Zienowicz, supra,* p. 917 (under headnote 8); *Bossi, supra,* p. 376 (under headnote 3, 4); *Uram, supra,* p. 795; and *Kelly, supra,* p. 318 (Col. 2).

We are aware that the precedents cited deal with intrastate transfers, but the constitutional questions raised and decided are the same. It is our decision that the "due process" clause has not been violated.

Plaintiff urges that he has not been extended protection equal to other persons of the category in which he finds

himself, and bases this contention upon the fact that in Chapter 27 of the 1954 Revised Statutes Section 75 provides that for transfer from the Reformatory for Men to the State Prison a transfer board consisting of the Commissioner (of Institutional Service) the Warden of the State Prison and the Superintendent of the Augusta State Hospital must give unanimous approval. From the fact of a "board" plaintiff assumes that the prisoner has a right to be heard by that board before the transfer can be executed. The statute does not so provide. Under Section 32-A no transfer board is required. Plaintiff misunderstands the "equal protection" clause. All persons faced with an administrative transfer under Section 75 must be used alike. All persons transferred under Section 32-A must be used alike. Equal protection constitutionally does not mean that every person faced with an administrative transfer from any institution to any other must be processed alike. As between Section 32-A and Section 75 the category of persons involved is not the same. See *Skinner* v. *State of Oklahoma,* 62 S. Ct. 1110.

It is our decision that the plaintiff's constitutional right for "equal protection" has not been violated.

> It being our decision that Section 32-A violates neither the "due process" nor "equal protection" clauses of the Constitution we record no comment on petitioner's contention that affording notice and a hearing to an inmate pre-transfer under Section 32-A would not substantially affect the rights of the state or the public. If a prisoner were constitutionally entitled to a pre-transfer notice and a hearing the administrative inconvenience and expenses of such procedure would be immaterial.

While our finding that there has been no violation of plaintiff's rights under the fourteenth amendment to the

federal constitution disposes of the underlying legal basis of his petition we choose to point out that some of the phases of factual prejudice which he alleges may follow from transfer, expressed in the subparagraphs under I, *supra,* have been likewise considered judicially.

> In addition to the comment in the cases already cited, it has been judicially determined that a convict is not entitled to a transfer whereby he might confer with attorneys or to be visited by relatives *People* v. *Hoffner,* 76 N. Y. S. (2nd) 915 (Queens County Ct. 1947) and by analogy we hold that being transferred away from family, friends, and legal counsel is violative of no constitutional rights.
>
> There is complaint that such transfer impairs opportunity to obtain parole. Section 32-A specifically provides that such person shall not be deprived of his rights to parole and, even without that provision here protective to the prisoner, "no substantive rights of prisoner" would have been violated. *Stillwell* v. *Looney,* 207 F. (2nd) 359 (10th Cir. 1953); *Aderhold* v. *Lee,* 68 F. (2nd) 824 (5th Cir. 1934).
>
> As to the complaint that the transfer results in "alienation from family and friends" it must be pointed out that plaintiff is speaking of a privilege and not a right. Visiting privileges extended an inmate of a State institution of necessity must be subordinated to the orderly administration of the institution, the presence of suitable facilities for visitation, co-operative conduct by the visitor and the visitee and other similar administrative consideration. Such visitation is entirely an administrative concession within the discretion of

the officer in charge, and no constitutional question is involved.

Transfer under Section 32-A impairs no right to commutation and pardon. Constitution of Maine, Article V, Part I, Section 11, and Section 32-A in Footnote 1.

It is urged that a transfer under Section 32-A to federal physical custody exposes the petitioner to more onerous rules regarding deduction of sentence for good behavior, commonly termed "good time." It is true that the application of the Maine and federal statutes extending time credit for good behavior of a prisoner serving an indeterminate sentence is not the same, the Maine statute crediting "good time" to the minimum term (§ 28, Chapter 27, R. S., 1961 Cum. Supp.) and the practice under the federal statute (U. S. C. A., Title 18, § 4161 formerly § 710) crediting "good time" to the maximum term (*Ware* v. *Hill,* 28 F. Supp. 346 (D. C. Pa. 1939)). We subscribe to the principle of the decision in *U. S. ex rel. Foley* v. *Ragen,* 52 F. Supp. 265, 280 which, applied to the present case, would suggest, and we hold, that any good time earned by the petitioner while in federal physical custody will, by Maine, be credited consistently with the Maine law, to the minimum term of his indeterminate sentence. This is not only proper but necessary under the provisions of Section 32-A whereby a prisoner shall be subject to the terms of his original sentence "as if he were serving the same within the confines of the Maine State Prison,"— not because entitlement to "good time" is a part of the sentence, for indeed it is not, but because the prisoner is being held on behalf of the State of

Maine and is entitled to good time under the Maine law as an incident to his legal custody by the State of Maine.

Petitioner's contention that the application of Section 32-A attaches a "badge of infamy" to the prisoner merits no legal consideration.

CONTRACT WITH THE ATTORNEY GENERAL OF THE UNITED STATES

The Congress of the United States (U. S. C. A., Title 18, § 5003) and our Legislature (Section 32-A) have authorized the contract with which we are here concerned. There is a mutual interest and responsibility for the housing, treating, and rehabilitation of persons who have been found unwilling or incapable of meeting the demands of society. The federal government has established and maintains a variety of institutions to meet varying penal needs. It has been, and doubtless will be, impossible for each State to furnish comparable facilities. The availability of these institutions to the states is fully as beneficial as it is detrimental to those persons required to live in them. We cannot expect all of the inmates to admit to this view.

The validity of a contract between the Attorney General of the United States and the State to transfer federal prisoners to state physical custody as provided in U. S. C. A., Title 18, § 4002 was affirmed in *Rosenberg* v. *Carroll,* 99 F. Supp. 630 (D. C. N. Y. 1951) and the validity of a contract between the Attorney General of the United States and a State to accept transfer of a state prisoner into federal physical custody as provided by U. S. C. A., Title 18, § 5003 was affirmed in *Duncan, supra.*

The clause in the transfer contract of which petitioner complains is lifted from subparagraph (c) of reference § 5003. It may also be recorded that federal prisoners confined to a State Prison are subject to the same discipline

and treatment as those sentenced by the court of the State in which the Prison is located. *Rosenberg, supra.*

Whether the transfer exposes the prisoner to a more rigid custody than is incidental to service of sentence in the Maine State Prison is a question of fact, not law. The clause offensive to the petitioner does not violate his constitutional rights.

JURISDICTION AND SOVEREIGNTY OF MAINE

It is urged that by virtue of Section 1, Chapter 1, R. S., 1954 and plaintiff's transfer to a place of confinement outside the State of Maine, that Maine has relinquished its sovereignty and lost jurisdiction of his person, as well as violated his constitutional rights. The constitutional aspect has been discussed. Section 32-A provides that by means of the contract, which we have discussed, with "a copy of the mittimus * * * under which the prisoner is held" is authority for the United States "to hold said prisoner on behalf of the State of Maine." The statute specifically retains Maine sovereignty.

The plaintiff is not involved in a problem of sovereignty, for by the statute appropriate officers of the United States Government (under U. S. C. A., *supra*) accept and hold the prisoner as agents of the State of Maine, at Maine's expense and subject to Maine's demand.

To petitioner's contention that the act of the respondent in causing him to be removed from within the territorial boundaries of the State of Maine resulted in the loss of Maine's jurisdiction over his person, we must reply that upon the record the question is moot. Section 32-A does not spell out the mechanics of the transfer and the record here discloses only that this transfer was accomplished "by officers employed by the State of Maine." The official identity of the officers is unknown to us. Section 32-A, by its terms, does not suggest the use of officers without legal power to accomplish the transfer.

To plaintiff's contention that the intent of the legislature in Section 32-A governs and that the legislature could not have intended a prisoner to be removed from within the territorial jurisdiction of Maine, it must be recorded that the United States Bureau of Prisons has never had a federal penal institution within such limits of the State of Maine and it is unlikely that the legislature contemplated Section 32-A to be invoked only in cases where state prisoners could be transferred to a federal institution within the said limits of the State.

SUBSEQUENT TRANSFER FROM ATLANTA

In addition to constitutional questions raised and discussed, *supra,* petitioner also charges the respondent with the responsibility of his transfer from the United States Penitentiary at Atlanta, Georgia, to the United States Penitentiary at Alcatraz, California. Assuming, without accepting, such responsibility, it is sufficient here to say that the petitioner having been lawfully transferred under Section 32-A to federal physical custody and administration, the United States under U. S. C. A., Title 18, § 4082 (formerly § 753f) and clause 5 of the transfer contract has, and decisions have confirmed, the power of federal agencies to accomplish such transfer between federal institutions *Zerbst* v. *Kidwell,* 92 F. (2nd) 756 (Cir. Ct. App. Ga. 1937) (reversed on other grounds 304 U. S. 359, 58 S. Ct. 872) and between federal and state institutions *Chapman* v. *Scott,* 10 F. (2nd) 156, affirmed p. 690, certiorari denied 270 U. S. 657, 46 S. Ct. 354. And without notice to or consent of the subject, *Chapman, supra.*

CRUEL AND UNUSUAL PUNISHMENT

Petitioner represents that transfer under Section 32-A is a violation of Article I, Section 9 of the Maine Constitution (and the eighth amendment of the United States Con-

stitution)[5] which prohibits the infliction of "cruel and unusual punishments." This category of discipline "implies something inhuman and barbarous or punishment unknown at common law," *In Re: Pinaire,* 46 F. Supp. 113 (D. C. Texas 1942); *Rosenberg, supra,* p. 632—which imprisonment authorized by statute and imposed within statutory limits is not. *Fraser* v. *Warden of Maryland Penitentiary,* 109 A. (2nd) 78. Transfer from one institution to another, perhaps of greater security or sterner discipline is not cruel and unusual punishment. *Zienowicz, supra,* p. 917 (under headnote 8), *Rosenberg, supra,* p. 633, *Stroud* v. *Johnson,* 139 F. (2nd) 171, 172 (under headnotes 3, 4) on which certiorari was denied 64 S. Ct. 846. Nor is sentence to imprisonment banishment, long since prohibited by our common law following the English Habeas Corpus Act of 1679.

COMPLIANCE WITH SECTION 32-A

This section authorized transfer of a prisoner for one or more of three reasons (See Footnote Page 1), no one of which is expressed in terms of feasibility or safety. The "well being" of the prison is involved only when the presence of a prisoner is "seriously detrimental" to it, — the well being of the prison. The authority of the Commissioner of Institutional Service is both created and limited by this statute. The statute is to be strictly construed. The pertinent portion of the purported certificate[6] under

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[5] See *Robinson* v. *California,* 370 U. S. 660, 666, 82 S. Ct. 1417 (1962) extending the eighth amendment to the states.

[6] " * * * I hereby certify that in my opinion and in the opinion of my staff, that it is not feasible, nor safe, to keep inmates * * * and John Duncan * * * confined in this institution and that for the well being of the Maine State Prison, I recommend that they be transferred to the custody of the U. S. Bureau of Prisons where they can be kept under close confinement. * * *."

which the Commissioner transferred petitioner does not comply with the terms of the statute.

Additionally the statute calls for "written certification from the Warden to the Commissioner" which means a document signed by the person whose responsibility it is to certify. *Chapman* v. *Inh. of Limerick*, 56 Me. 390, 393, *United States* v. *Naughten*, 195 F. Supp. 157. The certificate upon which this transfer was initiated is unsigned. It is invalid and the transfer by virtue of this certificate was error.

Upon consideration, therefore, it is ordered that the petitioner be forthwith returned to the State Prison at Thomaston, Maine, for further execution of his sentence.

Appeal sustained as to point VIII only. Case remanded to the Superior Court for the entry of a declaratory judgment decree in accordance with this opinion.

PETER MENDALL, PRO AMI

AND

GEORGE V. MENDALL

vs.

PLEASANT MOUNTAIN SKI DEVELOPMENT, INC.

AND

STATE PRINCIPALS' ASSOCIATION

Kennebec. Opinion, June 14, 1963.

Charities. Torts.

An organization which receives and administers virtually no charitable gifts or donations is not entitled to immunity from liability for its torts.

Where there is no suggestion that tickets for an event are purchased by persons who have had no intention of attending such an event, admission fees paid are not to be considered as charitable contributions.

ON APPEAL.

Plaintiffs appeal the granting of summary judgment for defendant under Rule 56, exempting defendant, State Principals Association, charitable institutions immuned from tort liability. The main issue is whether the defendant is a charitable institution. Appeal sustained. Case remanded for further proceedings below in accordance with this opinion.

Frank E. Southard, Jr., for Plaintiffs.

Verrill, Dana, Walker, Philbrick and Whitehouse, by John A. Mitchell and Roger Putnam,
Stanwood Holt,
William B. Mahoney, for Defendants.

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

WEBBER, J. The complainants seek to recover damages for injury alleged to have been caused by the negligence of the defendants. The defendant, State Principals' Association, filed its motion to dismiss under M. R. C. P. Rule 12 (b) (6) setting forth that the complaint fails to state a claim upon which the relief demanded can be granted. The parties then submitted an agreed statement of facts bearing upon the basic contention of this defendant that it enjoys the immunity from tort liability accorded to charitable institutions. The justice below quite properly treated the motion as one for summary judgment to be disposed of as provided in Rule 56. Judgment was entered for the defendant. The plaintiffs seasonably appealed and the issue

here presented is whether or not the defendant State Principals' Association is a charitable institution immune from liability.

The learned justice below carefully reviewed the purposes for which the Association is organized and its method of operation. He concluded that its efforts are devoted to, and all of its funds are expended in, furthering and developing education in the public secondary schools of Maine. We are concerned primarily, however, with the sources of the income of the Association. The agreed statement contains the following:

> "The Association carries on basketball tournaments, and a hockey tournament at which an admission fee is charged. The fees are collected by the committee in charge and after the expenses are paid, in basketball, one half of the net profit is given to the association, and one-half to the schools participating.
>
> "The One-Act Play Contests also charge admission, but the association receives none of these funds. * * *
>
> "State Principals' Association receives no funds from the State of Maine, municipalities, school boards or school districts. *It has no donations or funds from outside sources,* except that for the school year 1959-1960 and again for the school year 1960-1961, the State Principals' Association received $1,000.00 from the Sears Foundation to conduct a Leadership conference for secondary school student leaders." (Emphasis supplied.)

Sections 1 and 2 of Article III of the constitution of the Association provide:

> "Section 1 The annual membership dues shall be one dollar ($1.00). Membership dues are payable on or before October 1st of each year.

> "Section 2 Membership shall be limited to principals of secondary schools and to members of the secondary division of the State Department of Education. * * * "

The justice below considered the sources of income of the Association and in that connection stated:

> "The plaintiffs claim that the Association is no different than any other commercial professional basketball or football outfit; that its major revenue is derived from profit rather than private or public charity. The payment of admission fees by patrons of basketball or football games sponsored by the Association presents a situation no different than if the fans got the funds together by school drives instead of by admission fees. They know that the funds are for the best interests of the secondary schools of Maine and not for private purpose; in their minds, their ticket purchases are contributions to a school cause."

It is apparent that except for the nominal membership dues paid in as above set forth, the Association administers funds derived entirely from admission fees paid by patrons of the activities sponsored and directed by the Association. More specifically its principal revenue is derived from conducting basketball tournaments. There is no suggestion that charitable donors have in any ordinary sense made contributions to be administered by the Association.

We cannot agree that the admission fees paid by those attending these athletic contests are in reality charitable "contributions to a school cause." We deem it more accurate to say that the patrons attend for recreation and that the entertainment thus afforded constitutes an adequate *quid pro quo* for the fees charged. There is no suggestion that tickets are purchased by persons who have no intention of attending the sporting events and we therefore

have no occasion to make the assumption which was made by the court in *Smith* v. *Relief Association,* 128 Me. 417. In that case the court said at page 423:

> "Again, plaintiff contends that an annual increment to the funds of defendant, approximating $2,000.00, is realized from sale of tickets to the firemen's ball, at two dollars per ticket. All firemen are supposed to purchase tickets, but none will deny that the main body of such tickets is sold to the general public, and our conclusion is inescapable that the average citizen pays for the ticket which he buys as a contribution to this worthy charity."

In *Jensen* v. *M. E. & E. Infirmary,* 107 Me. 408, in which our court adopted the principle of charitable immunity from tort liability, it was stated at page 410:

> "No principle of law seems to be better established both upon reason and authority than that which declares that a purely charitable institution, *supported by funds furnished by private and public charity,* cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness. * * *
>
> "The constituent elements which are regarded as characteristic of charitable institutions are defined in *Hospital Association* v. *McKenzie,* 104 Maine, 320, as follows: 'It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital and no provision for making dividends or profits, *deriving its funds mainly from public and private charity* and holding them in trust for the object of the institution.' The same doctrine is also emphatically established in Massachusetts. In *McDonald* v. *Mass. Gen. Hospital,* 120 Mass. 432, the

> court say: 'The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. *Its funds are derived mainly from public and private charity;* its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity.' " (Emphasis supplied.)

Several theories have been advanced in support of the doctrine of charitable immunity. Our court saw fit in *Jensen* to rest its grant of immunity upon two grounds, (1) that funds donated for charitable purposes are held in trust to be used exclusively for those purposes, and (2) that to permit the invasion of these funds to satisfy tort claims would destroy the sources of charitable support upon which the enterprise depends. Neither theory would have application where the institution claiming immunity derives none of its support from charitable gifts or donations. *Hamilton* v. *Corvallis General Hospital Ass'n.* (1934), 30 P. (2nd) (Ore.) 9.

The plaintiffs urge us to reconsider and overrule *Jensen.* We are satisfied that if the doctrine of charitable immunity from tort liability were to be abolished in Maine, such a far reaching change in policy should be initiated in the Legislature and receive careful legislative consideration. Charitable institutions have with reason acted upon the assumption that they enjoy the protection from tort liability which has been afforded for many years. In *Nelson* v. *Turnpike Authority,* 157 Me. 174, 186, we said:

> "The policy of immunity from liability for tort under the circumstances before us has been so long established and so long acted upon that only the clearest and most convincing reasons should compel a reversal by our court. It cannot be questioned that Legislatures and the people of the State from 1820 have acted or refrained from acting in reliance upon sovereign immunity.
>
> "We may agree that the State or its agency, the Authority, ought to bear the plaintiff's loss under the circumstances set forth. We may agree that sovereign immunity from tort liability has served its usefulness and ought to be destroyed. These are reasons directed, in our opinion, to the determination of the policy of the State, and not to the construction of legislative acts in the process of ascertaining the intent of the Legislature.
>
> "The issue is not complex. Should sovereign immunity in tort, time tested in our State, be discarded or destroyed? This is a policy question which, in our opinion, is more properly directed to the Legislature than to the court."

We see no reason, however, for broadening the class which may be entitled to the immunity. We hold that an organization which receives and administers virtually no charitable gifts or donations is not entitled to immunity from liability for its torts.

Appeal sustained. Case remanded for further proceedings below in accordance with this opinion.

ORMAND W. BEDELL AND PATRICIA BEDELL
vs.
WILLIAM A. REAGAN III

York. Opinion, June 21, 1963.

Joint Tortfeasors. *Third Party Plaintiff.*
Husband and Wife. *Equity.* *M. R. C. P.*

Reciprocal spouses may not maintain causes of action, the one against the other, for negligent tort.

There is an enforceable right of contribution amongst negligent participating or joint tortfeasors.

It is a proper object of equity to prevent application of a universal legal principle in an eventuality where unconscionable and unjustifiable hardship must otherwise ensue. M. R. C. P. 1, 14 (a).

Legal unity of husband and wife will not be observed where to do so would inflict injustice on the wife or inflict injustice upon outsiders and deprive them of their legal rights.

ON APPEAL.

The defendant (third-party plaintiff) appeals from the ruling of the trial justice dismissing the third party complaint. Appeal sustained. Plaintiff's motion overruled. Defendant's third-party complaint reinstated. Case remanded.

Harvey & Harvey,
by Joseph E. Harvey, for Plaintiffs.

Verrill, Dana, Walker, Philbrick & Whitehouse,
by John A. Mitchell, for Defendant.

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

SULLIVAN, J. The plaintiffs are husband and wife. The husband owned and operated an automobile in which his wife was a passenger. The automobile collided with

one driven by the defendant. For consequential injuries and losses the plaintiffs instituted this twofold complaint against the defendant who answered upon the merits, denying liability.

Defendant sought recourse to Rule 14 (a), Maine Rules of Civil Procedure, 155 Me. 504, and in the role of a third-party plaintiff filed his complaint against the plaintiff husband who was designated therein as third-party defendant. This sequential complaint ascribed the collision to the negligent conduct of the (plaintiff husband) third-party defendant and charged him with an obligation to contribute to and/or indemnify for damages sustained by the (defendant) third-party plaintiff because of the collision and damages for which the (defendant) third-party plaintiff may be adjudged to be beholden to the plaintiff wife in her action against the (defendant) third-party plaintiff.

The plaintiffs responded to this posterior complaint with a denial of the negligence and liability of the (plaintiff husband) third-party defendant and moved for the dismissal of the subsequent complaint for the assigned reasons that a plaintiff in one and the same action cannot be made a third-party defendant and that, in as much as the plaintiff wife has no right to recovery in tort against her spouse, the husband can have no obligation of contribution or indemnity for damages inflicted upon his wife.

After a hearing the trial justice denied and dismissed the third-party complaint. The (defendant) third-party plaintiff appeals from that ruling.

Rule 14 (a) M. R. C. P., *supra*, reads as follows:

> "**When Defendant May Bring in Third Party.** At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be

> liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and his failure to do so shall have the effect of the failure to state a claim in a pleading under Rule 13 (a). The third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter claims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim above in accordance with the provisions of Rule 54 (b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

Because of legal disability the Bedells as reciprocal spouses may not maintain causes of action, the one against the other, for negligent tort. *Anthony* v. *Anthony,* 135 Me. 54, 55.

The instant case is not a single action but is obviously and in truth two separate causes of action procedurally combined or joined by grace of the commendable provisions

of Rule 20, M. R. C. P., 155 Me. 510. *Chevassus* v. *Harley,* 8 F. R. D. 410, 413.

Ormand W. Bedell is not a party to the action of his wife against the defendant Reagan. Ormand W. Bedell may be liable to Reagan, the third-party plaintiff, in contribution for a part of any recovery by Mrs. Bedell against Reagan as amongst the parties the possibilities are contingent and multiple, e.g., that the plaintiff spouses exercised due care, that one or both of them was or were guilty of contributory negligence, that the defendant was proximately negligent or dutifully careful or that the collision was an unavoidable misadventure. In such a complex conceivably a judgment might be rendered favorable to Mrs. Bedell and adverse to her husband and to Reagan. *Kimball* v. *Bauckman,* 131 Me. 14, 19.

There is an enforceable right of contribution amongst negligent participating or joint tortfeasors:

> "- - - - when the parties are not intentional and wilful wrongdoers, but are made wrongdoers by legal inference or intendment, are involuntary and unintentional tort-feasors - - - - It is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law." *Hobbs* v. *Hurley,* 117 Me. 449, 451.

Maine Civil Practice, Field and McKusick, Rule 14, Reporter's notes, at page 186 observes:

> "This rule is similar to Federal Rule 14 - - - When a defendant believes that a third person, not a party to the action, is or may be liable to him for all or part of the plaintiff's claim, he may bring such third person into the case as a party by service upon him of a summons and complaint. Thus the entire controversy can be settled in a single proceeding - - - - - - - Impleader cannot be used by a defendant who contends that it is the third party

instead of the defendant who is liable to the plaintiff."

In its commentary applicable to Rule 14 (a), Maine Rules of Civil Procedure, 155 Me. 504, and to Rule 14 (a) of the Federal Rules of Civil Procedure, Federal Practice and Procedure, Barron and Holtzoff-Wright, contains *inter alia* the following:

"§ 421. - - - only a person who is secondarily liable to the original defendant may be brought in.

"§ 426. Subdivision (a) of this rule, both as originally drafted and as later amended, permits a defendant to bring into the action a third-party defendant, 'who is or may be liable to him' for all or part of the plaintiff's claim. Thus impleader is authorized to bring in a third party who would necessarily be liable over to the defendant for all or any part of plaintiff's recovery, whether by way of - - - contribution - - - or otherwise.

" - - - - The third-party claim need not be based upon the same theory as the main claim. And impleader is proper even though the third-party's liability is contingent, and cannot be established until the original defendant has been held liable."

The rationale of the disability of reciprocal spouses as litigants against each other is the legal unification of husband and wife and the preservation of domestic peace and felicity. Should, however, a passenger wife injured by the participating or joint negligence of her driver husband and of a third party be permitted to recover the entire amount of her damages from the third party who is denied his equitable right to contribution from her husband solely because of the husband's marital status, then such third party would be unjustly required not only to compensate for his own fault but also to pay the pecuniary equivalent of the husband's wrong. The third party would be penalized because of the marital fact which to him can only constitute

an accidental under such circumstances. The mystical concept of personal, wedded unity and the paternalistic apprehension of domestic discord between the spouses can not be so compelling as to vindicate such an incongruity.

> "The legal unity of husband and wife and the preservation of domestic peace and felicity between them are desirable things to maintain where they do not produce injustice to the wife and where they do not inflict injustice upon outsiders and deprive them of their legal rights." *Fisher* v. *Diehl,* 156 Pa. Super. 476, 40 A. (2nd) 912, 917: See, also, *Kiser* v. *Schlosser,* 389 Pa. 131, 132, A. (2nd) 344, 346.

> "- - - The rule denying tort liability in actions between parties bearing certain domestic relationship to each other may rest on sound policy. It is difficult to see, however, what connection this policy has with a joinder proceeding and cross-complaint by the singly sued defendant against a third party whose conduct equally contributed to the plaintiff's damage."
> Note, 47 Harvard Law Review, 209, 241.

> "- - - If the purpose of contribution is to make the wrongdoers share the financial burden of their wrong, then the primary element of contribution should be the participation of the wrongdoers in acts or omissions which are considered tortious and which result in injury to a third person. The fact that one of the tort-feasors has a personal defense if he were to be sued by the injured party would seem to be irrelevant." Harper and James, The Law of Torts, § 10.2, P. 718.

In an annotation at 19 A. L. R. (2nd) 1003, with supporting authority, is to be found the following reportorial commentary:

> "- - - - the courts in most of the few cases passing upon the question have denied to a tortfeasor the right to contribution from one whose concurrent

> negligence produced the injury of the plaintiff in the tort action, where, because of a marital, filial, or other family relationship between such injured person and the tortfeasor against whom contribution is sought, the former had no enforceable right of action against the latter, since the element of common liability of both tortfeasors to the injured person, essential to the right of contribution, is lacking in such cases."

"The element of common liability of both tortfeasors to the injured person" has been suffered to become a fetish in the *ratio decidendi* stated just above. The element should not be a controlling condition or factor when one joint tortfeasor unintentionally and negligently has wrought harm which he is dispensed from righting because of his matrimonial union with the victim but which the other joint tortfeasor not in the marital relation must redress in full to the injured spouse without any equitable right of contribution from the joint tortfeasor spouse. Law is only sensibly formalistic. It is a practical science. It is of the very proper object of equity to prevent the application of a universal legal principle in an eventuality where unconscionable and unjustifiable hardship must otherwise ensue.

A prime canon of interpretation for the construction of the Maine Rules of Civil Procedure is stated in Rule 1, 155 Me. 479, as follows:

> "- - - - They shall be construed to secure the just, speedy and inexpensive determination of every action."

In the instant case Ormand Bedell, an original plaintiff and third-party defendant, has been cited and designated conformably with M. R. C. P., Rule 14 (a), as a party who should be adjudged secondarily liable to Reagan, original defendant and third-party plaintiff, in contribution toward any recovery judgment of Mrs. Bedell in her action against Reagan. Barron and Holtzoff-Wright, § 421, *supra.*

Rule 14 (a) provides a technique for the impleading of the husband, Ormand Bedell, into a secondary and adversary relation with Reagan, defendant and third-party plaintiff, for the ancillary adjudication of any right of recourse of Reagan against Ormand Bedell for contribution in the foreseeable event of an unfavorable aftermath for Reagan from Mrs. Bedell's action against Reagan.

Rule 14 (a) would authorize the husband to wage fully his defenses and counterclaims against Reagan, third-party plaintiff.

The husband may not, however, assert any claim against his wife, the plaintiff, arising out of the transaction or occurrence which is the subject matter of the claim of Mrs. Bedell against Reagan because of the ancient and subsisting litigious disability operative between the Bedells. Nor for the same impediment may Mrs. Bedell assert against her third-party defendant husband any claim arising out of the transaction or occurrence which is the subject matter of Mrs. Bedell's claim against Reagan.

Rule 14 (a) permits the third-party defendant to *"assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."* This privilege when, as in the case at bar, the third-party defendant and the plaintiff are husband and wife may present on occasion an unenviable dilemma to a third-party defendant spouse. The quoted text was added to Rule 14 (a) to supply a resource against the eventuality of a third-party's neglect or indifference in his own defense (Barron and Holtzoff-Wright, § 426, P. 685), a development not to be readily anticipated. Should such a contingency arise an assertion by a husband against his wife of a third-party plaintiff's defenses to the wife's action would be reliably calculated to engender marital discord but not to any insuperable degree. Such a regrettable evil must be regarded, however, as more tolerable

than a denial of contribution to the third-party plaintiff in cases such as the one at bar. The equities clearly preponderate in favor of just contribution for the third party rather than of undeserved immunity for the joint tortfeasor husband. The third-party plaintiff is entitled to the adjuncts provided by Rule 14 (a).

It will be a concern of the Trial Court in cases of this kind to conserve the rights of the parties where necessary by controlling the issuance of executions on judgments rendered to the end that a plaintiff may recover only from the original defendant who may obtain in turn only fixed contributions from a third-party defendant. M. R. C. P., Rule 54 (b), 155 Me. 554; *Chevassus* v. *Harley,* 8 F. R. D. 410, 413.

The mandate shall be:

Appeal sustained; Plaintiffs' motion overruled; Defendant's third-party complaint reinstated; Case remanded.

MAURICE LEBEL AND LORRAINE LEBEL
vs.
WILLIAM A. REAGAN III

York. Opinion, June 21, 1963.

Liability. Tortfeasors. M. R. C. P. 19 (b)

Rule relating to joinder of conditionally necessary parties is mandatory where applicable; and is operative when such parties are subject to jurisdiction and ought to be parties to effectuate complete relief amongst persons already parties. M. R. C. P. 19 (b).

Tortfeasors are not indispensable or necessary to action against one of their number, because their liability is both joint and several.

ON APPEAL.

The defendant appeals from the ruling of the trial justice denying defendants motion to join co-defendant. Appeal denied.

Harvey & Harvey,
by Joseph E. Harvey, for Plaintiffs.

Verrill, Dana, Walker, Philbrick & Whitehouse,
by John A. Mitchell, for Defendant.

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

SULLIVAN, J. The plaintiffs, husband and wife, were passengers in an automobile operated by Ormand W. Bedell and sustained injuries when that motor vehicle collided with a car driven by the defendant. The plaintiffs instituted this duplex complaint for compensation. The defendant presented a motion to the trial court professedly pursuant to Rule 19 (b), Maine Rules of Civil Procedure, 155 Me. 510, to have Ormand W. Bedell, a resident of Saco, Maine, joined as a co-defendant in these conjoined actions. The plaintiffs filed a counter motion for the denial of defendant's motion, for the assigned reasons that any attributable negligence of Ormand W. Bedell can not be imputed to the plaintiffs, that the plaintiffs seek no recovery from Bedell, that Bedell's inclusion as a party defendant would tend to confuse the issue and that any negligence of Bedell is immaterial to the issue between the plaintiffs and the defendant. The justice below dismissed the motion of the defendant who now prosecutes his appeal from that ruling.

Rule 19 (b) is in pertinent text as follows:

"(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. - - - -"

In Maine Civil Practice, Field and McKusick, P. 222, it is said:

"- - - - Rule 19 (b) in referring to persons 'who ought to be parties if complete relief is to be accorded between those already parties' is speaking of parties 'conditionally necessary.'

If a party is one who ought to be joined if possible, the rule provides that the court shall order him summoned to appear. This will normally be done pursuant to motion, but the court might make such an order on its own initiative. If such a party cannot be served with process and does not come in voluntarily, the court has discretion to permit the action to proceed without him. He will not, of course, be bound by any judgment in the action."

Where applicable the rule is mandatory.

It is to be noted that Rule 19 (b) is operative when conditionally necessary parties:

1. are subject to the court's jurisdiction;

2. ought to be parties to effectuate complete relief amongst persons already parties.

Because of Bedell's residence in Maine he is amenable to the jurisdiction of the Superior Court. It is necessary to decide if he is a conditionally necessary party.

The following excerpts are from decided cases of this court upon the topic of non joinder in actions of tort.

"- - - - One reason why the plaintiff in an action ex delictu, should not be required to include all the

tort-feasors, is, that he may not know them, or be able to find proof against them - - - -"
Southard v. *Hill* (1857), 44 Me. 92, 96.

" In tort, as a general rule, the action may be brought against one or all of the tort feasors - - - -"
Howe v. *Shaw* (1868), 56 Me. 291, 293.

"- - - - As every wrongdoer is responsible for his own act, it is a general rule that when two or more participate in the commission of a wrong, the injured party may proceed against them either jointly or severally; and if severally, whether the separate actions are brought at the same time or successively, each may be prosecuted to final judgment. But the sufferer is obviously entitled to only one full indemnity for the same injury - -"
Cleveland v. *Bangor* (1895), 87 Me. 259, 262.

"- - - - It is of course a familiar rule that where several persons jointly commit a tort, the person injured has his election to sue all or any of the joint tort-feasors, and in an action against one or more may recover the damages caused by all jointly."
Allison v. *Hobbs* (1901), 96 Me. 26, 29.

"A person who commits a tort is a tort-feasor.

Persons who do not cooperate, the harm by each being distinct, cannot be sued jointly, even though the harms may have been precisely similar in character. *Allison v. Hobbs,* 96 Me., 26, 51 A. 245, 246.

Persons who contribute to the commission of a tort are joint tort feasors."
Gordon v. *Lee* (1935), 133 Me. 361, 363.

"- - - - When two or more participate in the commission of a wrong, the injured party may proceed against them severally as well as jointly and prosecute his action to final judgment, but obtaining complete indemnity, must be content - - - -"
Gregware v. *Poliquin* (1937), 135 Me. 139, 141.

The authorities cited and quoted confirm with verifying clarity that Bedell, driver of the motor vehicle in which the plaintiffs were passengers at the time of the collision between the two automobiles involved, is in the instant case neither necessary nor indispensable as a party *"if complete relief is to be accorded between those already parties."*

> " - - - - Tort feasors are not indispensable or necessary to an action against one of their number because their liability is both joint and several - - - - " Moore's Federal Practice, 2nd ed., Vol. 3, § 19.07, P. 2153.
>
> "Since the liability of joint tort-feasors is joint and several, the plaintiff may sue one or more as he chooses. The omitted wrongdoers are neither indispensable nor necessary."
>
> Federal Practice and Procedure, Barron and Holtzoff-Wright, § 513.8, P. 127.
> *Ward* v. *Deavers,* C. A. D. C., 203 F. (2nd) 72, 76.
> *Rumig* v. *Ripley Mfg. Corp.,* D. C. Pa, 9 F. R. D. 467, 468.
> *News, Inc.* v. *Buescher,* D. C. Ill., 81 F. Supp. 741, 742.

Dismissal of the defendant's motion by the justice below was proper.

The defendant is in no way prevented from instituting a third-party complaint for contribution under Rule 14 (a). *Bedell* v. *Reagan,* 159 Me. 292.

The mandate must be:

Appeal denied.

GEORGE A. CURRY

vs.

PORTLAND TERMINAL COMPANY

Cumberland. Opinion, June 24, 1963.

Contracts. Unions. Seniority.

Assuming the union to be a competent contracting party, the contract between the union and the employer is a completed contract in itself, enforceable in the interest of the union as an organization or in the interest of individual employees as third parties.

The authority of the union as a given employee's bargaining agent is presumed to continue following the execution of the contract, in the absence of anything to show its termination.

ON APPEAL.

This case is on appeal from the granting of summary judgment to the defendant upon motion addressed to the complaint and answer with supporting affidavit. Appeal denied.

Berman, Berman, Wernick & Flaherty,
by John J. Flaherty, for Plaintiff.

Pierce, Atwood, Scribner, Allen & McKusick,
by Fred C. Scribner, Jr. and *Ralph I. Lancaster,*
for Defendant.

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

MARDEN, J. On appeal from the granting of summary judgment to the defendant upon motion addressed to the complaint and answer with supporting affidavit. We are involved with the construction of a collective bargaining agreement dated November 29, 1947, hereinafter termed

"Contract" among the Brotherhood of Railroad Trainmen of which the plaintiff is a member, hereinafter "Union," Maine Central Railroad Company, and the defendant.

Plaintiff became an employee as a yard brakeman on August 12, 1941. On April 26, 1944 he was transferred from the class of yard brakeman to the class of switchtender and achieved certain seniority status in that class by service up to March 1, 1961. The contract covered rules and rates of pay for trainmen, yardmen and switchtenders, Article 56 specifically applying to switchtenders, and therein (Art. 56 (a)) making certain articles of the yardmen's agreement applicable to the switchtender class. Of these articles, Article 21, Seniority[1], Article 32, Reduction of Force[2], and Article 56, Switchtenders[3], control our consideration of the controversy.

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[1] **Article 21 Seniority.** "Section (a). A two (2) year limitation is established on protesting seniority of any Yardman (Switchtender). After having stood that period of time, no protest will be recognized.

"Section (b). Yardmen's (Switchtender's) seniority rosters covering Maine Central System, and Portland Terminal Company, will be revised and corrected as of January 1st of each year and copy furnished General and Local Chairmen. Revised seniority rosters to be posted on bulletin boards each year. * * * *."

[2] **Article 32 Reduction of Force.** "When reducing forces seniority rights shall govern. When forces are increased, employes shall be returned to the service in order of their seniority.

"*Note:* When men are to be dropped from the roster, junior men will be dropped first, and in their relative seniority standing.

"*Note:* Laid off Yardmen (Switchtender's) responding to calls in emergency not in the order of their roster rights, are not protected by the above.

"Employes desiring to avail themselves of this rule must file their address with the proper official at the time of reduction, advising promptly of any change in address and renew their address each ninety (90) days. Employes failing to renew their address each ninety (90) days or return to the service within thirty (30) days after being notified (by mail or telegram sent to the address last given) will be considered out of the service."

[3] **Article 56 Switchtenders.** "* * * **Portland Terminal Company.** "Section (m). Owing to the limited number of men on the present Switchtenders' seniority roster, Portland Terminal Company, and in

Factually the switchtender's seniority roster and the yardmen's seniority roster were never consolidated (Article 56 (m)). Effective January 1, 1948 separate switchtender's and yardmen's seniority rosters were furnished the union and were posted in 1948 and annually thereafter through 1961 (Article 21 (b)). No protest based upon the seniority lists so posted was voiced by plaintiff.

On November 29, 1947 there were four switchtenders in the employ of the defendant, of which the plaintiff was one, and at the end of 1960 three had left the employ of the defendant company leaving plaintiff as the sole remaining switchtender.

On or about December 1, 1960 the defendant abolished the position of switchtender and plaintiff was furloughed as a result of which plaintiff filed a formal protest relative to violation of his seniority rights (Article 32). Following furlough plaintiff failed to comply with the provisions of

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view of the extent that Switchtender service is being covered by Yardmen in the Portland Terminal territory, it is agreed —

"That effective December 1, 1947, the present Switchtenders' seniority roster will be combined with the Yardmen's seniority roster so that one roster covering the Portland Terminal Company will be in effect for the consolidated service.

"Such roster consolidation will make no change in the rates of pay or conditions of Switchtenders employed in the Portland Terminal territory.

"Section (n). It is agreed the Switchtenders now holding regular assignments in Portland Terminal territory have preference to these assignments, will remain on them in the same manner as previously and will hold rights against displacement from positions now held. Such Switchtenders will be expected and required to cover Switchtender Service in the Portland Terminal territory as long as it is available.

"Under the above arrangement it is understood, if and when the present incumbents on Switchtenders' positions in the Portland Terminal territory — (four (4) in number) — namely Messrs. Foster, Lehan, Curran and Curry, these being the only men on the present Portland Terminal Switchtenders' seniority roster, leave the service of the Portland Terminal Company for any reason or if their positions as Switchtenders are eliminated, the senior Yardman bidding for such Switchtender vacancy will be assigned to same. * * * *.'"

Article 32, relative filing and renewing his address, resulting in his employment being terminated on March 7, 1961 by notice.

By complaint dated April 7, 1962 plaintiff alleges that his employment was wrongfully terminated in violation of the contract and seeks damages. Defendant stands upon the terms of the same instrument.

It is plaintiff's contention that the provisions of Article 56 calling for a consolidation of the switchtender's and yardmen's seniority rosters effective December 1, 1947 was self executing, that by that provision in the contract the rosters were in fact consolidated, that such consolidation gave him a seniority status applicable to both the switchtender and yardman classes which prevented his furlough on or about December 1, 1960 and inasmuch as he was improperly furloughed and later discharged, the company is answerable to him in damages.

> There is nothing in the pleadings to establish the fact that assuming a consolidation of the rosters, plaintiff was in fact senior to anyone in the switch-tender-yardman classes, but because this litigation is pointless if it were not so, and because the case has been presented to both the Superior Court and this court, with seniority of the plaintiff over someone in the yardman category as implicit, we so accept it.

Our problem is one of seniority governed by Articles 21, and 56, and Article 32, *supra.*

> "The seniority right of a man who toils, * * * is a most valuable economic security, * * * . The right, however, is not inherent. It must stem either from a statute * * * , or from a collective bargaining agreement between employees and their employer."
> *Elder* v. *New York Cent. R. Co.,* 152 F. 361, 364 (under headnote 1-3) (6th Cir. 1945) ; *Fagan* v.

Pennsylvania Railroad Company, 173 F. Supp. 465, 470 (under headnote 4) (D. Pa. 1959); and 31 Am. Jur., Labor § 107.

See also *Palizzotto* v. *Local 641, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 170 A. (2nd) 57, 61 (under headnotes 5, 6) (Super. Ct. of New Jersey 1961), affirmed 177 A. (2nd) 538 (1962); *National Labor Relations Board* v. *International Association of Machinists, Aeronautical Industrial District Lodge 727 and Local Lodge 758*, 279 F. (2nd) 761, 765 (under headnote 1) (9th Cir. 1960) rehearing denied July 11, 1960, certiorari denied 81 S. Ct. 221; *Lamon* v. *Georgia Southern and Florida Railway Co.*, 90 S. E. (2nd) 658, 662 (under headnote 7) (Ga. 1955).

> " 'Seniority', as it applied to trainmen, means: 'the oldest man in point of service * * * is given the choice of jobs, is the first promoted within the range of jobs subject to seniority, and is the last laid off. It proceeds so on down the line to the youngest in point of service.' " *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 198 F. Supp. 402, 412 (under headnote 7) (D. Cal. 1961).

In collective bargaining, seniority acquires special attributes.

> " * * * (S)eniority is not a matter which can affect one man alone; it is a definition of his relationship to a number of other individual workers. Seniority, if it is a right at all, is a vested interest in a certain specific permutation of individuals. It is a permutation which, barring disciplinary penalties, deaths, and voluntary withdrawals, can change only by promotions from the top or by additions at the bottom. It is an interest in a 'specific orderly arrangement'. As such, each of the rights is tied to all of the rest. The employer with an agreement to respect seniority which is treated as legally enforceable could not, therefore, offer to change the roster in the interest of a par-

> ticular worker without laying himself open to a charge of violating the rights of other employees. Seniority in any business establishment is a whole chain of rights, rotating in accordance with a specific pattern. Thus, it is no mere accident that the collective bargaining agreement should be the typical instrument in which it is incorporated." Christenson, Seniority Rights Under Labor Union Working Agreements, 11 Temple L. Q. 355, 371, cited in *Falsetti* v. *Local Union No. 2026 United Mine Wkrs.*, 161 A. (2nd) 882, 893.

These special attributes assume particular importance in this case. Additionally, of three possible views as to the place which a collective bargaining contract occupies, we adopt the view that assuming the union to be a competent contracting party, the contract between the union and the employer is a completed contract in itself, enforceable in the interest of the union as an organization, or in the interest of individual employees as third parties. See Dr. Christenson's Article, *supra,* and *Donovan* v. *Travers,* 188 N. E. 705 (headnote 1) (Mass. 1934). That the plaintiff has standing to complain is unchallenged. Furthermore, the authority of the union as a given employee's bargaining agent is presumed to continue following the execution of the contract, in the absence of anything to show its termination. Annot. Labor Union-Duration of Authority, 42 A. L. R. (2nd) 1415, 1423.

We now apply these principles to the present controversy.

While the contract here stated that the switchtender's and yardmen's roster "will be combined" effective December 1, 1947, the rosters were never combined and on or about January 1, 1948 and annually thereafter separate seniority rosters for switchtenders and yardmen were posted. Article 21 (a) provided a period of two years during which a yardman or switchtender might protest his posted seniority rating, following which no protest would

be recognized. The periodic publication of these rosters was to enable employees who were entitled to places thereon to check their relative positions on the list for the purpose of preserving their seniority rights. Adverting to the characteristics of seniority discussed above, we are to be reminded that not only were the rights of the plaintiff involved in such rosters, but the rights of all other roster personnel were equally involved. *Hilton* v. *Norfolk & Western Railway Company,* 194 F. Supp. 915, 919 (under headnotes 1, 2) (D. W. Va. 1961), *Sanders* v. *Louisville & N. R. Co.,* 144 F. (2nd) 485, 486 (under headnote 1) (6th Cir. 1944). If the continued posting of these separate rosters from 1948 through 1961, contrary to the contract, brought no protest from the plaintiff, he cannot at this time raise the issue. *Sanders, Supra.* We cannot speculate as to why the rosters were never consolidated, but we are entitled to conclude that the absence of such physical consolidation was for some reason mutually acceptable to the contracting parties (the union still representing the employee's interests) and a factual execution of the contract of which the plaintiff cannot complain against the defendant. His place on the seniority roster for switchtenders and his abscence of place on the seniority roster for yardmen was fixed at the expiration of two years from the publication of the rosters on or after January 1 for the year 1948.

When plaintiff was furloughed on or about December 1, 1960 under Article 32 of the contract, its terms applied, requiring him, if he desired to avail himself of his seniority standing, to file an address with the proper official at the time of furlough, to advise promptly any change in address and renew his address each ninety days. Plaintiff did not do this and urges that his reason for so doing was to preserve his contention that he was unlawfully furloughed. Here again the special nature of seniority must be considered and while his failure to comply with Article 32 may

well have been brought about by his proper but misguided desire to protect his own position, the rights of other employees in knowing their respective positions on the roster, and their several interests in succession to a spot on the roster made vacant by noncompliance by a fellow employee proscribes plaintiff's self-serving conduct. *Hilton, supra* and *Sanders, supra.*

Plaintiff contends that in spite of the physical nonconsolidation of the rosters they were automatically consolidated by the terms of the contract whereby, if he in fact had seniority over any yardman, he was entitled to displace that yardman, and was wrongfully furloughed. Assuming this position, but without so finding, plaintiff derives no benefit. Article 56 protects his switchtender's position as a switchtender, but gives him no seniority over a yardman in a yardman's position, — as was properly determined by the justice presiding on the motion for summary judgment. Plaintiff's seniority status, furlough and subsequent release were not in violation of the contract.

Appeal denied.

TIMOTHY DUCHAINE, BY HIS FATHER GIRARD DUCHAINE,
AND
GIRARD DUCHAINE
vs.
ROBERT G. FORTIN
EUGENE G. GOUZIE

Cumberland. Opinion, July 3, 1963.

Negligence. Liability. Surmise and Conjecture. Verdicts.

Liability cannot be predicated upon the mere happening of an accident; it (accident) does not necessarily imply negligence.

Mere surmise or conjecture will not warrant submission of a plaintiff's claim to a jury.

Inferences based on mere conjecture or probabilities will not support a verdict.

ON APPEAL

This case is on appeal from the refusal of the trial court justice to direct a verdict for the defendant and subsequently to enter, after verdict for plaintiff, judgment *n.o.v.* for the defendant. Appeal sustained. Judgment re-opened and judgment to be entered for the defendant *n.o.v.*

Alton L. Yorke, for Plaintiffs.

Albert E. Guy, for Defendants.

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

MARDEN, J. On appeal from the refusal of the trial court to direct a verdict for the defendant and subsequently to enter, after verdict for plaintiff, judgment *n.o.v.* for the defendant. This is a complaint in negligence wherein

Girard Duchaine in self behalf and as father and next friend of Timothy Duchaine a minor, seeks to recover damages for injuries sustained by the minor.

The jury was competent to find as pertinent to our consideration that Timothy Duchaine, age three, lived with his parents on the second floor at 195 Brown Street, Westbrook and on the date in question was playing in the back yard of his home. Access from this yard to Brown Street was supplied by a driveway. As he played he was observed, periodically, by his mother from a kitchen window overlooking the yard, while she was engaged in her household duties. Shortly after her last observation she was informed that the child had been "hit" and he was found lying injured in Brown Street near a motionless truck owned by defendant Fortin and in the possession of defendant Gouzie.

The evidence on liability is found in the following abstracts of the record of the mother's testimony on direct examination:

"Q And how long had he been out there?

"A Not very long because if I remember, it wasn't a very nice day and it had just started to clear. So he hadn't been out all morning. Oh, I'd say he had been out about fifteen or twenty minutes.

"Q And you were going about in your kitchen, and I believe you said you were making cookies?

"A That is right.

"Q And then in your own words * * * what you did and what you saw from then on?

"A Well, I was taking — putting the cookies in the oven and I heard a scream and my little boy, my other little boy Michael who is only in school half a day, opened the door and said,

'Mommy, he is hit. Timmy is hit.' So I ran downstairs and went out and he was lying in the street.

"Q And was there any vehicle around there with relation to Timmy?

"A Fortin's green truck."

And in response to a question asking the mother to describe the area where the child was playing:

"A Well, as I say, Mrs. Jalbert lived downstairs and her doorway was a little under mine over to the left, I'd say. And the area is quite large, and there is a fence dividing ours from the next-door neighbor's. And then you can go around the building, and it is sort of a driveway. Well, evidently the ball went down there and Timmy ran down the driveway after the ball."

The following are abstracts from cross-examination of Mrs. Duchaine:

"Q So that from time to time would it be fair to say that you glanced out the window to see if the children were there?

"A That is right.

"Q You weren't watching the children?

"A Not constantly, no.

* * * * * * *

"Q Now, you testified that the ball evidently rolled down the driveway. Did you see the ball roll out of the play area?

"A No. Timmy didn't go out of the house with the ball. Evidently it must have been a little neighbor's ball.

"Q Were there other children in the yard?

"A Yes. I believe there were one or two other children.

"Q So that it is possible then when Timmy went out, the other children were playing ball and he joined them?

"A I assume. Yes.

"Q As you looked out the window, did you see some of the children and Timmy playing ball?

"A I saw Timmy. Yes. And then I went back to my work.

* * * * * * *

"Q And you didn't see the ball run down the driveway?

"A No, I didn't.

"Q And you didn't see Timmy run down the driveway?

"A No.

* * * * * * *

"Q Do you know how he got to Brown Street? Do you know if he went down the driveway?

"A Do I know?

"Q Yes.

"A I didn't see him. But I —

"Q My question to you is, do you know how he got onto Brown Street?

"A Well, he must have gone down through the driveway.

"Q Could he have gone this way?

"A Oh, yes, he could have.

"Q So you don't know how he got down onto Brown Street, do you?

"A I didn't see him, No.

"Q And you don't know when he went down onto Brown Street, do you?

"A What do you mean when?

"Q Just what I say. You don't know when he went down onto Brown Street?

"A Well, it must have been shortly after I had checked the last time.

* * * * * * *

"Q (By Mr. Guy) How did you become aware that an accident had happened?

"A My little boy burst in the door and told me, my five-year old."

A Mrs. Jalbert who, at the time of the incident, lived on the first floor at 195 Brown Street beneath the Duchaine family, testifies that she was aware that the child was playing with other children in the backyard by her door and as bearing upon the accident testified:

"Q (By Mr. Yorke) What were you doing at that time, Mrs. Jalbert?

"A Well, I was working in my kitchen and I came out. My door was right in the yard there. And sometime I was sitting with the kid and talking to them. They were playing there.

"Q And you saw them playing?

"A Yuh.

"Q On the tar area in back of the —

"A Yes, in back of the — yes.

"Q (continuing) — house?

"A Yuh.

"Q Then will you tell the Court and jury what next happened? You saw them?

"A Yes.

"Q Then if we understand correctly, you didn't see them again?

"A Yes.

"Q What next did you hear or see or do?

"A Well, I heard a little noise like a brake there — not so. And after, just after that I hear Mrs. Duchaine came down.

"Q You heard a noise that was like a brake?

"A Yuh. And she was crying.

"Q Will you tell us, please, how long it was as time, in point of time from the time that you last saw little Timmy playing on the tar and you heard the noise of the brake?

"A Well, I just came into my house there in the kitchen, and just after that I heard that."

The record further discloses that a member of the Westbrook Police Department came along in his cruiser car, saw a group of people standing in the Street, found a truck at the scene and the boy, Timothy, lying in the Street four or five feet distant from the front of the truck and approximately fourteen feet from the curb (unidentified) of Brown Street. There were marks characterized by the officer as "skid" marks measuring twenty-five feet seven inches.

Neither defendant was called to testify. Defendant Gouzie was present in the courtroom.

We have no occasion to cite authority holding that the plaintiff has the burden of proving not only some act of negligence on the part of either defendant, but that the act proved contributed in some manner to the damage for which recovery is sought.

Liability cannot be predicated upon the mere happening of an accident. It does not necessarily imply negligence. *Marr* v. *Hicks,* 136 Me. 33, 36, 1 A. (2nd) 271. "Mere surmise or conjecture will not warrant submission of a plaintiff's claim to a jury. When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict." *Bernstein* v. *Carmichael,* 146 Me. 446, 451, 82 A. (2nd) 786; *Jordan* v. *Portland Coach Company,* 150 Me. 149, 151, 107 A. (2nd) 416.

The case is devoid of evidence upon which the jury could justify liability, and a verdict directed for the defendants was in order. In each case:

Appeal sustained.

Judgment re-opened and judgment to be entered for the defendant n.o.v.

A. WILLMANN & ASSOCIATES
AND
MAXWELL A. H. WAKELY
vs.
JOSEPH PENSEIRO

Oxford. Opinion, July 8, 1963.

Contracts. Partnerships. Error of Justices.

The burden of proving that the presiding justice was in error as to a matter of law, is upon the appellant.

ON APPEAL.

Defendant appeals from the trial justice's decree striking an accounting and imposing a settlement amongst the parties to this litigation. Appeal sustained. Case remanded for further appropriate proceedings in accordance with this opinion.

Albert Beliveau, for Plaintiffs.

William E. McCarthy, for Defendant.

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

SULLIVAN, J. Defendant appeals from the trial justice's decree striking an accounting and imposing a settlement amongst the parties to this litigation. *Willmann & Associates* v. *Penseiro,* 158 Me. 1.

In 1955 one Kenneth M. Phillips and the defendant as partners or upon a joint adventure associated themselves in the enterprise of developing a tract of land known as Woodlawn Acres and of selling house lots therefrom.

> "- - - - 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.' - - - - - - - Phillips from early 1956 did little in connection with the development."
>
> *Willmann & Associates* v. *Penseiro, supra,* 3, 5.

On November 14, 1960 Phillips made a complete assignment of his interest in the partnership or venture to the plaintiff, Wakely, and thus terminated the joint engagement with the defendant. The plaintiffs thereupon succeeded to the rights of Phillips and became entitled to an accounting with the defendant and a settlement, for which the objective would 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." *Willmann & Associates* v. *Penseiro, supra,* 8.

Subsequent to the decision of this court reported in 158 Me. 1, *supra,* these plaintiffs formally applied to the sitting justice for the appointment of a referee. The justice assented and his order is pertinently as follows:

> "- - - to make a complete audit and examination of the affairs of Woodlawn Acres and of the defendant insofar as said Woodlawn Acres are concerned.
>
> This reference is made with the reservations as to questions of law as to both parties.
>
> There is reserved to the parties the right to object to acceptance of the Report of the Referee."

The referee reported to the justice in due course.

The defendant seasonably objected to the report because of an item totalling $2,000 which the referee had pronounced to have been paid directly to Phillips by 3 purchases of single lots and to have been expended by Phillips for road improvement in the land development. The defendant moved the justice to require that the report be amplified by a specific finding of fact as to whether the $2,000 had been paid to Phillips for services personally performed for the land enterprise or whether the $2,000 were a sum paid by Phillips to someone else. The defendant requested that such additional findings afford full details attending the receipt and disbursement of the $2,000 by Phillips.

Defendant also challenged the propriety of a finding by the referee that a listed payment of $280 by the enterprise to Phillips had been applied by the latter "for development costs." Defendant no longer urges this protest and must be assumed to have abandoned it.

With the justice's approval the referee responsively implemented his report with the following written commentary:

> "1. Item in Exhibit C of accounting entitled 'Disposition of proceeds paid to Phillips for roads,' represents money received by Phillips from the

sale of lots to be used for clearing streets as follows:

Belanger #2	$ 800.00
Hemingway #35	800.00
Roy #54	400.00
	$2000.00

Mr. Penseiro, in his answer to the Plaintiff's request number 3, filed earlier in the case, states that this amount was paid to Phillips for clearing streets.

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

I am unable to state, on the basis of information furnished to me by Mr. Penseiro and Mr. Phillips, whether these sums of money were paid to Phillips for services that he personally performed or whether these sums were an expenditure paid from Phillips to someone else. I am further unable to account as to what services were performed by Phillips nor when they were performed, or if in the nature of an expenditure by Phillips, I am unable to state when he paid these amounts, to whom and for what.

I can only state that Penseiro agrees that the money was paid to or withheld by Phillips to clear streets; that Phillips agreed that he received the money; and that a number of streets were cleared in the area owned by the partnership."

There is contained in the record of the case at bar no benefit of testimonial evidence or intimation that any such was availed of. The referee was a certified public accountant.

Defendant's reaction to the referee's commentary quoted above was a motion as follows:

"1. That the Referee be ordered to explain and further amplify the obvious inconsistency in the last two Paragraphs of his answer - - - - to Defendant's Motion for further finding of fact - - - - -

> 11. That this Honorable Court set a date for hearing between the parties hereto on the following question of law not in the province of the Referee, for final completion of the accounting between the parties.
>
> (a). To determine what, if anything, is due the Defendant, Joseph Penseiro, for services rendered and work performed on behalf of the joint enterprise or partnership during the absence of Kenneth Phillips, the Plaintiff's assignor, prior to dissolvement.
>
> (b). To determine if the remaining real estate is part of the profits to be divided between the parties or whether it is property solely owned by the Defendant."

The foregoing motion was denied by the court.

The presiding justice rendered a decree finding as a fact that in accordance with the referee's report there remained in defendant's possession the sum of $7,537.33 of association funds. From that amount the defendant was ordered to pay some specific fees, expenses and bills payable. Such disbursements would leave a balance of $5,447.20 which defendant was directed to share equally with the plaintiffs. The defendant was required to convey to the plaintiffs one half of the title to the unsold land at Woodlawn Acres.

The defendant appealed and now prosecutes 3 of his assigned grievances:

1. That the defendant is entitled to the value of his services rendered for the joint adventure from early 1956 after which Phillips "did little in connection with the development." 158 Me. 1, 5.

2. That the referee failed to account adequately for the $2,000 item found in the referee's audit to have been received by Phillips and credited by the court decree as hav-

ing been expended by Phillips in road improvement at the land development.

3. That the court erred in ordering the conveyance from the defendant to the plaintiffs of one half title in the residual land.

The defendant here necessarily commits himself to the burden of demonstrating that the presiding justice was in error as a matter of law in denying to the defendant a hearing to secure a determination of any sums due to the defendant for personal services bestowed by him upon the joint enterprise during Phillips' absence from the project and prior to the dissolvement. We possess no transcript of testimony and the record in the case at bar is empty of data as to services contributed by either associate. In the reported decision, *supra,* 158 Me. 1, 5, is recited a negative fact that "Phillips from early 1956 did little in connection with the development." There is no affirmative information as to what either associate may have done. The decided case, *supra,* 158 Me. 1, 3, contains an abridgement or abstract of the written agreement evidencing the joint land enterprise. Such agreement as reported does not attest the right nor fortify the claim of either partner or associate to compensation for personal services. Upon this record we discern no meritorious occasion to activate any special and sound discretion by the justice below.

> "As a general rule, in the absence of an agreement therefor, a partner is not entitled to compensation, other than his share of profits, for his services to the firm, regardless of how valuable such services may be or how much greater than the services contributed by other partners; but an agreement for compensation, express or implied, will be enforced by the courts."
>
> 68 C. J. S., Partnership, § 94, P. 531.

"As a general rule a partner is not entitled to compensation for his services to the partnership in the absence of a contract allowing it to him - - -"

Neilsen v. *Holmes* (Cal.), 186 P. (2nd) 197, 202.

"A partner is not entitled to any salary unless there is shown an agreement to that effect or circumstances from which such an agreement may be implied - - - -"

Kist v. *Coughlin* (Ind.), 57 N. E. (2nd) 199, 205.

"- - - - In the absence of such express contract or facts creating such implication, a partner cannot recover salary or compensation, even though he had control of the business and performed the major portion of the work - - -"

Johnson v. *Oil & Gas Co.* (Ky.), 129 S. W. (2nd) 111, 114.

"- - - - It is further said that the defendant should have been granted an allowance in compensation for his work in connection with the business over and above the share allotted to the complainant. But this contention has no support in the terms of the partnership agreement. In the absence of an agreement, a partner is not entitled to remuneration for acting in the partnership business, - - - -"

Bell v. *Perry* (N. J.), 160 A. 421, 422.

Defendant challenges and disputes as an unwarranted assumption the justice's decree in so far as it in effect finds that Phillips who had personally received $2,000 as the sale price of 3 lots of the association or partnership had in fact expended that sum for street development at Woodlawn Acres. It is incontrovertible that if Phillips did not expend the $2,000 fund for street improvement or for some other legitimate joint purpose then the accounting struck by the justice's decree is affected and patently faulty.

The record discloses that the defendant had returned a sworn answer to a demand of the plaintiffs that he reply to an interrogatory, as follows:

"Money received by Kenneth Phillips from sale of lots *to be used for clearing streets.*

Joseph Belanger No. 2	800.00	
Richard Hemingway No. 35	800.00	
Leonard Roy No. 54	400.00	2000.00"

(emphasis added)

The referee in his audit included the following item of partnership bookkeeping:

"*Disposition of proceeds*

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

Paid to Phillips for roads	2000.00"

In his final report the referee stated his indeterminate conclusions concerning this $2,000, as follows:

> "I am unable to state, on the basis of information furnished to me by Mr. Penseiro and Mr. Phillips, whether these sums of money were paid to Phillips for services that he personally performed or whether these sums were an expenditure paid from Phillips to someone else. I am further unable to account as to what services were performed by Phillips nor when they were performed, or if in the nature of an expenditure by Phillips, I am unable to state when he paid these amounts, to whom or for what.
>
> "I can only state that Penseiro agrees that the money was paid to or withheld by Phillips to clear streets; that Phillips agreed that he received the money; and that a number of streets were cleared in the area owned by the partnership."

The record reveals that several streets were improved by several operators. Thus the statement of the referee "that a number of streets were cleared in the area owned by the partnership" becomes, without more information, deficient as a circumstance for specific fact finding purposes.

There is no competent or satisfactory evidence of any disposition of the $2,000 by Phillips. The decree of the justice was erroneous in presuming or conceding that there was.

The defendant imputes error to the court's ordering of a conveyance by the defendant to the plaintiffs of a one-half interest in the unsold land at Woodlawn Acres.

This court in *Willmann & Associates* v. *Penseiro,* 158 Me. 1, construed the contract between Phillips and this defendant as the controlling and authoritative basis of an accounting and settlement between the parties to the instant case and held: (page 8)

> "- - - - 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 - - - - Case remanded for further proceedings in accordance herewith."

The report of the referee adopted by the sitting justice provides full compensating credit to effect reimbursement to the defendant for his initial land outlay with interest. Obviously the unsold land thus becomes an expression of a portion of the joint profits in the form of real property. The ordering of an equal division of title in the residual land by the medium of a conveyance was a proper and practical choice of method in the settlement to be achieved.

The appeal must be sustained but only to the extent of providing a corrective reconsideration and resolution of the actual disposition or application of the $2,000 fund received by Kenneth M. Phillips and of the effect of such disposition upon an accounting and settlement amongst these parties.

The mandate shall be:

Appeal sustained:

Case remanded for further, appropriate proceeding in accordance with this opinion.

STATE OF MAINE

vs.

RALPH THOMAS PARK, II

Kennebec. Opinion, July 30, 1963.

Murder. Insanity. Malice. Manslaughter. Juries.

Words, alone, do not constitute sufficient provocation to reduce homicide from murder to manslaughter.

The jury is the judge of the facts and must take the law from the court.

The jury, in murder cases, is generally given the opportunity to find manslaughter.

Malice is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder. Malice includes intent and will.

Facts which are not sufficient to establish lack of criminal responsibility may not be used for the purpose of reducing the degree of homicide from murder to manslaughter.

The function of the jury is to find the facts and to apply the law as given by the court to the facts in reaching their verdict. Punishment, or whatever may transpire after the verdict, is not the concern of the jury.

The burden is upon the respondent to establish insanity by the preponderance of evidence.

ON EXCEPTIONS.

This case is on exceptions to the refusal of the presiding justice to give requested instructions to the jury. Exceptions overruled. Judgment for the State. Case remanded for sentence.

Jon Lund, County Atty.,
Foahd Saliem, Asst. Atty. Gen.,
Wayne Hollingsworth, Asst. Atty. Gen., for State

Lewis I. Naiman,
Harold Shapiro, for Defendant.

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

WILLIAMSON, C. J. The respondent, a boy fifteen years old, was convicted of murder at the October 1962 term of the Kennebec Superior Court on pleas of not guilty and not guilty by reason of insanity. The case is before us on exceptions to the refusal of the presiding justice to give requested instructions to the jury. The exceptions are overruled.

The jury in reaching its verdict could have found the following facts. The respondent "bumped into" the victim Avis Longfellow, a girl fifteen years old, on a camp road at Lake Cobbosseecontee. The victim dropped a child about two years old she was carrying and called the respondent "a queer," a term which he understood referred to a "filthy thing" — a "common sexual perversion." The respondent then drew from his pocket a jackknife and stabbed the victim to death by inflicting more than forty knife wounds. He then pursued and stabbed the young child.

The respondent did not take the stand. The evidence of the physical contact with the victim and her words came from oral admissions and a signed statement by the respondent. Expert evidence of psychiatrists was offered by both State and respondent on the issue of insanity.

On the evidence the jury was fully justified in finding the respondent guilty of murder.

EXCEPTION 1

The error claimed in Exception 1 is that the court removed the issue of manslaughter from consideration of the jury. The instructions requested and refused raise two points: (1) that the general law of manslaughter (apart from any question of mental condition) was applicable on the evidence; and (2), in the words of his brief, that "The general law of murder with respect to the alleged commission of the crime by the respondent, while suffering from either a mental disease or defect, as defined by Sec. 38-A, Chap. 149, R. S. of Maine, 1961 (*Durham* v. *United States,* 214 F. (2nd) 862, and *McDonald* v. *United States,* 312 F. (2nd) 847), which has the effect of reducing the crime of murder to that of manslaughter, by virtue of the fact that the mental disease or defect wipes out the specific intent of premeditation or deliberation, and malice aforethought."

In the course of the charge the presiding justice discussed among other matters the law relating to murder, manslaughter, and insanity or mental responsibility for criminal conduct under the 1961 Act, or Durham Rule as modified by the Legislature. R. S., c. 149, § 38-A. He stated in substance that there was no evidence in the case which could reduce the killing (if established) from murder to manslaughter. Three possible verdicts were submitted to the jury; namely, not guilty, guilty of murder, and not guilty by reason of insanity.

There was plainly no question about the fact of the killing by the respondent. It may fairly be said that the jury was left with the choice of finding the respondent guilty of murder or not guilty by reason of insanity.

Murder and manslaughter are defined by statute in R. S., c. 130 as follows:

> "**Sec. 1. Murder, definition.**—Whoever unlawfully kills a human being with malice afore-

thought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

"**Sec. 8. Manslaughter, definition.**—Whoever unlawfully kills a human being in the heat of passion, *on sudden provocation*, without express or implied malice aforethought . . . or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years." (Emphasis ours.)

The differences between the two offenses have been set forth by our court in the often cited cases below.

"The jury was instructed that murder was the unlawful killing of a human being with malice aforethought, either express or implied;—

"That when a human being was unlawfully killed without said malice, upon sudden provocation, and in the heat of passion, and under such circumstances that it could not be justified or excused, the crime would be manslaughter; . . "
State v. *Conley,* 39 Me. 78, 88.

"The jury were instructed that 'where the killing is unlawful, and neither express or implied malice exists, the crime is reduced from murder to manslaughter. 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.' "
State v. *Knight,* 43 Me. 11, 137.

"Malice is *implied* by law from any deliberate, cruel act, committed by one person against another, suddenly, without any, or without a considerable provocation. And all homicide is, as a

> general rule, presumed to be malicious, until the contrary appears from circumstances of alleviation, to be made out by the prisoner, unless they arise out of the evidence produced against him. 1 Russ. on Crim. 183, and authorities there cited." *State* v. *Neal,* 37 Me. 468, 470; *State* v. *Arsenault,* 152 Me. 121, 124 A. (2nd) 741.

Setting aside any question arising from the respondent's mental condition, we find in the record no evidence from which the jury could have found that the homicide was committed without implied malice. "[Malice] is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder. Malice includes intent and will." *State of Maine* v. *Merry,* 136 Me. 243, 248, 8 A. (2nd) 143.

At best for the respondent, he "bumped into" the deceased and was angered by her calling him "a queer." There is not the slightest evidence that the physical contact was an offensive act by the deceased against the respondent. If the words of the deceased angered the respondent, he is faced with the plain rule of law that words alone do not constitute sufficient provocation to reduce homicide from murder to manslaughter.

> "In considering what is regarded as such adequate provocation, it is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter."
> *Commonwealth* v. *Webster,* 59 Mass. (5 Cush.) 295, 305.

> "The principle . . . that an affray may occur or sudden provocation be given which, if acted on in the heat of passion produced thereby, might mitigate homicide to manslaughter, yet if the provocation, though sudden, be not of that character which would, in the mind of a just and reasonable

> man, stir resentment to violence, endangering life, the killing would be murder, applies here."
>
> *Holmes* v. *State* (Ala.), 7 So. 193, 194.

See *Commonwealth* v. *York,* 50 Mass. (9 Met.) 93; *People* v. *Marrow* (Ill.), 85 N. E. (2nd) 34; *Commonwealth* v. *Cisneros* (Pa.), 113 A. (2nd) 293; 1 Wharton's Crim. Law (12th ed.) §§ 584, 585; 40 C. J. S., Homicide, §§ 46, 47; 26 Am. Jur., Homicide, §§ 25, 29.

Whether there was any evidence from which the jury could find provocation and other elements reducing the offense to manslaughter, was a question of law for the determination of the court. The jury is the judge of the facts and must take the law from the court. *State* v. *Wright,* 53 Me. 328, 345. In the absence of any evidence from which the jury could find manslaughter, the court properly withdrew the issue from their consideration. There was no error in failing to give the requested instructions. *Foster* v. *State* (Ariz.), 294 P. 268; *Singh* v. *State* (Ariz.), 280 P. 672; *Sparf and Hansen* v. *U. S.,* 156 U. S. 51, 62, 103; *State* v. *Nelson* (N. H.), 175 A. (2nd) 814; *Commonwealth* v. *Cisneros, supra; State* v. *Prescott* (R. I.), 40 A. (2nd) 721; *State* v. *Cianflone* (Conn.), 120 A. 347; *Commonwealth* v. *Moore,* 323 Mass. 70, 80 N. E. (2nd) 24; *Commonwealth* v. *Heinlein,* 256 Mass. 387, 152 N. E. 380; 16 C. J., Criminal Law, § 2485; 26 Am. Jur., Homicide, §§ 555, 559; 41 C. J. S., Homicide, §§ 390, 395; Abbott, Criminal Trial Practice (4th ed.) § 674, p. 1266; 2 Bishop's New Criminal Procedure, § 980.

We are aware that under our practice as a matter of custom the jury in murder cases is generally given the opportunity to find manslaughter. In *State* v. *Albanes,* 109 Me. 199, 83 A. 548, however, the court with one justice dissenting upheld a conviction of murder when manslaughter was not given as a possible verdict.

In *State* v. *Duguay*, 158 Me. 61, 178 A. (2nd) 129, it was urged on appeal that the homicide was manslaughter and not murder. The case does not hold, as suggested by the respondent, that in every case an instruction permitting a manslaughter verdict must be given, but only that, such an instruction having been given, the verdict of murder was fully justified.

The respondent further contends that mental disease or defect as defined in our 1961 statute compels the reduction of homicide from murder to manslaughter. He would have us adopt a rule of partial or limited responsibility, bearing upon the degree of the offense. This we are not prepared to do.

The line between criminal responsibility and lack of criminal responsibility is drawn by our 1961 statutes. We then discarded the McNaghten Rule and adopted the Durham Rule with modifications.

The statute in R. S., c. 149 reads:

> "**Sec. 38-A. Responsibility.** An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. The terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol."

In finding against the respondent on his plea of not guilty by reason of insanity, the jury found him responsible for his acts, and so guilty of murder.

The respondent would inject a standard of responsibility determined not by insanity (or lack of criminal responsibility), but by a mental disease or defect not destroying total criminal responsibility for the respondent's acts. In brief, the respondent proposes to use facts not sufficient to establish that he was not criminally responsible under

our 1961 Durham Rule for the purpose of reducing the degree of homicide from murder to manslaughter. In *Fisher* v. *U. S.*, 328 U. S. 463, 66 S. Ct. 1318, 1323, the Supreme Court with three justices dissenting held that under the law of the District of Columbia "that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder." We recognize that *State* v. *Green* (Utah), 6 P. (2nd) 177 and *Maher* v. *People* (Mich.), 81 Am. Dec. 781 take a contrary view. See also Glueck, Law and Psychiatry, p. 24.

We had no such rule of partial or limited responsibility under the McNaghten Rule. There is nothing inherent in our Durham Rule requiring the creation of a new zone of uncertain width with changing shadows for the benefit of those charged with crime.

EXCEPTION 2

The court refused to give the following instruction:

> "That the defendant is entitled to every inference in his favor which can be reasonably drawn from the evidence, and where two inferences may be drawn from the same facts, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence."

We are satisfied from a study of the charge that the instruction requested was given in substance. There was no reason to believe that the jury was not properly advised of its duties in this respect.

EXCEPTION 3

The respondent requested and the court refused to instruct the jury as follows:

"That, the consequences of a verdict of not guilty by reason of insanity, in the event the jury find the respondent not guilty by reason of insanity, are set forth in Sec. 38-B, Chap. 149, R. S. of Maine, 1961; and the Court should have either read or summarized said statutory provision to the jury, which is:

" 'Sec. 38-B. **Commitment of person acquitted on basis of mental disease or defect.**—When the respondent is acquitted on the ground of mental disease or mental defect excluding responsibility, the verdict and the judgment shall so state and the court shall order him to be committed to the custody of the commissioner of mental health and corrections to be placed in an appropriate institution for the mentally ill for custody, care and treatment.' "

It has long been the settled practice in our State that the function of the jury is to find the facts and to apply the law as given by the court to the facts in reaching their verdict. Punishment, or whatever may transpire after the verdict, is not the concern of the jury.

No exception to this general rule is found in our cases where the plea has been not guilty by reason of insanity. There was therefore no error on the part of the presiding justice in refusing to inform the jury of the consequences of a verdict of not guilty by reason of insanity.

We are not convinced that there is any sound reason for altering our practice by reason of the adoption of the 1961 statute relating to mental responsibility for criminal conduct. We are aware that in cases arising on appeal from the courts of the District of Columbia under the Durham Rule, so-called, which our 1961 Act closely follows, the point has been otherwise decided. *Lyles* v. *U. S.*, 254 F. (2nd) 725 (C. A. D. C.); *Catlin* v. *U. S.*, 251 F. (2nd) 368 (C. A. D. C.); *McDonald* v. *U. S.*, 312 F. (2nd) 847 (C. A. D. C.). The result we reach is found in *Pope* v.

U. S., 298 F. (2nd) 507 (C. A. 5th), involving an insanity plea but not the Durham Rule. The respondent takes nothing from the exception.

EXCEPTION 4

The court refused to give the following instruction:

> "That, if you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case. . . (*Durham* v. *United States*, 94 App. DC 228, 214 F. (2nd) 862. 45 ALR (2nd) 1430 pp. 1445-1447.)"

In substance the court instructed the jury that the respondent was presumed to be sane and that the burden was upon the respondent of establishing insanity by the preponderance of evidence. In short, the jury was charged in accordance with our law as known and acted upon without question since the leading case of *State* v. *Lawrence*, 57 Me. 574 in 1870. See also *State* v. *Arsenault, supra; State* v. *Quigley*, 135 Me. 435, 199 A. 269; *State* v. *Turner*, 126 Me. 376, 138 A. 562; *State* v. *Parks*, 93 Me. 208, 44 A. 899.

The respondent in requesting the instruction seeks to have us adopt the rule that upon the introduction of some evidence of mental disorder, sanity would then become a fact to be proved by the State beyond a reasonable doubt. This was the rule in effect in the District of Columbia when *Durham* v. *U. S., supra,* was decided. The court did no more than apply existing law on the burden of proof of insanity in a criminal case to the *Durham* situation. See *Tatum* v. *U. S.,* 190 F. (2nd) 612 (C. A. D. C.) cited in *Durham.*

In our view there is no reason for changing the burden of proving insanity under the 1961 Act from the rule existing prior thereto. The difficulties in the way of the State proving beyond a reasonable doubt that the unlawful act in question was not the product of mental disease or mental defect are readily apparent. See Law and Psychiatry by Professor Glueck (1962) pp. 112, 118. We find no error in the refusal to give the requested instructions.

The entry will be

Exceptions overruled.

Judgment for the State.

Case remanded for sentence.

JOHN D. DUNCAN, PET'R. FOR WRIT OF ERROR CORAM NOBIS

vs.

ALLAN L. ROBBINS, WARDEN MAINE STATE PRISON

Knox. August 7, 1963.

Coram Nobis. Criminal Law. Constitutional Law.

Indigent Prisoners. Appointment of Counsel.

Coram nobis in criminal cases is an aftermath or post appellate remedy; it is sought and applied only after conviction and final court judgment.

An appellant's indigency may not deprive him of manifestly necessary legal aid which a citizen of sufficient means could have acquired.

A petitioner invoking relief who has already been accorded his full day in court, no longer enjoys any presumption of innocence but is subjected to the assumption and satisfaction of the burden of proof.

For the necessary preservation of constitutional equality between rich and poor, assistance of counsel is not to be summarily restricted to conventional trials or appellate reviews.

ON APPEAL.

This is on appeal from the dismissal of appellant's writ of error *coram nobis*. The main issue is whether or not an indigent shall be denied the assistance of counsel on appeal. Appeal sustained. Judgment vacated. Case remanded for further hearing in accordance with this opinion.

Louis Scolnik,
G. Curtis Webber, for Plaintiff.

Richard A. Foley, Asst. Atty. Gen.,
John W. Benoit, Asst. Atty. Gen., for State.

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

SULLIVAN, J. Appellant sought from the Superior Court a common law writ of error *coram nobis*. The writ was issued but after a hearing it was dismissed. This is an appeal from such dismissal.

In 1956 appellant had been tried by a jury upon an indictment and had been adjudged guilty and heavily sentenced for the crime of attempting to escape from the State prison. P. L., Me., 1955, c. 309. He is serving that sentence. His plea of error *coram nobis* antedates P. L., Me., 1961, c. 131 and recites three grievances in justification for a recall or vacation of the court judgment and sentence against him:

> "First, that perjured testimony was given at the trial by William E. Goldthwaite;
>
> Second, that said perjured testimony was knowingly used by the prosecution;
>
> Third, that the County Attorney induced William E. Goldthwaite to give such perjured testimony."

Such assertions frontally and gravely impugn appellant's 1956 trial as a repudiation of his liberty and a nullification of guarantees of Article 1, Section 6 of the Constitution of Maine and of the Fourteenth Amendment to the Constitution of the United States. Under those circumstances an issued common law writ of error *coram nobis* must be regarded as constituting an address "of right" for the movant in respect to the entertainment, consideration and adjudication of the issues generated. *Dwyer* v. *State*, 151 Me. 382, 393 through 396.

Immediately prior to the hearing in the case at bar appellant requested from the justice presiding an opportunity to retain legal counsel. The justice responded that the appellant had had a period of some 3 months in which to secure counsel and was entitled to no further indulgence.

Appellant who had been incarcerated in prison for years advanced reasons why his confinement had presented impediments to his engagement of an attorney. Appellant asked for a suspension of the proceeding to afford him an interval for prevailing upon his brother or aunt to supply funds or to finance the procurement of an attorney. The justice without success assisted the appellant in the latter's effort to engage one or the other of two local attorneys nominated by the appellant. The justice thereupon informed the appellant as follows:

> "It doesn't seem to me that any of your rights have been violated in that regard. You knew all the time that you were going to be back here with the opportunity to correspond with counsel and have counsel ready here when you were returned from Alcatraz for the express purpose of this hearing. I have sent for Mr. Burgess and Mr. Knight, and you may have the opportunity to talk with them. If either or both are willing to represent you I can assure you the Court would be pleased to have you have representation. The case could then be handled more expeditiously by a person who is familiar with our Court procedure. You have a right to represent yourself, and the Court appreciates that it will have to be indulgent and permit you to present your case in the best manner possible. The Court has no intention of in any way preventing you from having a full and complete hearing, but so far as continuing this hearing to some later date in order for you to investigate the possibility of being able to employ counsel it seems that it is a request entirely unreasonable and unjustifiable in view of the time that has elapsed during which you have had every opportunity so far as the Court is concerned to employ such counsel as you saw fit to employ. You may be seated if you wish until Mr. Knight and Mr. Burgess arrive. I have just been informed that Mr. Knight left for Maryland yesterday. I now hand you through the officer a certified copy of the writ of

> error corum (sic) nobis that was issued on your petition. Is there any error or complaint that you have or know of that is not contained in your petition?"

Twice more during the hearing appellant without avail applied to the court for the aid of legal counsel.

The record contains satisfying assurances of appellant's indigence. Appellant in his pleading had without challenge by denial represented that he was impecunious. At his jury trial some four years earlier the court had afforded him counsel. In the interim he had been a prison inmate continuously, for much of that period at Alcatraz without any comprehensible means of acquiring finances. He had stated that he must have recourse to a brother or an aunt for the securing of counsel fees. The court at the hearing in the case at bar presumably considered it incumbent to absorb for the appellant the expense of his witnesses.

It must be noted that the learned presiding justice in 1960 possessed no authority for affording counsel to the appellant. There was no enabling statute or rule of court to such purpose. No public fund existed to supply payment for counsel appointed. By tradition, juristic principle and precedent no such obligation of providing counsel to a petitioner in *coram nobis* process had ever been recognized in this jurisdiction. *Coram nobis* in criminal cases is an aftermath or post appellate remedy. *Dwyer* v. *State*, 151 Me. 382. It is sought and applied only after conviction and final court judgment. It is denominated a civil proceeding. *Maine Civil Practice, Field and McKusick*, § 81.3, P. 613. A petitioner invoking relief has already been accorded his full day in court, no longer enjoys any presumption of innocence but is subjected to the assumption and satisfaction of the burden of proof. In 1960 and prior thereto he was obliged to procure his own paid or altruistic counsel.

The decisions of the Supreme Court of the United States interpreting and applying the clauses of the Federal Constitution are conclusive and binding.

State v. *Furbush,* 72 Me. 493, 496;

Whiting v. *Burger,* 78 Me. 287, 295;

Waterville Realty Corp. v. *Eastport,* 136 Me. 309, 315;

Higgins v. *Carr Brothers Co.,* 138 Me. 264, 271.

In these latter years many curative and corrective pronouncements of the Supreme Court of the United States have been rendered, purposed to evolve, define, restore or vindicate, for respondents charged with crime, their guaranteed rights under the *"due process of law"* and *"the equal protection of the laws"* clauses of Article XIV of the Amendments to the U. S. Constitution. The cogent effect upon federal and state administration of justice has been pervasive, trenchant and, withal, revealing. Comment and debate in university and legislative halls and from bench and bar have been rife and divided. But with undeniable certitude all must concede that many oppressive abuses have been exposed, outlawed and redressed.

The gathering and accumulating precedents with their promulgated propositions and consequential corollaries progressively afford more dependable assurance for the anticipation and prescience of conclusions yet to be formally declared by the nation's court of last resort. We know of no decided case of the United States Supreme Court expressly commanding the furnishing by a State of counsel for an indigent applicant seeking remedy by the common law writ of error *coram nobis.* It becomes necessary, then, for us to resolve whether the decisions hitherto rendered by that court divulge to the standard of moral certitude or through the dictates of consistency reasonably attest the

mind of the court upon this issue of counsel for this appellant.

In *Griffin* v. *Illinois* (1956), 351 U. S. 12, 100 L. ed. 891, Griffin for lack of funds did not have a stenographic report of his trial proceedings, necessary by law for the prosecution of a direct appellate review of his conviction for a non capital offense. The United States Supreme Court held that an indigent criminal defendant is entitled to a transcript of the trial record or to an adequate substitute therefor when the transcript or such substitute is necessary for the effective prosecution of an appeal from a conviction. The court quoted from Magna Charta:

> "To no one will we sell, to no one will we refuse, or delay, right or justice - - - -"

The court employing the implication of "invidious discriminations" further said: (P. 19)

> "- - - - Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside - - - - - There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

In *Burns* v. *Ohio* (1959), 360 U. S. 352, the U. S. Supreme Court held that a State may not constitutionally require that an indigent defendant in a criminal case pay a filing fee ($20) before permitting such defendant to file a motion for leave to appeal in one of its courts. The court commented in part as follows:

> "- - - - There is no rational basis for assuming that indigents' motions for leave to appeal will be less

meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio." (p. 257)

"- - - - The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." (p. 258)

In *Gideon* v. *Wainwright* (March 18, 1963), — U. S. — , 9 L. ed. (2nd) 799, Gideon had been charged with the commission of a noncapital felony and appeared in the State court without funds and without a lawyer. He asked the court to appoint counsel for him but was refused. He defended himself, was found guilty and imprisoned. In habeas corpus process the State denied him relief. The U. S. Supreme Court on certiorari overruled its former decision of *Betts* v. *Brady* (1942), 316 U. S. 455 and held that the Fourteenth Amendment made immune from State invasion and obligatory on the States the fundamental right to counsel in a felony trial. That court said, in part: (P. 805)

"- - - - From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him - - - -"

Draper v. *Washington* (March 18, 1963), — U. S. — , 9 L. ed. (2nd) 899.

Draper and another, both indigent, after conviction of felony in the State court, filed a notice of appeal with as-

signment of errors and a motion for a free transcript of the trial evidence and record. A hearing before the trial judge was had upon the motion and a transcript was denied as a waste of public funds in as much as the assignment of errors was frivolous. On certiorari such ruling was reversed by the U. S. Supreme Court. *Griffin* v. *Illinois, supra,* was reaffirmed. The latter court held, *inter alia:* (p. 907)

> "- - - - the Washington Supreme Court could not deny petitioners' request for review of the denial of the transcript motion without first granting them a 'record of sufficient completeness' to permit proper consideration of their claims. Such a grant would have ensured petitioners a right to review of their convictions as adequate and effective as that which Washington guarantees to nonindigents. Moreover, since nothing we say today militates against a State's formulation and application of operatively nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals, the affording of a 'record of sufficient completeness' to indigents would ensure that, if the appeals of both indigents and nonindigents are to be tested for frivolity, they will be tested on the same basis by the reviewing court - - - -"

In *Douglas* v. *California* (March 18, 1963), — U. S. —, 9 L. ed. (2nd) 811, the issue was "whether or not an indigent shall be denied the assistance of counsel on appeal." The court said:

> "- - - - But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (P. 814)

> "- - - - The present case, where counsel was denied petitioners on appeal, shows that the discrimina-

> tion is not between 'possibly good and obviously bad cases,' but between cases where the rich man *can require the court to listen to argument of counsel* before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." (Emphasis added.) (P. 815.)

Smith v. *Bennett* (1961), 365 U. S. 708, 6 L. ed. (2nd) 39, contains the following: (P. 708.)

> "The issue in these habeas corpus cases concerns the validity, under the Equal Protection Clause of the Fourteenth Amendment, of the requirements of Iowa law that necessitates the payment of statutory filing fees by an indigent prisoner of the State before an application for a writ of habeas corpus or the allowance of an appeal in such proceedings will be docketed - - - - - We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."

Lane v. *Brown,* — U. S. —, 9 L. ed. (2nd) 892 was also decided, March 18, 1963. We quote the authentic head note 1 from 9 L. ed. (2nd) 892, 893:

> "1. The Fourteenth Amendment is violated where under the pertinent statutes only the Public Defender can procure a free transcript of the hearing of an indigent prisoner's petition for a writ of

> error coram nobis, and the indigent cannot procure such a transcript for himself and appeal pro se from the denial of the writ, nor can he secure the appointment of another lawyer to get the transcript and prosecute the appeal, and the Public Defender refuses, because of his stated belief that the appeal would be unsuccessful, the indigent's request to represent him in perfecting his appeal."

In the instant case this appellant who has previously had his jury trial with benefit of counsel is not pressing to their culmination his appellant rights. *Coram nobis* by nature and objective is a collateral process. However, the common law writ of error *coram nobis* had been issued here prior to the court hearing and appellant thenceforth was undeniably proceeding as "of right." The factual issues in the case at bar are complex. The operative principles of law, the construction and effect of controlling criminal statutes are multiple, refined and intricate factors. Legal research is unavoidable. The assemblage, evaluation and legality of the available evidence are exercises sufficiently sophisticated for expert attention. The function and utility of common law *coram nobis* are somewhat occult for the bench and bar. To laymen they must provide confusion. In the present case a productive and determinative questioning of witnesses make urgent the talents of a trained examiner. The decided cases, too, make no longer tenable any theory that the participation of counsel at hearings is only for the assistance of the court. Counsel in the case at bar was indispensable to an adequate presentation and advocacy of the appellant's accusations.

Since appellant's cause is one "of right," this case, by the characterization contained in *Douglas* v. *California, supra,* would, were this suitor a citizen of financial resources and not impoverished, be one which *"can require the court to listen to argument of counsel before deciding on the*

merits." The U. S. Supreme Court by the authority of those cases hereinbefore cited is notably sensitive to "invidious discriminations" against the impecunious. The instant case would accordingly be dependably calculated to induce the redressing reversal of that court on behalf of the indigent appellant for whom the presiding justice was without authorization or means to furnish counsel or to effect that equality demanded by the Fourteenth Amendment.

True, appellant's *coram nobis* proceeding was instituted subsequent to final judgment against him. But, in its indispensability and for the necessary preservation of not absolute but constitutional equality between rich and poor, assistance of counsel is not to be summarily restricted to conventional trials or appellate reviews thereof. In the case at bar this common law writ of *coram nobis* poses a grave and arresting issue of the constitutional liberty of a citizen. The appellant was afforded the aid of legal counsel at his jury trial but now his need for such assistance has become recurrent and quite as compelling. Notwithstanding the circumstance that the relief now sought in this case may be classified as post appellate and collateral such a distinction will have little significant meaning because of the persistent and preponderant elements that the appellant at his hearing upon the writ was a suitor "of right" before a court required to listen to his attorney concerning appellant's constitutional liberty. The State has in effect suffered appellant's indigency to deprive him of manifestly necessary legal aid which a citizen of sufficient means could have acquired.

By their rationale and by their implications, at least, the precedents of the nation's highest court authoritatively admonish that under the circumstances of this case denial to appellant of the advice and guidance of legal counsel was reversible error.

The mandate shall be:

Appeal sustained:

Judgment vacated:

Case remanded for further hearing in accordance with this opinion.

BRUCE E. PETTENGILL
AND
CLARA R. PETTENGILL

vs.

EDWARD J. TURO AND MARY A. TURO

Cumberland. Opinion, August 9, 1963.

Real Estate. Mortgages. Damages. Torts. Nuisance.

A mortgage affords no protection against a claim for damages and a mortgagee is liable therefor if before entry he causes to be deposited thereon (the mortgaged premises) any substance injurious to the land.

As a general rule, punitive damages are recoverable in all actions upon tortious acts which involve ingredients of malice, fraud or insult; or wanton and reckless disregard of plaintiff's rights. Generally, such damages may be recovered regardless of whether a cause of action is in trespass or case.

Damages for a contributory nuisance are recoverable to the date of the writ and thereafter may be compensated by successive actions at law, or by seeking abatement in equity.

The injured land-owner is entitled to be compensated for the depreciation in the rental or useable value of the property caused by the nuisance during the continuance of the injury, together with such special damages as may be proved.

When one sues to recover damages for injury permanent in nature caused his land by the loss of trees, the measure of damages is the difference between the market value of the land immediately before and immediately after the injury.

The mortgagee is not, in a general sense, the owner of the mortgaged estate before foreclosure; until the mortgagee chooses to take possession, the mortgage gives him no right to do any act whereby the mortgagor may be disturbed in his enjoyment of the estate, or its value and earnings be diminished.

ON APPEAL.

This case is on objections to admission and exclusion of evidence, to portions of the jury instructions, to refusal of the presiding justice to give certain instructions and appeal from denial of defendant's motion for judgment *n.o.v.* and alternate motion for a new trial. The main issue is whether the impounding of water by the defendant, by virtue of his elevating the roadway, came about by his impediment only of the natural run-off of surface water or whether it blocked a watercourse. Appeal sustained. New trial granted, but limited to the question of damages in accordance with the above.

Peter N. Kyros,
Philip G. Willard, for Plaintiff.

Millard E. Emanuelson,
Basil A. Latty, for Defendant.

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

MARDEN, J. On objections to admission and exclusion of evidence, to portions of the jury instructions, to refusal

of the presiding justice to give certain instructions and appeal from denial of defendants' motion for judgment *non obstante veredicto,* and alternate motion for a new trial.

The undisputed facts in brief establish that by warranty deed of August 20, 1959 the plaintiffs purchased from one Doughty real estate adjoining the defendants' property, executing a purchase price first mortgage to a bank. Between the property of the plaintiff and that of the defendant was a driveway owned by the defendant but in which plaintiff had an easement for access to and egress from his property. About October 1959 the defendant raised the grade of the driveway, with insufficient drainage, as a result of which, water was impounded on the rear yard of plaintiffs' property and overflowed plaintiffs' well and sanitary drainage system during fall and winter of 1959. In November 1959 it was determined that the well was polluted and during the winter 1959-1960 plaintiff procured drinking water elsewhere. Plaintiffs executed a second mortgage to Doughty, his vendor, on June 8, 1960. In August of 1960 the defendant further elevated the roadway resulting in additional impoundment of water on the plaintiffs' land, during which season plaintiff added gravel to the affected area to absorb the water, found the well still polluted, had a new well drilled, was deprived of the use of the flooded yard and lost a number of trees. Doughty assigned the second mortgage on plaintiffs' property to the defendant on January 23, 1961. To date of hearing no foreclosure had been instituted by the defendant. On June 2, 1961 was filed this complaint for damages. Defendant seasonably counterclaimed for damage to his driveway, alleging injury by plaintiff or his agents.

In July of 1961 the health officer and selectmen of the Town of Cape Elizabeth were brought into the situation, as a result of which certain recommendations were made

by the Town Manager involving freedom of drainage to be supplied by the defendant and restoration by the plaintiff of the leaching bed connected with his septic tank. Defendant made some changes in the drainage provision under the roadway and plaintiff hauled in sand to "restore" his leaching bed. The flowage continued. On August 23, 1961 plaintiff executed a deed of his property to one Trefethen.

Controversy exists over the extent of the flowage and its effect as applied to the plaintiffs' well and trees. Defendant contends that the participation of Town officials in the controversy resulted in an accord and satisfaction which prohibits the prosecution of this present complaint, that his position as a mortgagee after January 23, 1961 and the conveyance by plaintiff to Trefethen on August 23, 1961 gives plaintiff no standing in court as against him. Plaintiff denies the accord and satisfaction and contends that the deed to Trefethen was an equitable mortgage. The heart of the case is whether or not the impounding of the water by the defendant, by virtue of his elevating the roadway, came about by his impediment only of the natural run-off of surface water, or whether it blocked a watercourse.

The jury returned a verdict for the plaintiff in the amount of $4,000.00 including a special finding of $300.00 for loss of plaintiffs' trees and $1,000.00 punitive damages, and likewise for plaintiff as defendant in the counterclaim.

The objections taken during trial are consolidated in the statement of points on appeal, and we quote:

"1. The Court erred in refusing to dismiss the complaint for failure to state a claim upon which relief can be granted.

"2. The Court erred in refusing to direct a verdict in favor of the Defendants.

"3. The Court erred in allowing testimony of the cost of an artesian well over Defendant's objection.

"4. The Court erred in allowing testimony of the cost of putting in a second leaching bed over Defendant's objection.

"5. The Court erred in allowing testimony of the value of trees over Defendant's objection.

"6. The Court erred in instructing the Jury that the Jury should not be concerned if somebody other than Plaintiffs held a mortgage on this property.

"7. The Court erred in instructing the Jury that as a matter of law there was no evidence of accord and satisfaction in this case.

"8. The Court erred in instructing the Jury that it could award Plaintiff punitive damages.

"9. The Court erred in refusing to grant the following requested instruction: 'I instruct you as a matter of law that Defendants were the owners of the "Pettengill" property, therefore, Plaintiffs cannot recover.'

"10. The Court erred in refusing to grant the following instruction: 'If you find that Plaintiff's suffered damages after January 23, 1961, they cannot recover damages if you find that Defendants were mortgagees from that time on.'

"11. The Court erred in refusing to grant the following requested instruction: 'An accumulation of water is no indication of a water course.'

"12. The Court erred in refusing to grant the following requested instruction: 'Plaintiffs are not entitled to damages for loss of trees.'

"13. The Court erred in refusing to grant the following requested instruction: 'I instruct you

as a matter of law that Plaintiffs are not entitled to punitive damages.'

"14. The Court erred in expressing the opinion that the facts in this case did not fit the definition of accumulation of surface water given in a case cited by the Court to illustrate the difference between water course and surface drainage.

"15. The Court erred in refusing to order judgment for Defendants N. O. V.

"16. The Court erred in refusing to grant a new trial."

The issues will be treated seriatim, combining those which turn upon the same legal question.

No. 1. Error alleged in the court's refusing to dismiss the complaint.

The expression of the complaint is inartistic for it might be interpreted as a complaint for obstruction of a watercourse and in the alternate the obstruction of the natural flow of surface water, one act of the defendant (obstructing a watercourse) actionable, *Card* v. *Nickerson*, 150 Me. 89, 104 A. (2nd) 427, and the other (obstructing flow of surface water) nonactionable, *Morrison* v. *Bucksport & Bangor Railroad Company*, 67 Me. 353, but we find no motion addressed to this pleading and the case was tried, by implied consent of the parties upon the "water course" theory, and under Rule 15 M. R. C. P. there is no error to be attributed to the trial court.

No. 2 and 15. Error alleged in the court's refusing to direct a verdict for the defendant and later to order judgment for the defendants *n.o.v.*

The record supports amply the conclusion that there were jury questions on both liability and damage and there

was no error in the refusal of the presiding justice to neither direct a verdict for the defendants nor order judgment for defendant *n.o.v.*, *McMann* v. *Reliable Furniture Co.*, 153 Me. 383, 385, 140 A. (2nd) 736.

No. 3, 4, 5, and 12. Error alleged in the application of the measure of damages to the artesian well, the leaching bed, and loss of trees.

The jury was justified in finding that the well existing on the premises of the plaintiff at purchase was overflowed by the ponding of the water created by the defendants raising the grade of the road; that the leaching bed serving the septic tank on the plaintiffs' property was inundated; and that the flowage so created by the defendant killed a number of plaintiffs' trees. The measure of damages applied at trial to these injuries was as follows: Leaching bed: Cost of material and labor to restore it. Pollution of well: Cost of drilling new well and connecting it to the house. Trees: Reasonable value.

To all of this evidence defendant seasonably objected.

The facts competently establish a nuisance. *Norcross* v. *Thoms*, 51 Me. 503, 504; *Card, supra*, pp. 91, 96. The cause was abatable. The injuries to the real estate, except to the trees, were temporary. Damages for a continuing nuisance are recoverable to the date of the writ and thereafter may be compensated by successive actions at law, or by seeking abatement in equity. *Caron* v. *Margolin*, 128 Me. 339, 343, 147 A. 419; *Goodwin* v. *The Texas Company*, 134 Me. 266, 268, 185 A. 695.

The rule of damages to be applied to temporary nuisance injury occasioned by water pollution varies considerably among the several jurisdictions. See Annot. 49 A. L. R.

(2nd) 253, Annot. 19 A. L. R. (2nd) 769. We do not find that a composite rule has ever been pronounced in Maine. It is clear that the "before and after" rule applicable to permanent injury does not apply. See *Cumberland and Oxford Corporation* v. *Hitchings,* 65 Me. 140, 142; and *Card, supra.* And, using the cost of restoration as a measure of damage in a case of waste is criticized in *Rockland Water Company* v. *Tillson,* 69 Me. 255, 269, the court there pointing out that "the plaintiff may repair in his own way, and thus make the property very much more or less valuable than it was before, or, if no repairs were made or 'expenses incurred' in consequence to the injury, the damages recoverable would still be the same." The measure of damages to be applied in cases of temporary nuisance injury to real estate, supported by reason and authority, is that the injured land-owner is entitled to be compensated for the depreciation in the rental or useable value of the property caused by the nuisance (here flowage) during the continuance of the injury, together with such special damage (including permanent injury to land) as may be proved. 15 Am. Jur., Damages, § 110; 39 Am. Jur., Nuisances, §§ 134, 136; Annotations in A. L. R. (2nd) *supra; Manning* v. *Woodlawn Cemetery Corporation,* 131 N. E. 287, 288 (Mass. 1921); *Albemarle Soapstone Co.* v. *Skipwith,* 211 F. 323, 325 (under headnote 3) (4th Cir. 1913); *City of Harrisonville, Mo.* v. *W. S. Dickey Clay Mfg. Co.,* 61 F. (2nd) 210, 212 (under headnote 5) (8th Cir. 1932); *Ginther* v. *Long,* 87 So. (2nd) 286, 288 (under headnotes 2, 3) (Miss. 1956); *Bartlett* v. *Hume-Sinclair Coal Mining Company,* 351 S. W. (2nd) 214, 217 (under headnotes 3, 4) (Kansas City Court of Appeals 1961); *The City of Henryetta* v. *Runyan,* 370 P. (2nd) 565, 566 (under headnotes 3, 4) (Okla. 1962).

This rule has not been repudiated in Maine, *Plimpton* v. *Gardiner,* 64 Me. 360, 365 (matter of pleading), and its acceptability is implied in *Canal Corporation* v. *Hitchings,*

supra, p. 142 ("inconvenience suffered") and almost adopted in *Atwood* v. *City of Bangor,* 83 Me. 582, 586, 22 A. 466.

See also Annot. 142 A. L. R. 1307 as to special damage.

It follows that the damages claimed for the flooding of the leaching bed of the septic tank and the pollution of the well must be reconsidered.

The measure of damages for the destruction of trees allows the land owner an election. When the trees have an intrinsic, estimable value other than that which their presence adds to the value of the real estate, "the owner may treat them as personal property, and sue for their value as though they had been detached from the realty, in which case his measure of damages is the value of the trees separate and apart from the soil; but where one sues to recover damages for injury, permanent in nature, caused his land by the loss of the trees, the measure of damages is (the difference between) the market value of the land immediately before and immediately after the injury." *Spear-Vose* v. *Hoffses,* 128 Me. 409, 411, 148 A. 146.

Plaintiff and his original complaint demanded judgment "for lessening the value of the plaintiffs' land * * * which resulted in the killing of trees * * *." In his amended complaint, after alleging the wrongful flowage, he continues "whereby the value of the plaintiffs' real estate was greatly depreciated and the plaintiffs were put to great expense, namely, * * * 'the sum of $300.00 for trees killed.' " Based upon the questions addressed to the plaintiff by his counsel

"Q. Do you know the reasonable value of those trees.
"A. Yes. * * *.

"Q. What is, in your opinion, the value, reasonable value, of those trees.

"A. $300.00, but they could never be replaced for $300.00"

the presiding justice was entitled to understand that the plaintiff was seeking "reasonable value" for the special permanent injury which he suffered by way of the nuisance within the authority of *Spear-Vose, supra,* and the rule herein confirmed, and as to that there is no error, either in allowing this testimony as to value or in refusing to grant the requested instruction prohibiting plaintiff's entitlement to damages for the trees.

No. 6, 9, and 10. Error alleged in instruction to jury that the existence of a mortgage upon plaintiff's property would not affect his rights to prosecute his complaint against defendant, first as a third party and subsequent to January 23, 1961 as a second mortgagee by assignment.

At common law a mortgage of real estate is regarded as a conveyance in fee, which title is defeasible by the performance of the mortgage obligation. Nevertheless, the mortgagee is not, in a general sense the owner of the mortgaged estate before foreclosure. His interest is not, in fact, real estate, but he is entitled to have it treated as such so far as it may be necessary to enable him to protect his security. As to the rest of the world, the entire estate is in the mortgagor. The freehold remains in him, *Hammatt* v. *Sawyer,* 12 Me. 424, 427; *Wilkins* v. *French,* 20 Me. 111, 117; and while in possession he may maintain a complaint for flowage, *Atwood* v. *Pulp and Paper Co.,* 85 Me. 379, 380, 27 A. 259. Until the mortgagee chooses to take possession, the mortgage gives him no right to do any act whereby the mortgagor may be disturbed in his enjoyment of the estate, or its value and earnings may be diminished. Note: 7 Am. St. Rep. 31, and *Kimball* v. *Lewiston Steam*

Mill Co., 55 Me. 494, 499. And "if before entry the mortgagee * * * causes to be deposited thereon (the mortgaged premises) any substance injurious to the land * * *, the mortgage affords no protection against a claim for damages and he is liable therefor notwithstanding the mortgage." *Morse* v. *Whitcher*, 15 A. 207, 209 (N. H. 1888); *Runyan* v. *Mersereau*, 6 Am. Dec. 393 (N. Y. 1878). See also 36 Am. Jur., Mortgages, § 275 and 59 C. J. S., Mortgages, § 195, p. 253.

The conveyance by plaintiff to Trefethen, whether an outright transfer or in equitable mortgage is of no defensive aid to defendant. Plaintiff's cause of complaint had long since arisen and the transfer of the property to Trefethen was not ipso facto an assignment of his right of action. See *Kimball, supra*, p. 499.

No. 7. Error alleged in jury instruction that there was no accord and satisfaction between these parties as a matter of law.

Defendant urges that a conference held on the premises sometime prior to July 8, 1961 at which the parties, two of the selectmen of the town, the town manager and the town health officer were present, as a result of which conference the town manager dispatched a letter to the parties suggesting a two-part solution wherein defendant was to provide drainage of the water and plaintiff was to restore his leaching bed, followed by conversation between and action by both parties, accomplished an accord and satisfaction barring the prosecution of this complaint. Neither party agrees that the other did what was recommended out of the conference, and the sole evidence supporting the contention that there was an accord and satisfaction is to be found in defendant's guided testimony, as follows:

"Q. Before you put this entire draining system in, did you have a conversation with Mr. Pettengill?

"A. Yes, I know of one, at least.

"Q. Did you have a conversation pertaining to this whole draining system which you were going to put in before you put it in, is that correct?

"A. Yes.

"Q. And you agreed to do certain things, is that correct?

"A. Yes.

"Q. And he agreed to do certain things, is that right?

"A. Yes.

"Q. And that was to rectify the whole situation, settle it all, is that correct?

"A. Obviously, yes.

"Q. Did you do everything that you agreed to do to carry out that understanding you had with Mr. Pettengill?

"A. Yes, sir.

"Q. Did he do everything he agreed to do?

"A. That wouldn't be fair. I am a perfectionist."

It is to be borne in mind that the complaint was filed June 2, 1961 and by August of 1961 after defendant had done what he says he was supposed to do, the flowage had not abated.

Our statutory provision for an accord and satisfaction as expressed in Sec. 64, Chap. 113, R. S., is not here involved.

At common law:

"To constitute an accord and satisfaction, there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is

> to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed. * * * (A)n accord is an agreement by one party to give or perform and by the other party to accept, in settlement or satisfaction of * * * (a) claim, something other than that which is claimed to be due, and the satisfaction is the * * * performance of the agreement * * * ." 1 Am. Jur. (2nd) Accord and Satisfaction, § 1.
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> "The rule is universally recognized that except where the new agreement is itself accepted as a satisfaction, * * * the failure to * * * perform an act required by a new agreement entered into in satisfaction of a * * * claim leaves such agreement a mere executory accord, without satisfaction, and as such, it constitutes no bar to the enforcement of the original claim * * *." 1 Am. Jur. (2nd) *supra,* § 47.

Assuming an accord here, without so finding, it is clear that there was no satisfaction. Removing this issue from jury consideration was not error.

> No. 8, and 13. Error is alleged in permitting the jury to consider punitive damage.

As a general rule punitive damages are recoverable in all actions upon tortious acts which involve ingredients of malice, fraud or insult, or wanton and reckless disregard of plaintiffs' rights. Generally such damages may be recovered regardless of whether a cause of action is in trespass or case, 15 Am. Jur., Damages, § 274, and in Nuisances, 39 Am. Jur., Nuisances, § 137. The general rule is followed in Maine, *Goddard* v. *Grand Trunk Railway,* 57 Me. 202, 218; *Wilkinson* v. *Drew,* 75 Me. 360, 362, and specifically for pollution of a well in *Klassen* v. *Central Kansas Co-Operative Creamery Ass'n.,* 165 P. (2nd) 601, 603,

and 608 (under headnote 18) (Kan. 1946). While adjectives characterizing the nature of the act vary in a given case among intentional, willful, malicious, fraudulent, reckless, oppressive, or grossly negligent, the phrase used by the presiding justice in discussing punitive damage with the jury calling for a finding of an act on the part of the defendant of "malice, fraud, gross negligence, or recklessness" has been used in Maine in *Lord* v. *M. C. R. R. Co.*, 105 Me. 255, 258, 74 A. 117, and is accurate. The law of punitive damage was applicable upon appropriate finding by the jury and submission of this question to the jury was proper.

> No. 11. Error is alleged in the court's refusing to grant an instruction that "an accumulation of water is no indication of a water course."

This instruction was correct in law, but defendant was not entitled to have it given unless the subject matter was not already covered by the charge and the refusal to give it was prejudicial. *Desmond, Pro Ami* v. *Wilson,* 143 Me. 262, 268, 60 A. (2nd) 782. The charge of the presiding justice on the point at which the instruction was aimed was clearly, fairly and fully stated and the absence of this instruction was not prejudicial error.

> No. 14. Error is alleged in the court's "expressing the opinion that the facts in this case did not fit the definition of accumulation of surface water given in" *Morrison* v. *Bucksport & Bangor Railroad Company,* 67 Me. 353, 356.

In illustrating the difference between a land owner's duty in the handling of surface water as compared to a watercourse, the court read to the jury the reference portion of the *Morrison Case,* and interrupted his reading at

the point where the opinion changes to compare surface water with a watercourse to state: "Then the court goes on to use this language about a situation which does not sound like a description of terrain in this case and I point that out to you because I still think that the language which the court uses will help you in understanding the definition of watercourses. The court goes on to say: 'It is contended in some cases, that there may be an exception to this description of a water course in the case of gorges and narrow passages in hills or mountainous regions.' *You may find that this terrain (in controversy) doesn't sound like mountainous regions* (parenthetical and emphasis added), but the language I am going on to read, I think, may be of help to you."

The court then continued with the quotation from *Morrison* which points out the broad distinction between a watercourse and accumulation of surface water. The comment of the court, if it were an opinion, did not imply that the facts in this case did not fit the definition of an accumulation of surface water, as defendant urges, but that the terrain in this case might not "sound like mountainous regions."

The excerpt from *Morrison* was fully as applicable to the defendants contention in the case as it was to the plaintiffs, and was appropriately used in exposition of the problem to the jury.

No. 16. Error is alleged in the court's refusing to grant a new trial. The grounds for a new trial, seasonably urged upon the presiding justice after verdict, are in substance that the damages were excessive, that the court erred in the admitting and excluding of unidentified evidence and granting and failing to grant unidentified instruc-

> tions and that the charge to the jury "failed to cover the law and the facts of the case."

This objection (the claim of error in the trial court's refusing to grant a new trial) is not to be resolved upon excess of damage as such. The record reveals that there was a very understandable uncertainty, — our court having never recorded a rule, as to the measure of damages applicable to a temporary nuisance injury. The plaintiff was allowed to testify, without objection, to the "before and after" value representing depreciation of $4,000.00 in his property taking into consideration the pollution of his well, the loss of use of his yard, the flooding of his cesspool and the loss of his trees, but in due course the jury was instructed to disregard this evidence and the plaintiff later testified to the several items of damage discussed ante, together with a claimed loss of $2,000.00 for deprivation of use of the yard, the total of which, if accepted without reduction by the jury, and without the assessment of punitive damages, was $3,525.00. The defendant offered no evidence challenging the plaintiffs' evaluation of his losses, or suggesting that plaintiff failed to act in mitigation of his damage, if indeed plaintiff had such a duty, upon which point we do not now rule. See 39 Am. Jur., Nuisances, § 138, Harper & James, Torts, § 22.8, Nuisance, p. 1221. The appeal on the ground of excessive damage is denied.

For us to consider alleged but unidentified errors, broadly challenged in point No. 16, our approach is governed by Rules 59 and 73 M. R. C. P. (New Trials and Appeal to the Law Court). Rule 73, as amended, "preserves for review any claim of error in the record" including any claim of error in denying a motion for a new trial under Rule 59. Rule 59 authorizes a new trial "on all or part of the issues for any of the reasons for which new trials have heretofore been granted * * * in the courts of this state," — one such

reason being an error in law on a vital point whereby the verdict must have been based upon a misconception of the law. *Johnson* v. *Parsons,* 153 Me. 103, 111, 135 A. (2nd) 273.

The manner in which the "yard" damage was considered requires review. The plaintiff, without objection, was permitted to express his owner-opinion of the reasonable value of his loss of use of the back yard and thereupon fixed the damage at $2,000.00. The basis of his conclusion was not explored. There is nothing to indicate that it was founded upon anything but arbitrary owner-evaluation in which depreciation in rental or usable value did not enter, and was well calculated to result in unjust assessment. Logically the various elements of temporary damage (here identified with well, leaching bed and yard) might well be reflected in one assessment of the depreciation in rentability or usability of the property as a whole. To do so would minimize risk of unwitting duplicity in damage.

Because the basis of the assessed damage to the yard does not clearly fall within the prescribed rule and the absence of application of such recognized measure, both in presentation of the evidence and in jury consideration, must have led to a verdict based upon misconception of the law, we hold that this damage must be reconsidered.

This ruling is not to be understood as broadening the area in which new trials will be granted. The hitherto unsettled state of the law in Maine as to measure of damages arising out of temporary nuisances leads us to this particular conclusion.

A verdict for the plaintiff was returned in the amount of $4,000.00 including, by special finding, $300.00 for loss of trees and $1,000.00 for punitive damages. The record

does not enable us to determine how the remaining $2,700.00, under this trial procedure, was apportioned among injuries to the well, leaching bed and backyard. We can find no sound basis for ordering a remittitur as an alternative to setting aside the verdict as to these items. The verdict of $1,300.00 identified above will stand. The remainder of the verdict is set aside and the case remanded to the Superior Court for a new trial consistent with this opinion but only upon the question of damages attributable to the well pollution and inundation of the leaching bed and back yard. See *Cosgrove* v. *Fogg, et al.*, 152 Me. 464, 467, 54 A. (2nd) 538.

Appeal sustained.

New trial granted, but limited to the question of damages in accordance with the above.

HERSCHEL E. SINCLAIR

vs.

THE HOME INDEMNITY COMPANY

Somerset. Opinion, August 12, 1963.

Equity. Mutual Mistake. Insurance Policies.

Where a mutual mistake is shown to exist as to the terms of an insurance policy, the same may be reformed even though the insured has failed to read the policy.

The insured has a right to assume that a policy will be written in accordance with an antecedent oral agreement between himself

and an agent for the company, and a failure on the part of the insured to read the policy is not a bar to its reformation.

Insurance companies that hold their agents out to do business with the public must be bound by what they do in the name of the company.

The agent stands in place of the company; he is the company in all respects regarding any insurance effected in behalf of the company by him.

The party alleging a mutual mistake must prove by convincing evidence that the instrument when altered will correctly reflect the actual intention of both parties to it and thereby perfect and establish the real agreement.

Plaintiff has the burden of proving that the mistake was mutual.

ON APPEAL.

This is an equity case on appeal to bring about a reformation of the policies claiming that the lack of coverage was due to a mutual mistake. Appeal denied.

Richard J. Dubord,
Lawrence D. Ayoob, for Plaintiff.

Robinson, Richardson, Leddy and Hewes,
by Richard D. Hewes, for Defendant.

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

TAPLEY, J. On appeal. This is an equity action seeking reformation of an insurance policy. The action was commenced by a bill in equity previous to the promulgation of the Maine Rules of Civil Procedure. The trial of the cause was had after the effective date of the new rules and all proceedings thereafter were conducted thereunder.

The matter was presented to and determined by a single justice without the intervention of a jury. He ordered that plaintiff's action be dismissed with costs and that judgment be entered for the defendant. The cause is before this court on an appeal from the final judgment.

The plaintiff is engaged in the contracting business requiring the use of heavy equipment. On April 18, 1953 he purchased a twenty-ton Lorrain Motor Crane which is a self propelled vehicle capable of being operated from job to job over the highway. Before purchasing the equipment the plaintiff consulted with his insurance agent, Mr. Lester L. Stone, who did business under the firm name and style of Stone Agency. Mr. Stone was a selling agent for The Home Indemnity Company, the defendant. He advised Mr. Stone that he was purchasing this piece of heavy equipment and was moving it over the road from Bangor to Millinocket. He informed Mr. Stone that he wanted complete coverage on the machine, both as to liability and collision insurance. He later received from Mr. Stone an insurance policy which he believed gave him the coverage he had requested. For two succeeding years he received renewal policies. These renewal policies provided the same coverage as did the original policy. Mr. Sinclair did not read the original policy nor the renewals because, as he testified, he was relying upon Mr. Stone, his insurance agent, to provide him with the coverage he requested.

On January 4, 1956, while the second renewal policy was in force, the crane, during the process of being operated on a highway in Bangor by the plaintiff, caused substantial damage to the property of third parties, as a result of which claims for damages were made against him, including one suit. Mr. Sinclair reported the claims for damage to the defendant insurance company, The Home Indemnity Company, whereupon the insurance company denied liability

on the basis that the original and renewal policies did not afford coverage.

Plaintiff Sinclair contends that it was the intent of defendant's agent, Mr. Stone and himself, that the original insurance policy and the two renewal policies were to cover the motor crane while being used on a public highway. He instituted this equity action to bring about a reformation of the policies, claiming that the lack of coverage was due to a mutual mistake.

The fact that the plaintiff did not read the original policy or the renewals is urged by the defendant as being fatal to plaintiff's cause in that he is now barred from seeking reformation of the policy and the renewals.

Where a mutual mistake is shown to exist as to the terms of an insurance policy, the same may be reformed even though the insured has failed to read the policy. *National Traders Bank, et al.* v. *Ocean Insurance Company,* 62 Me. 519.

The insured has a right to assume that a policy will be written in accordance with an antecedent oral agreement between himself and an agent for the company, and a failure on the part of the insured to read the policy is not a bar to its reformation. *Home Ins. Co. of New York* v. *Sullivan Machinery Co.,* 64 F. (2nd) 765.

> "- - - - *where the elements required for reformation are otherwise present,* even negligent failure of plaintiff to discover the variance between the instrument as written and the mutual understanding of the parties is not fatal to his right to have it reformed." *Broida* v. *Travelers' Ins. Co.,* 175 A. 493, 494. (Penn.). (Emphasis supplied.)
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> "It is well settled that an insured has a right to presume that a policy received by him is drafted

> in accordance with the agreement made between him and his insurer; and that his failure to read its provisions because of his reliance upon this presumption does not necessarily bar his subsequent action to have it reformed even after a loss if its terms are at variance with such agreement - - - -." *Mosiman* v. *Rapacz*, 84 N. W. (2nd) 898, 903 (Minn.).
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> "The negligent failure of a party to know or to discover facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof." *Restatement of the Law (Contracts)*, Chap. 17, Sec. 508.

See Annotation in 81 A. L. R. (2nd) beginning at Page 7.

Under the circumstances of the instant case, where the plaintiff testified he relied entirely on Mr. Stone, the acknowledged agent of the defendant, for insurance which would provide sufficient coverage for his needs, the fact that he did not read the policy or the renewals does not militate against him.

Mr. Stone, in his relationship with the plaintiff, was acting for and in behalf of the defendant, The Home Indemnity Company, as its agent. Both the defendant and its agent, Mr. Stone, are subject to the provisions of Sec. 63, Chap. 60, R. S., 1954, which in its pertinent part reads:

> " - - - - Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company and waived by it as if noted in the policy."

The purpose of this law is to protect the public in purchasing insurance so that the insured may safely depend

upon an agreement made with the agent as fully and completely as one made with the company. The companies that hold their agents out to do business with the public must be bound by what they do in the name of the company.

The agent stands in place of the company. He is the company in all respects regarding any insurance effected in behalf of the company by him. *LeBlanc* v. *The Standard Insurance Company,* 114 Me. 6; *Maxwell, et al.* v. *York Mutual Fire Insurance Company,* 114 Me. 170; *Mercier* v. *The John Hancock Mutual Life Insurance Co.,* 141 Me. 376.

We now give our attention to the crux of this case. Does the evidence disclose such a mutual mistake as being one reciprocal and common to both the insured and the defendant's agent, wherein each labored under a misconception in respect to the terms of the original policy and its renewals?

The party alleging a mutual mistake must prove by convincing evidence that the instrument when altered will correctly reflect the actual intention of both parties to it and thereby perfect and establish the real agreement. *Potter* v. *Frank, et al.,* 106 Me. 165.

Plaintiff has the burden of proving that the mistake was mutual. *Andrews* v. *Andrews,* 81 Me. 337.

> "A mutual mistake which will afford ground for relief from a contract by reforming it, means a mistake reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instrument." *Tarbox* v. *Tarbox,* 111 Me. 374, 380, 381.
>
> "A mutual mistake is one common to both parties to a contract, each laboring under the same misconception; more precisely, it is one common to both or all parties, wherein each labors under the same misconception respecting a material fact,

> the terms of the agreement, or the provisions of the written instrument designed to embody such agreement - - - - -." *17 C. J. S., Contracts,* Sec. 144 (a).

See also *76 C. J. S., Reformation of Instruments,* Sec. 28 (a) (b).

Plaintiff Sinclair testified that he informed his agent, Mr. Stone, that he wanted complete liability and collision coverage on the Lorrain Motor Crane. He was informed by Mr. Stone that he was adequately covered and later he received a policy and the subsequent renewal policies. The plaintiff did not read the policies because, as he said, he relied on Mr. Stone to furnish him with the type of coverage required.

Mr. Stone, in testimony, claims to have communicated with Mr. Convey of The Home Indemnity Company regarding the Sinclair coverage and that Mr. Convey assured him that both liability and property damage would be provided to cover the machine when it was operated on the highway. Mr. Stone was told, as he says, that the policy would be issued and in the meantime a binder would be in effect.

The original policy issued in April of 1953, as well as its subsequent renewals, were liability policies based on and at the site of the work. The policies specifically excluded coverage of automobiles (land motor vehicles). Mr. Stone read the policy upon its receipt in April of 1953 with an understanding of its terms. He noted that the policy did not describe the crane; that it insured only the site or premises on which Mr. Sinclair might be working and that the policy specifically excluded coverage to automobiles or, as defined in the policy, "land motor vehicles."

Thomas Convey, Special Agent for The Home Indemnity Company, denied any conversation with Mr. Stone regarding coverage for Mr. Sinclair.

The record discloses a marked discrepancy between the testimony of Mr. Stone and Mr. Convey, thus presenting the presiding justice with the necessity of determining the credibility of these two witnesses whose testimony was so diametrically opposite and irreconcilable one with the other. The determination by the justice as to where the truth lies between these two key witnesses would have some bearing on resolving the question of mutual mistake between Sinclair and Stone.

Mr. Stone is an insurance agent presumed to be familiar with contracts of insurance. He read and understood the terms of the original policy. It is reasonable to deduce that in April of 1953 he must have had knowledge that the terms of the policy were not adequate to give Mr. Sinclair the coverage he requested. In the mind of Mr. Stone there could be no mistake that the terms of the policy did not cover Mr. Sinclair's needs. The fact he took no steps to notify the defendant of the insufficiency of the conditions of the policy and have them changed to meet the requirements is in itself strong and persuasive evidence to negate the existence of a mutual mistake between Mr. Stone, the agent of the defendant, and Mr. Sinclair, the plaintiff. The mistake, if there is one on the part of Mr. Stone, is not one in common with Mr. Sinclair, nor can it be said that Mr. Sinclair and Mr. Stone were laboring under the same misconception respecting the terms of the policy. The evidence does not support the cause of mutual mistake but rather a failure on the part of the agent for the defendant insurance company to provide Mr. Sinclair with the type of coverage he ordered.

The justice below was not in error when he dismissed the plaintiff's action and ordered judgment for the defendant.

Appeal denied.

CHEQUINN CORPORATION

vs.

WILLIAM MULLEN, ET AL.

Cumberland. Opinion, August 19, 1963.

Ordinances. Licenses. Statutes. Mandamus.

A statute which gives no right of appeal from a denial of a license by the board, may be appealed to the Superior Court.

A writ of mandamus is not a writ of right; it is granted in the discretion of the court to promote justice when there is no other adequate remedy.

The burden of establishing good moral character is upon the applicant for the license to carry on the desired business or profession.

Prejudice and bias may lead a court to weigh with greater care evidence tending to show abuse of discretion, but taken alone, they do not constitute such a finding.

ON APPEAL.

This case is on appeal from a denial of a writ of mandamus charging the licensing board with prejudice as the sole grounds for denying a victualer's license. Appeal denied.

Bennett and Schwarz,
by Robert D. Schwarz, for Plaintiff.

William P. Donahue, for Defendant.

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

WILLIAMSON, C. J. This is an appeal from denial of a peremptory writ of mandamus after hearing on alternative writ, answers, replies, and proof. R. S., c. 129, §§ 17, 18.

The plaintiff corporation seeks to compel the municipal officers or town council of Old Orchard Beach, the named defendants, to issue a victualer's license and to approve applications to the State Liquor Commission for a "restaurant malt liquor license" and for a "special amusement permit for dancing and entertainment" at the "Barn," so-called. After hearing the council refused to grant a victualer's license and tabled the other applications. Without approval of a victualer's license action on the other applications would have been pointless.

By ordinance adopted pursuant to a 1961 Act, the municipal officers of Old Orchard Beach were empowered to grant the desired victualer's license. The general statute under which the "municipal officers, treasurer and clerk of every town" constitute the "licensing board" was to this extent modified in the case of Old Orchard Beach. There is no suggestion indeed by the parties that the application for the license was not presented to and heard by the proper body, namely, the municipal officers or town council. Old Orchard Beach Ordinance, June 13, 1961, as amended March 5, 1963, adopted pursuant to P. & S. Laws, 1961, c. 176, "An Act Relative to the Granting of Licenses for Certain Businesses and Purposes by the Municipal Officers of the Town of Old Orchard Beach and the Town of Bar Harbor"; R. S., c. 100, § 29 — victualer's license; R. S., c. 61, §§ 24, 40 — State Liquor Commission license and entertainment permit.

The defendants contend that the plaintiff abandoned the mandamus proceedings by withdrawing its several applications from the town officers between the council hearing

and the start of the present case. It does not appear that the point was urged upon the sitting justice, and in any event, we are convinced that irregularities in procedure, if any, have been waived. We strike for the merits of the case.

The victualer's license statute reads in part:

> ". . . they [the licensing board] may license under their hands as many persons of good moral character, and under such restrictions and regulations as they deem necessary, to be innkeepers and victualers in said town, . . " R. S., c. 100, § 29.

> "The permission to conduct an inn is not granted to all who may apply for a license; it is not a right to be exercised by one at will, but a privilege to be exercised when granted by municipal officers. The last named officers may not at will grant such license, their duty is defined by statute, and they may issue licenses to such persons only as are of good moral character." *Goodwin* v. *Nedjip,* 117 Me. 339, 342, 104 A. 519.

The statute carries no right of appeal from a denial by the board (or as here the municipal officers or town council). On revocation or suspension, however, the licensee may appeal to the Superior Court. R. S., c. 100, § 51; *Kovack* v. *City of Waterville,* 157 Me. 411, 173 A. (2nd) 554.

Mandamus is designed to compel action and not to control decision. The writ is granted in the sound discretion of the court. It is not a writ of right. *Dorcourt Co.* v. *Great Northern Paper Co.,* 146 Me. 344, 81 A. (2nd) 662.

The writ reaches the issue of whether a board, as the town council of Old Orchard Beach, has acted upon an application for a license, but not the issue of whether the

license should have been granted, except when abuse of discretion has resulted in manifest injustice. In this event, mandamus is available to promote justice in the absence of other adequate remedy. Such abuse of discretion is not the exercise of discretion required of a board in the carrying out of its lawful duties. It is upon this theory that the petitioner seeks to overcome the decision of the sitting justice.

> "There are, however, cases which show that, if the discretion of the court below is exercised with manifest injustice, the court is not precluded from commanding its due exercise."
> *Davis* v. *County Commissioners,* 63 Me. 396, 398.

> "There are cases that, if, under the guise of discretion, manifest injustice is done, the court is not precluded from constraining that official action be honestly performed; that discretion, not its abuse, shall operate and have effect, and not be arbitrarily or capriciously refused."
> *Rogers* v. *Selectmen of Brunswick,* 135 Me. 117, 120, 190 A. 632.

> "But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by *mandamus.* A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such a case *mandamus* will afford a remedy."
> *Illinois State Board of Dental Examiners* v. *People* (Ill.) 13 N. E. 201, 202.

> "Courts are very reluctant to interfere with the power vested in municipal bodies and officers to grant or refuse licenses and permits, and will not

> do so except in a clear case of abuse. And when county commissioners refuse to grant a license to retail liquor, on the ground that the applicant is not a fit person, mandamus will not lie to compel the commissioners to grant it; . . . ."
> Spelling, Injunctions and other Extraordinary Remedies, § 1476.

Comm. of Maxton et al. v. *Comm. of Robeson County* (N. C.), 12 S. E. 92, cited for the above proposition, arose on demurrer to answer asserting applicants had not established good moral character. The court said, at p. 93:

> "The demurrer admitted these allegations to be true. It is settled that upon such state of facts a *mandamus* could not issue."

See also *Casino Motor Co.* v. *Needham, et al.*, 151 Me. 333, 118 A. (2nd) 781; *Nichols* v. *Dunton,* 113 Me. 282, 93 A. 746; *Lawrence* v. *Richards,* 111 Me. 95, 88 A. 92; *Furbish* v. *Co. Com.,* 93 Me. 117, 44 A. 364; *Smyth* v. *Titcomb,* 31 Me. 272; *Proprietors of Kennebunk Toll Bridge,* 11 Me. 263; 55 C. J. S., *Mandamus,* § 156 (c), p. 297; 34 Am. Jur., *Mandamus,* § 69, Ferris, Extraordinary Legal Remedies, § 209.

The sitting justice, in denying the peremptory writ, said:

> " . . . there is evidence that some of the councilors possess a well recognized and definite prejudice against some of the officers of petitioner corporation.
>
> "The councilors had before them ample evidence to warrant a denial. Under these circumstances the existing prejudice became immaterial."

On request, he also made the following supplemental findings:

> "The councilors did not have before them for consideration at the stated and lawful meeting of

April 18th any credible or admissible evidence bearing on the bad moral character of any officers of the Chequinn Corp. or their immediate families. I do not consider the fact that any hearsay evidence that was called to their attention before the meeting of alleged criminal records of Henry McCue, father of one of the officers of the corporation, as admissible or credible evidence to be considered as coming from the hearing of April 18th.

"There was no evidence in the case that the councilors relied on the criminal record of Henry McCue excepting one councilor said he was influenced by it and another said that he was not.

"There were one or more councilors who exhibited a strong and unmistakable bias against one or more members of Chequinn Corp. or their immediate families to the extent, in my opinion, that would make them incompetent to render a fair and impartial decision as a result of the hearing on April 18th. Councilor Sicard demonstrated such a personal interest that it could have influenced his vote.

"One or more councilors, prior to the hearing of April 18, 1963, told Henry McCue that the licenses to The Barn would be denied."

The plaintiff in its brief argues that the decision was fatally defective through prejudice and bias of certain members of the council, and that accordingly it is entitled to force or compel the granting of a license through mandamus. The two licenses and the permit — victualer's, and sale of malt beverages — were necessary for the continued operation of the "Barn" in the 1963 season. For our immediate purpose we need direct our attention only to the victualer's license.

The town council is the only body authorized to grant a victualer's license. If in fact its members were prejudiced or biased, they could not withdraw from, or be pushed

aside from, or escape their lawful duties. Prejudice and bias may well lead a court to weigh with greater care evidence tending to show abuse of discretion, but taken alone, they do not force such a finding. The test here lies in the evidence from which the council reached its conclusions. This, in our view, is the intended meaning of the plaintiff's argument, that is to say, that only in the abuse of discretion could the council have refused the license.

The good faith of a public official is not lightly to be denied. Proof of prejudice and bias sufficient to overcome the sense of responsibility to office and to community must be heavy. The sitting justice was fully justified in finding "the existing prejudice" was immaterial.

Under the victualer's license statute, the licensing board is charged, as we have seen, with the duty of licensing only "persons of good moral character." The remaining conditions of Section 29 are not here of concern. There is no suggestion that either the number of licensees in Old Orchard Beach or the failure to meet stated restrictions and regulations were in issue before the council. The "good moral character" of the victualer or innkeeper is obviously of great importance to the public. Like standards are established in other situations, for example, on admission to practice of an attorney and on licensing of a physician and surgeon. R. S., c. 105, § 3; R. S., c. 66, § 4.

Under familiar law the burden of establishing his good moral character is upon the applicant for the license to carry on the desired business or profession. In the case at bar, we understand the findings of the sitting justice to be in substance that there being no credible or admissible evidence of bad moral character before the council, good moral character was established, and that on other ample evidence the license was denied.

The council had evidence of noise and disturbances in the neighborhood from the operation of the "Barn" in 1962. It could readily infer and find that like conditions from improper or lax management would continue in 1963. This type of evidence, as we read the record and the findings, was considered by the sitting justice to be an adequate base for the adverse decision of the council. In the face of a finding of good moral character, the other "evidence" in our view would not have warranted the denial.

We reach, however, a like conclusion with the sitting justice for a different reason. The council had before it evidence credible and admissible, in our opinion, on the issue of the good moral character of persons involved and from which it could in the exercise of its discretion determine whether the applicant was a "person of good moral character."

The plaintiff Chequinn Corporation was organized in 1961 to operate the "Tide Inn" (not involved in this appeal) and the "Barn." Mr. Henry McCue, manager of the "Barn" in 1962 and 1963, and father of the president of the plaintiff and husband of its clerk, had a substantial investment in the plaintiff. He was intimately connected financially in his capacity as a manager with the plaintiff and with the "Barn." Unless Mr. McCue was a "person of good moral character," the council would be under a duty not to grant a victualer's license. The plaintiff does not escape the burden of association with Mr. McCue from the fact that he was not an officer, director, or stockholder.

Before the meeting at which the application for license was denied, the members of the council were informed that Mr. McCue had been convicted in Massachusetts over twenty years before of two serious crimes involving moral turpitude.

The convictions were not denied. The criminal record of Mr. McCue was a fact which the council was entitled to know and to consider. That the knowledge of the council of his record was not communicated to Mr. McCue at the hearing has no bearing on the lawfulness of the decision. Mr. McCue was not on trial. The issue was whether he was a "person of good moral character" in its bearing upon the application for a license.

There was also evidence before the council from witnesses in the neighborhood of the "Barn" to the effect that Mr. McCue had suggested that call girls would stop losses in a certain business, and that he had threatened one who complained of the "Barn" with a false charge of crime.

The finding relative to the reliance or non-reliance of councilors upon the criminal record of Mr. McCue is not material. The question is whether there was credible evidence which, if believed, warranted the decision of the council. We may not pry into the reasons behind the vote of each councilor to determine the validity of a decision based on adequate evidence.

On review of the record, we are satisfied that the council in the proper exercise of its discretion could have found that the plaintiff had not established that Mr. McCue was a "person of good moral character," and that the denial of a license to the plaintiff corporation with which Mr. McCue was so closely associated was justified.

There was no error in denial of the peremptory writ of mandamus.

The entry will be

Appeal denied.

STATE OF MAINE

vs.

EDMOND BERNATCHEZ

Kennebec. Opinion, August 21, 1963.

Juries. Rape. Testimony.

It is the jury's responsibility to decide to what extent, if any, positive testimony and any pre-trial statements conflicted and to accept or reject any explanation offered for the phrasing of complaints.

ON APPEAL.

This case is on appeal from the denial of a motion for a new trial. The issue is whether in view of the record, the jury was justified in finding the respondent to be guilty. Appeal denied.

Jon Lund, County Atty.,
Foahd Saliem, Asst. County Atty., for Plaintiff.

Richard J. Dubord, for Defendant.

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

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

Respondent saved two exceptions during the trial, which exceptions are expressly waived.

The issue before us is whether in view of the record, the jury was justified in believing beyond a reasonable doubt

that the respondent was guilty, *State* v. *Dipietrantonio,* 152 Me. 41, 54, 122 A. (2nd) 414, — of carnal knowledge of the prosecutrix, by force and against her will. Carnal knowledge is synonymous with sexual intercourse, 44 Am. Jur., Rape, § 2, and, by definition, sexual intercourse, as an element of rape, requires penetration of the female sex organ by the male sex organ. 44 Am. Jur., *supra,* § 3.

A detailed statement of the facts will serve no purpose. The complainant and her husband and the respondent and his wife were social friends, and all residents of Oakland. Complainant's husband was absent in the military service. The incident with which we are concerned occurred in the early morning of September 19th. On September 18th, following work, the respondent went to Waterville with male friends and had "some beers." His wife was working 6:00 p.m. to 12:00 midnight on that date. About midnight respondent started toward home, but continued on past his street of residence and at about 1:00 a.m. arrived at the home of complainant's grandmother, with whom prosecutrix lived, and upon his false representation that his, respondent's, wife was ill and needed the complainant, complainant dressed and joined the respondent in his car. Respondent operated the car with complainant as passenger in a direction other than that in which he lived, giving reasons therefor which complainant accepted, and shortly parked at a spot on the outskirts of the residential area of the town, where the alleged assault occurred. The physical aggression on the part of the respondent and resistance by the complainant occupied a substantial period of time. The verbal remonstrances of the complainant were consistent with the situation in which she found herself and the respondent's replies were not inconsistent with a person affected by the use of alcohol, and intent upon sexual intercourse. Following the incident respondent drove complainant back to her residence. She promptly reported her

experience to her grandmother, who observed marks on her face, physical and emotional distress, and a tear in her slacks (exhibit), officers were notified and on the same day complainant was examined by a physician.

The defense contention is conventional, respondent urging that such attention as he gave the girl was with her passive consent, but he strenuously denies the penetration, — which is essential to a rape. The respondent denies the presence of marks on complainant's face but the marks upon the complainant's body as witnessed by her grandmother, the Chief of Police, and the examining doctor, are uncontroverted.

At trial the prosecutrix gave positive testimony as to penetration by the accused by force and against her will.

Respondent places much reliance upon complainant's admittedly expressed report to her grandmother that he "had tried to rape" her and to her certain statements to the investigating officer from which doubt as to penetration might be inferred. Respondent urges that these equivocating statements are sufficiently contradictory to bring the case within the rule of *State* v. *Wheeler,* 150 Me. 332, 335, 110 A. (2nd) 578 and *State* v. *Field,* 157 Me. 71, 76, 170 A. (2nd) 167, and, in substance, raise a reasonable doubt of his guilt as a matter of law.

It was the jury's responsibility to decide to what extent, if any, her positive testimony and any pre-trial statements conflicted and to accept or reject any explanation offered by her for the phrasing of her complaints. The evidence justified the jury's conclusion of guilt and the jury finding is not to be disturbed under the *Field* and *Wheeler* holdings.

Appeal denied.

C. BERNADETTE FARRELL
vs.
HENRY F. KRAMER

Aroostook. Opinion, September 3, 1963.

Slander. Compensation. Damages.

A plaintiff is entitled to damages sufficient to compensate for humiliation and injury to feelings and reputation as have been proved or may reasonably be presumed.

Punitive damages are allowable if actual malice is shown.

The plaintiff is not entitled to damages for publicity which the trial has caused.

Provocation, though no excuse for slander, may be a mitigating factor when punitive damages are assessed.

Only to the extent that the defendant may be penalized for malice by imposition of exemplary damages may plaintiff be penalized for having provoked the wrong by mitigation of the recovery.

ON APPEAL.

This is on appeal from the denial of a motion for a new trial and from final judgment. The main issue is whether or not the jury's assessment of damages was excessive under all the circumstances of the case. Appeal on counterclaim denied. Appeal on complaint sustained and new trial ordered thereon unless plaintiff shall within 30 days from filing of mandate remit all of the verdict thereon in excess of $5,000.

George B. Barnes, for Plaintiff.

Solman and Solman,
by David Solman, for Defendant.

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

WEBBER, J. This was a complaint for slander on which the plaintiff was awarded a verdict of $17,500. The defendant seasonably filed a motion for a new trial and the matter is before us on the defendant's appeal from the denial of that motion and upon his appeal from final judgment. The determinative issue is whether or not the jury's assessment of damages was excessive under all the circumstances of the case.

The defendant filed a counterclaim charging the plaintiff with both libel and slander but the jury treated this claim as without merit as evidenced by their verdict. We treat the issue thereby presented as a jury question and decline to disturb the verdict upon the counterclaim.

The evidence most favorable to the plaintiff discloses the following facts, most of which are not in dispute. The plaintiff is a registered nurse possessed of skill and experience in her profession. Before taking up residence in Maine she was last employed as the head nurse in the recovery room of a large metropolitan hospital. Her competence as a nurse is not questioned. In 1953 she joined the staff of the Cary Memorial Hospital in Caribou and in 1956 became the night supervisor of nurses. The defendant is admittedly a competent and experienced physician and surgeon. In April, 1959 the defendant performed a surgical operation upon a patient in the Caribou hospital. The plaintiff became critical of the post-operative treatment being given this patient. She made a series of complaints to the supervisor of nurses, the hospital administrator, the patient's attending physician, the chairman of the hospital board, and to the Town Manager who was also a board member. In effect these complaints charged the defendant with neglect of the patient. The making of the complaints touched off a personal feud between the plaintiff and the defendant which was to continue unabated for more than a year and which culminated in the trial of the instant case.

In July, 1959 the plaintiff was dismissed from her employment at the hospital. No reason for the discharge was assigned at the time thereof but the evidence of hospital officials indicates that they were then convinced that the plaintiff had discussed the hospital and the treatment of specific cases therein in such places and in such a manner as to constitute unprofessional conduct on the part of a nurse. The plaintiff unsuccessfully lodged a request for a hearing before the Board of Directors. On August 19, 1959 the plaintiff suffered a miscarriage. In September of that year she appealed to the Caribou Town Council for a review of her discharge but the Council disclaimed any authority to act in connection with hospital affairs. In the same month she wrote to the Executive Director of the Maine Medical Association in effect charging the defendant with neglect of his professional duty and also with having exerted influence to procure her discharge. In response to this complaint a hearing was held by the Grievance Committee of the Aroostook County Medical Association as a result of which the charges against the doctor were dismissed. In June, 1960 a new administrator was employed by the hospital. In the following August the plaintiff was re-employed as a member of the hospital staff upon the stated condition that she not discuss hospital business outside of the hospital. On August 20, 1960 the defendant had occasion to make a telephone call to the hospital as a result of which he discovered for the first time that the plaintiff had returned to staff duty. Although the hour was very late, he immediately called the administrator and uttered to him the words which form the basis of the plaintiff's action. He said, "I wanted to ask you if you would stoop so low as to hire that creep, that malignant son of a bitch, back to work for you in the hospital." He added that "she was unfit for the care of patients" and that "he could prove that * * * and intended to make an issue of it." This conversation was duly reported by the administrator to the next

meeting of the hospital directors but the plaintiff was continued in her employment and in fact remained in the employ of the hospital up to and at the time of trial. In the spring of 1961 the plaintiff for reasons unrelated to the making of the defamatory remarks asked to examine the records of the meetings of the board of directors. She was afforded an opportunity to do so and from those records learned for the first time of the statements made by the defendant with reference to her. Shortly thereafter she instituted this action.

Although the defendant has sought to raise certain other issues by his statement of points on appeal, his contentions with respect thereto are without merit and need not be considered here. The only valid issue raised by the defendant on appeal relates to assessment of damages. That portion of the defendant's remarks which discredited the plaintiff's competence as a nurse may be taken to be slanderous *per se. Pattangall* v. *Mooers,* 113 Me. 412; Restatement of the Law of Torts, Sec. 573. In such cases malice is implied and without proof of special damages the claimant may recover compensatory damages for those results which are presumed to flow naturally, proximately and necessarily from publication of the slander. "She is entitled to damages sufficient to compensate her for her humiliation and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed." *Elms* v. *Crane,* 118 Me. 261, 266; *Boulet et al.* v. *Beals,* 158 Me. 53, 60. Punitive damages are allowable if actual malice is shown. *Boulet et al.* v. *Beals, supra.*

Applying these rules to the facts of the present case we note at the outset that no special damages are shown. The plaintiff lost no employment as a result of the defamatory remarks. In fact the slander remained a well kept secret known only to the administrator and the Board of Directors of the hospital until the plaintiff herself unearthed it from

the records and gave it the publicity attendant upon litigation. "The plaintiff is not entitled to damages for the publicity which this trial has caused." *Elms* v. *Crane, supra,* at page 266. We must conclude that only a modest portion of the verdict was attributable to compensatory damages. It follows therefore that a very substantial portion of the verdict must have been awarded as punitive damages.

There was some evidence in this case which would justify a jury finding of actual malice and it was proper for the jury to award some amount as punitive damages. "It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended." *Stacy* v. *Portland Publishing Co.,* 68 Me. 279, 287. The award of "smart" money may tend to deter the defendant and others from malicious and wrongful conduct in the future. The degree and extent of the punishment inflicted by a verdict must vary from case to case and all the circumstances must be taken into account. Provocation, though no excuse for slander, may be a mitigating factor when punitive damages are assessed. See *Baltimore & O. R. Co.* v. *Barger* (1894), 80 Md. 23, 30 A. 560, 562. The general rule is well stated in 15 Am. Jur. 739, Sec. 298, as follows: "In assessing exemplary damages the nature, extent, and enormity of the wrong, the intent of the party committing it, and, generally, *all the circumstances attending the particular transaction involved, including any mitigating circumstances* which may operate to reduce without wholly defeating such damages, may be taken into consideration * * * ." (Emphasis ours.) Although there is ample and respectable authority supporting the view that provocative acts and conduct of a plaintiff may under proper circumstances tend to reduce the *compensatory damages* awarded for defamation (*Conroy* v. *Publishing Co.* (1940), 306 Mass. 488, 28 N. E. (2nd) 729; Annot. 132 A. L. R. 932, and cases cited), we are satisfied that such factors should

be considered only in mitigation of *punitive* damages. What appeals to us as the better reasoned rule was stated by the writer of an article in 29 Georgetown L. J. 126 (132 A. L. R. 954) who concluded that provocation should act only to reduce punitive damages since "only to the extent that the defendant may be penalized for malice by imposition of exemplary damages may plaintiff be penalized for having provoked the wrong by mitigation of the recovery." The following cases support this view. *Earl* v. *Times-Mirror Co.* (1921), 185 Cal. 165, 196 P. 57, 63; *Gambrill* v. *Schooley* (1902), 95 Md. 260, 52 A. 500, 506; *La Porta* v. *Leonard* (1916), 88 N. J. L. 663, 97 A. 251; *Alderson* v. *Kahle* (1914), 73 W. Va. 690, 80 S. E. 1109, 1111; *Massuere* v. *Dickens* (1887), 70 Wis. 83, 35 N. W. 349, 352.

We are satisfied that the damages awarded in this case are grossly excessive. The plaintiff has obviously convinced herself that the defendant was able to procure her discharge from the hospital staff although this conclusion on her part rests only upon suspicion and conjecture. Her lost wages, her miscarriage, the shame and humiliation accompanying her discharge, all occurred *prior* to August 20, 1960, the date when the defamatory remarks were uttered. She lays no particular stress on any results flowing from the slander itself but rather holds the defendant responsible and accountable for every misfortune which befell her during the previous thirteen months. We can only conclude that the jury was persuaded that her suspicions were justified and that they sought to punish the defendant for much that could not be proved against him by credible evidence. In review, however, we are compelled to address our attention only to those damages that demonstrably flow from and are related to the remarks made on August 20, 1960. We are directly concerned with what occurred *after* that date. As already noted, the compensatory damages must necessarily comprise only a small portion of the total verdict on

the basis of the plaintiff's own testimony. As we have stated, there being some evidence of actual malice on the part of the defendant, some amount may properly be awarded as exemplary damages. We have purposely reviewed in some detail the events which occurred prior to August 20, 1960 because in our view those events bear directly upon the mitigation of punitive damages. The plaintiff began the feud which subsequently raged between the parties by launching an attack upon the defendant's professional competence. Implicit in her criticism was the thinly veiled suggestion that her judgment as to proper methods of post-operative treatment of a patient was better than his. Any professional nurse knows, or should know, that criticism of this sort will almost certainly induce irritation, annoyance and even anger on the part of any medical practitioner against whom it is directed. This attack was followed in due course by a direct complaint which forced the defendant to defend himself before a grievance committee of the medical association. This complaint must be deemed groundless. The decision of a competent board dismissing the charge is not under review and may not be challenged in the instant case. We are therefore presented with yet another instance of conduct on the part of the plaintiff well calculated to arouse the anger and hostility of the defendant. Human frailties, emotions and passions being what they are, it should not surprise anyone that the defendant deemed himself tormented and persecuted by the plaintiff and thereupon abandoned that caution and restraint which is required by society. Although the slander is not thereby excused, such provocation will substantially diminish both the public interest in the punishment of the defendant and the plaintiff's right to have severe punishment inflicted. Under these circumstances a verdict of $17,500 is patently and grossly excessive and must reflect either an inability on the part of the jury to heed the instructions of the presiding

justice as to the proper elements of damage or an inability to deliberate in an atmosphere entirely free of passion and suspicion. We are satisfied that an award of $5,000 will fully compensate the plaintiff for any injuries attributable to these defamatory remarks and will afford an adequate deterrent to the defendant and to others under all the circumstances of this case.

The entry will be

Appeal on counterclaim denied.

Appeal on complaint sustained and new trial ordered thereon unless plaintiff shall within 30 days from filing of mandate remit all of the verdict thereon in excess of $5,000.

GREEN ACRE BAHA'I INSTITUTE

vs.

TOWN OF ELIOT

York. Opinion, September 4, 1963.

Taxes. Charities. Exemptions. Constitutional Law.

Taxation is the rule; exemption is the exception. The burden is on the petitioner to establish its exemption.

Denial of exemption to property of Maine benevolent and charitable corporation conducted or operated principally for benefit of non-residents was constitutional exercise of legislative power.

ON REPORT.

This is on report to determine whether the 1957 amendment exempting charitable institutions is constitutional and do the facts bring the petitioner within the 1957 amendment. Remanded for entry of a decree in accordance with this opinion.

Charles W. Smith, for Plaintiff.

Thomas M. Dudley, Jr., for Defendant.

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

WILLIAMSON, C. J. This appeal to the Superior Court from the denial of a tax abatement for 1961 on property in the Town of Eliot is before us on report. R. S., c. 91-A, §§ 51, 52.

The petitioner, a Maine Corporation, is a benevolent and charitable institution within the meaning of the exemption

provisions of the taxing statute. There has been no change in the corporate status or in the use of its property, apart from two parcels, since our decision in 1954 holding the petitioner entitled to exemption. *Green Acre Baha'i Institute* v. *Eliot,* 150 Me. 350, 110 A. (2nd) 581. The court said, at p. 352:

> "Petitioner owns and operates in respondent town certain real estate comprising a number of acres of land and certain buildings suitable for classes, lectures, concerts and the like, with facilities for lodging and board. The activities are confined to the summer season. Persons in attendance include members of the Baha'i faith, nonmembers who express a sincere interest in the faith, and citizens of the local community. There are facilities for recreation. Persons who require board and lodging pay for those services, but are required to participate in the classes and lectures. As the Baha'i faith has no official clergy, all members are expected to serve in a missionary role and expand the faith. In short, the purposes of the Institute embrace the essential elements of missionary societies which have long been deemed to possess the required attributes of benevolent and charitable institutions for tax exemption purposes."
>
> * * * * * * * * *
>
> "The justice below found on the basis of supporting evidence that the institution was operating the property for the benevolent and charitable purposes for which it was organized, that the program was conducted in good faith and not with any purpose or intention of tax evasion, that the dominant purpose of the operation was the furtherance of its religious and missionary aims and that any charges for board or lodging were purely incidental to the dominant purpose, and that neither the institution nor any individual was deriving any profit from the operation other than reasonable compensation for services performed."

The statute under which the petitioner seeks to establish tax exemption reads:

"II. **Property of institutions and organizations.**

A. The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this state, and none of these shall be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit such funds are applied.

1. No such institution shall be entitled to tax exemption if it is in fact conducted or operated principally for the benefit of persons who are not residents of Maine and if stipends or charges for its services, benefits or advantages in excess of an equivalent of $15 per week are made or taken. The provisions of this subparagraph shall not apply to institutions incorporated as non-profit corporations for the sole purpose of conducting medical research." R. S., c. 91-A, § 10-II-A.

Apart from the effect of subparagraph 1, enacted in 1957 (hereinafter called 1957 amendment), the property in question admittedly would be exempt from taxation. Two questions arise: (1) Do the facts bring the petitioner within the 1957 amendment? (2) If so, is the 1957 amendment constitutional?

The parties have agreed "that a large majority of the registrants for the years 1960 and 1961 at the institution summer school who occupied dormitory space of the plaintiff corporation at their premises in Eliot, Maine, are residents of other States and Countries other than the State of Maine, and that a majority of the enrollees of the classes for those years were nonresidents of the State of Maine." Without question, the "stipends or charges" are in "excess of an equivalent of $15 per week."

A pamphlet on "Green Acre A Baha'i Summer School" for the season of 1961, introduced in evidence by agreement of the parties, reads in part:

> "The place, of course, has something to do with this. Hard by an historic river, within smell of the sea, Green Acre's unspoiled woods, its riverbank and rolling meadow typify the natural beauties which, together with the climate, make New England one of the great summer recreation areas of the nation. Unobtrusively in this rustic setting, the buildings at Green Acre provide a variety of living accommodations—from cottage with kitchen to individual room. In addition, there are places of assembly and recreation, a library, a children's school, and a dining room operating cafeteria style.
>
> "But these things only serve the main resource of Green Acre — the people who, coming, give life and spirit to the place. Last summer they came — nearly four hundred — from thirty states and five foreign countries. This year plans have been made to take care of as many — and more."

Taxation is the rule; exemption is the exception. The burden is on the petitioner to establish its exemption. *Camp Emoh Associates* v. *Inhabitants of Lyman,* 132 Me. 67, 166 A. 59; *Green Acre Baha'i Institute* v. *Eliot, supra; Calais Hospital* v. *City of Calais,* 138 Me. 234, 24 A. (2nd) 489; *Park Association* v. *City of Saco,* 127 Me. 136, 142 A. 65.

We are satisfied from the record that the petitioner was "in fact conducted or operated principally for the benefit of" nonresidents. Accordingly the petitioner is not entitled to exemption under the statute.

We therefore reach the issue of constitutionality. Is the petitioner denied the "equal protection of the laws" under the Fourteenth Amendment to the Federal Constitution and under the Declaration of Rights in our State Constitution

(Art. I)? The attack is upon the 1957 amendment. In the absence of the amendment no constitutional issue would here arise.

Under the 1957 amendment Corporation A, a benevolent and charitable Maine corporation, conducted or operated as is the petitioner with the same amount and type of property used for the same purposes and receiving the same charges for like services may be entitled to tax exemption. The one point of difference between Corporation A and the petitioner may be in the fact that the petitioner is, and Corporation A is not, conducted or operated principally for the benefit of nonresidents. In this event Corporation A is tax exempt. In our view such a difference is sufficient to warrant a different classification for purposes of taxation.

We cannot say that it is unreasonable for the State to require the ordinary and normal support of government when a corporation as here principally benefits nonresidents, and to remit taxes when benefits accrue to our own residents. Exemption from tax places an equivalent burden on the remaining tax payers. Loss in tax revenue from exemption must be balanced by increased assessments on others.

In our view, the denial of exemption to the property of a Maine benevolent and charitable corporation "in fact conducted or operated principally for the benefit of (nonresidents)" is a constitutional exercise of legislative power.

> "Taxation is legislative. What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations except such as are imposed by express constitutional provisions. *Brewer Brick Company v. Brewer,* 62 Me. 62."
>
> *Re Maine Central Railroad Co.*, 134 Me. 217, 219, 183 A. 844.

In *Evanston Y.M.C.A. Camp* v. *State Tax Commission* (Mich.), 118 N. W. (2nd) 818, 823, the Michigan Court upheld an analogous statute granting tax exemption to a Michigan corporation "if at least 50% of the membership of the associations or organizations are residents of this state," against attack as a discrimination based on residence prohibited by the Fourteenth Amendment. The court pointed out that the Legislature had not "singled out a particular class denoted 'nonresidents' for the purpose of imposing a tax. No discrimination between 'residents' and 'nonresidents' is involved, since appellant is a Michigan corporation."

In other cases touching analogous situations, courts have recognized the broad powers of the Legislature in creating different classifications for purposes of tax exemption.

In *Camp Emoh Associates* v. *Inhabitants of Lyman, supra,* in 1933 our court sustained the exemption of a Maine corporation conducting a summer camp with upwards of two hundred and fifty children "all but one of the children having come from outside this State." The court said, at p. 70:

> "The statute enacts that a corporation such as this shall be considered benevolent and charitable, without regard to the sources from which it gets its property or funds, or limitations in the classes of persons for whose benefit the property and funds are applied." (Our present subsection A.)

In sustaining the exempt status of a New York charitable corporation conducting a social welfare camp, the Connecticut Court said in *Camp Isabella Freedman of Conn. v. Town of Canaan* (Conn.) 162 A. (2nd) 700, at p. 704:

> "It may be said, however, that the statute does not restrict the benefits to Connecticut residents. If such a restriction is desirable, it is a matter for action by the legislature. . . Claims of a like nature

> have been advanced in the courts of three of our New England states, and each has held that in the absence of legislative enactment the property of local charitable corporations is not to be denied tax exemption because the beneficiaries of the charity are out-of-state residents. And this is so though the inference is plain that the motive activating the organization of the local corporation was to take advantage of the tax exemption. Camp Emoh Associates v. Inhabitants of Lyman, 132 Me. 67, 69, 166 A. 59; Greater Lowell Girl Scout Council, Inc. v. Town of Pelham, 100 N.H. 24, 28, 117 A. 2d 325; Old Colony Trust Co. v. Commissioner of Corporations & Taxation, 331 Mass. 329, 339, 119 N.E. 2d 175."

In *Greater Lowell Girl Scout Council* v. *Town of Pelham* (N. H.), 117 A. (2nd) 325, the town contended that since the petitioner, conducting a girl scouts camp, established and operated primarily for the benefit of nonresidents of New Hampshire, it should not be and could not be entitled to a tax exemption. The court noted there was no express provision "that a charitable society organized in this state must be a substantial benefit or advantage to the public of this state."

The court said, at p. 327:

> "Undoubtedly there may be good reasons in logic and policy why charities should benefit the state if they are to enjoy tax exemption but that tax policy should be dictated by the Legislature and not originated by the Court."

A 1955 New Hampshire statute (repealed in 1957) similar in purpose to our 1957 amendment, was held applicable to taxes under consideration by the New Hampshire Court in 1960. *Appalachian Mountain Club* v. *Meredith* (N. H.), 163 A. (2nd) 808. The court said, at p. 812:

> "As previously noted, the principal beneficiary of the plaintiff's activities is the public, and not the

> plaintiff's members. Its stated corporate purpose, and the manner in which it is in fact carried out, neither purport to be, nor in practice are designed primarily to benefit nonresident members of the public. The test to be applied is not whether nonresidents are in fact the principal beneficiaries, but whether the corporation is in fact 'operated principally for' their benefit. If in fact larger numbers of nonresidents than residents utilize the services and facilities afforded by the plaintiff's activities in general, this results from the circumstance that more interested nonresidents than residents frequent the areas which the plaintiff supervises, rather than from any purpose or course of conduct on its part calculated to benefit nonresidents in particular."

There is no suggestion of unconstitutionality in the New Hampshire case. The case turned on the construction of the statute and its application to the facts. That we reach a different result does not bear on the "equal protection" issue.

In Pennsylvania the Superior Court, in holding that a New York corporation conducting a camp for the benefit of New York City underprivileged children was entitled to tax exemption, succinctly stated the principle in these words:

> "Thus the Constitution does not forbid the General Assembly to exempt from taxation institutions of purely public charity which redound to the benefit of only non-residents of the state. It is, of course, true that the General Assembly can limit the exemption to institutions of public charity from which residents of the state receive a benefit. But it is also true that the General Assembly has not done so."

Appeal of Infants Welfare League Camp (Pa.), 82 A. (2nd) 296, 297; commented upon with approval by the Pennsylvania Supreme Court in *In Re Assessment for the*

Year 1952, *etc.* (Pa.) 128 A. (2nd) 773. See also *Old Colony Trust Co.* v. *Commissioner of Corp. and Tax,* 331 Mass. 329, 119 N. E. (2nd) 175.

A contrary result is reached under the Colorado constitution and statutes in *Young Life Campaign* v. *Board of County Com'rs* (Colo.), 300 P. (2nd) 535.

The second condition that the "stipends or charges . . . are in excess of an equivalent of $15 per week" does not destroy the validity of the classification. If the Legislature may deny tax exemption to a Maine corporation conducted or operated principally for the benefit of nonresidents, there is no constitutional reason why it may not limit the denial to those institutions receiving larger sums than others for their services, and so lessening the extent of their charity.

The petitioner in support of its argument that the 1957 amendment discriminates in violation of the constitutions (whether Federal, State, or both is not material) relies heavily upon the peddler license cases. In these cases our court held unconstitutional a tax or license on the nonresident when joined with exemption for the resident. *State* v. *Cohen,* 133 Me. 293, 177 A. 403; *State* v. *Mitchell,* 97 Me. 66, 53 A. 887. It also seeks to draw an analogy from state income tax cases relating to nonresidents. See *Eliasberg Bros. Mercantile Co.* v. *Grimes* (Ala.), 86 So. 56, 11 A. L. R. 300; *Travis* v. *Yale & T. Mfg. Co.,* 252 U. S. 60.

The cases cited by the petitioner do not require that our statute be held void. The issue is whether the classification whereby the petitioner is taxed is reasonable. If the loss of tax exemption here came from an arbitrary discrimination or without reason, then the 1957 amendment would be invalid. Such however is not the fact. We have pointed out above the basis for holding as we do, that the 1957 amendment stands as a proper exercise of legislative power and is constitutional.

On application of the law, both statutory and constitutional to the facts found by us on report, we conclude the petitioner is not entitled to tax exemption. Under familiar principles we are not in this inquiry concerned with the wisdom of the policy enacted into law by the Legislature. *Camp Emoh Associates* v. *Inhabitants of Lyman, supra.*

The entry will be

Remanded for entry of a decree in accordance with this opinion.

STATE OF MAINE
vs.
FRANK N. RING

Somerset. Opinion, September 24, 1963.

Testimony. Witness. Motion for New Trial.

The fact that a witness admits to error in testimony and later retracts such testimony in presence of jury, is not a ground for a new trial.

ON APPEAL.

Plaintiff appeals from a denial of a motion for a new trial. Appeal denied.

Clinton B. Townsend, for State.

George W. Perkins, for Defendant.

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

PER CURIAM.

This indigent respondent, ably represented by court appointed counsel, was tried by a jury and convicted of the

crime of breaking, entering and larceny. His appeal from the denial of a motion for a new trial brings the matter forward.

The respondent acknowledges that evidence given by his accomplice and by the complaining store owner would support a conviction. He seeks a new trial only because a sheriff, after testifying to alleged admissions by the respondent, admitted error, retracted his testimony, explained that he had attributed to the respondent remarks made by another, and gave a different version as to statements made by the respondent. Since all of this occurred in the presence of the jury, it would appear that the respondent must have been advantaged rather than prejudiced by these indications of confusion and lack of precise memory on the part of a witness for the prosecution. There is no occasion for a new trial.

Appeal denied.

JULIAN G. HUBBARD
vs.
ELTON C. NISBET

Cumberland. Opinion, September 25, 1963.

Competition. Fraud.

A claim of unfair competition requires a "clear and convincing proof."

The underlying element in all definitions of unfair competition is that no person shall be permitted to palm off his own goods or products as the goods of another; the ground of the action is fraud.

The complaining party must prove such circumstances "as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of."

"The gist of the action is not the employment of similar words, but the appropriation of the plaintiff's business; it is the deceiving use of the name and not the use itself which compels relief."

The test applied by the courts on the question of similarity is the likelihood of deceiving an *ordinary purchaser who is using ordinary care.*"

ON APPEAL.

Plaintiff appeals the denial of an injunctive relief against another businessman using a like name in a similar business. Appeal denied.

Julian G. Hubbard, for Plaintiff.

Bruce W. Chandler, for Defendant.

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

WEBBER, J. The plaintiff has for some time operated as an independent insurance adjuster under the name and style of "Maine Adjustment Bureau." His office for this purpose

is located in Portland but he has offered service in other parts of Maine. In 1962 defendant commenced similar operations at Waterville under the name and style of "Maine Adjustment Service." The plaintiff asserts that use of a business name so similar to the one used by him amounts to unfair competition. A single justice below denied injunctive relief and found for the defendant.

The guiding principles are fully set forth in *Lapointe Machine Tool Co.* v. *J. N. Lapointe Co.*, 115 Me. 472. We can do no better than to quote or paraphrase portions of that opinion which are clearly decisive of the instant case. A plaintiff's claim of unfair competition requires "clear and convincing proof." A court which affords equitable relief is reluctant to invade the realm of private enterprise and private rights and will do so only "when the necessity and the justice of such invasion are made clear." Except where monopoly is protected by a patent or copyright, free competition is to be desired and encouraged. At page 478 the court stated: "The underlying element in all (definitions of unfair competition) is that no person shall be permitted to palm off his own goods or products as the goods or products of another. * * * The ground of the action is fraud. The prohibition is confined to cases where the wrongdoer has resorted to some form of deception. The complaining party must prove such circumstances 'as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of.' *W. R. Lynn Shoe Co.* v. *The Auburn-Lynn Shoe Co.*, 100 Me. 461, 476, quoting the rule adopted by the Supreme Court of the United States in *Elgin Nat. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 674. * * * The converse is also true. If the defendant, although a sharp and vigorous competitor, so conducts his business as not to palm off his products as those of the plaintiff, the action fails. He has kept within his legal rights." In the instant case the justice below properly

found that the quality of proof failed to meet the high standards imposed in cases of this nature and that there was absent any intent to deceive on the part of the defendant.

Mere similarity in trade names will not afford relief. The court in Lapointe said at page 480: "The gist of the action is not the employment of similar words, but the appropriation of the plaintiff's business"; and again at page 483, "It is the *deceiving* use of the name and not the use itself which compels relief." (Emphasis ours.)

Whether there is likelihood that purchasers may be deceived may depend on the nature of the class of probable purchasers. "The test applied by the courts on the question of similarity is the likelihood of deceiving an *ordinary purchaser who is using ordinary care,* and in applying that test regard must be had to the nature and physical requirements of the article itself, its cost, *the class of persons who purchase it,* and the circumstances under which it is purchased." Page 486. (Emphasis ours.) The court emphasized that the machines in Lapointe were "purchased only by men who are mechanical experts and know precisely what they want and what they are buying. It is a limited and specialized trade. The customers are men with trained mechanical eye and brain who do not purchase a machine of this character and value without careful examination and consideration. * * * The likelihood of palming off the defendant's machines for the plaintiff's, even if the defendant desired to do so, is very remote." So in the instant case both plaintiff and defendant were offering services to insurance companies requiring particular competence and skill. The selection of a claims adjuster by an employing company, as the evidence clearly shows, is not based upon a particular trade name but upon the company's knowledge and appraisal of the skill and capacity of the individual who will actually perform the service. The employing companies

have investigative resources and special knowledge which are not available to the ordinary purchaser of groceries, clothing and the like. So here the likelihood of deception is virtually non-existent. See also *Diamond Drill C. Co.* v. *International Diamond Drill C. Co.* (1919), 106 Wash. 72, 179 P. 120, 122.

There is no showing here that the name "Maine Adjustment Bureau" had acquired any secondary meaning such as would entitle it to protection. The name is not fanciful or distinctive but merely combines the geographical with the generic to describe the location of operations and type of services offered. In any event those desiring the personal services of Mr. Hubbard are not likely to employ Mr. Nisbet or vice versa. See *Truck Ins. Exchange* v. *Truck Ins. Exchange, Etc.* (1940), 165 Ore. 332, 107 P. (2nd) 511, 523.

The court in *Lapointe* deemed the absence of any confusion or deception some evidence that there is no likelihood of confusion or deception. So in the instant case there is no showing that anyone has thus far been confused or misled. See *Patton Paint Co.* v. *Sunset Paint Co.* (1923), 290 F. 323, 326.

We conclude that the findings of fact and conclusions of law reached by the justice below are not clearly erroneous and may not be set aside.

Appeal denied.

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

* * * * * *

QUESTIONS PROPOUNDED BY THE
HOUSE OF REPRESENTATIVES
IN AN ORDER DATED MAY 23, 1963
ANSWERED JUNE 5, 1963

HOUSE OF REPRESENTATIVES ORDER
PROPOUNDING QUESTIONS

STATE OF MAINE

In House, May 23, 1963

WHEREAS, it appears to the House of Representatives of the One Hundred and First Legislature that the following are important questions of law and that the occasion is a solemn one; and

WHEREAS, there is pending before the House the Bill entitled "AN ACT Relating to Operating Business on Sunday and Certain Holidays" (H. P. 930) (L. D. 1364), as amended by Senate Amendment "A" (S. "A" S-240); and

WHEREAS, the Constitutionality of said Bill has been questioned; and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of said Bill; now, therefore, be it

ORDERED, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

QUESTION 1. Is a classification based on the size of a store as set forth in Bill "An Act Relating to Operating Business on Sunday and Certain Holidays" Constitutional?

QUESTION 2. Is a classification based on the number of employees as set forth in Bill "An Act Relating to Operating Business on Sunday and Certain Holidays" Constitutional?

Name: (Knight)

Town: Rockland

A true copy of an Order passed by the House of Representatives of the 101st Legislature, May 23, A.D. 1963.

ATTEST HARVEY R. PEASE
Clerk of the House

ONE HUNDRED AND FIRST LEGISLATURE

Legislative Document **No. 1364**

H. P. 930 House of Representatives, February 13, 1963

Referred to Committee on Legal Affairs. Sent up for concurrence and 1,000 copies ordered printed.

HARVEY R. PEASE, Clerk

Presented by Mr. MacGregor of Eastport.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED SIXTY-THREE

AN ACT Relating to Operating Business on Sunday and Certain Holidays.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., c. 134, § 38, repealed and replaced. Section 38 of chapter 134, as repealed and replaced by section 1 of chapter 362 of the public laws of 1961 is repealed and the following enacted in place thereof:

'Sec. 38. Operating business on the Lord's Day and certain holidays. No person, firm or corporation shall, on the Lord's Day, Memorial Day, July 4th, November 11th and Thanksgiving Day as proclaimed by the Governor, keep open a place of business to the public except for works of necessity, emergency or charity.

This section shall not apply to: the operation or maintenance of common, contract and private carriers; taxi cabs; airplanes; newspapers; radio and television stations; hotels,

motels, rooming houses, tourist and trailer camps; restaurants; garages and motor vehicle service stations; retail monument dealers; automatic laundries; drug stores; greenhouses; seasonal stands engaged in sale of farm produce, dairy products, sea food or Christmas trees; 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; motion picture theatres; sports and athletic events; musical concerts; religious, educational, scientific or philosophical lectures; scenic, historic, recreational and amusement facilities; provided that this section shall not exempt the businesses or facilities specified in sections 39, 40 and 41 from closing in any municipality until the requirements of those sections have been met; stores wherein no more than 3 persons, including the proprietor, are employed in the usual and regular conduct of the business; stores which, in the usual and regular conduct of the business, have no more than 1,000 square feet of interior floor space.

For the purpose of determining qualification, a "store" shall be deemed to be any operation conducted within one building advertising as, and representing itself to the public to be, one business enterprise regardless of internal departmentalization. All sub-leased departments of any store shall for the purpose of this section be deemed to be operated by the store in which they are located. Contiguous stores owned by the same proprietor or operated by the same management shall be deemed to be a single store for the purpose of this statute.

Any person, firm or corporation found guilty of violating any of the provisions of this section shall be punished by a fine of not more than $100 or by imprisonment for 30 days, or by both, for the first offense; and by a fine of $500 or by imprisonment for 60 days, or by both, for the 2nd offense

occurring within one year following the first conviction. Any offense subsequent to the 2nd offense and occurring within 2 years following the 2nd conviction shall be punished by a fine of not more than $1,000 or by imprisonment for 90 days, or by both. No complaint charging violation of this section shall issue later than 5 days after its alleged commission.

In addition to the penalty imposed by this section, all property and commodities exposed for sale on the Lord's Day or any of the aforementioned holidays in violation of this section may be forfeited. Upon conviction of the offender, the court may issue a warrant for the seizure of the forfeited articles, which when seized, shall be sold on one day's notice and the proceeds paid to the municipality in which the offending store is physically located for the use of the poor of that municipality.

Each separate sale, trade or exchange of property or offer thereof, in violation of this section, and each Lord's Day or one of the aforementioned holidays a person, firm or corporation engages in or employs others to engage in the sale, trade or exchange of property in violation of the law constitutes a separate offense.

In addition to any criminal penalties provided in this section, the Attorney General, county attorney, a mayor or city manager, a city council or the board of selectmen of a town, or any resident of a municipality in which a violation is claimed to have occurred may file a complaint with the Superior Court to enjoin any violation of this section. The Superior Court shall have original jurisdiction of such complaints and authority to enjoin such violations.

This section shall not apply to isolated or occasional sales by persons not engaged in the sale, transfer or exchange of property as a business.'

Sec. 2. R. S., c. 134, § 38-A, repealed. Section 38-A of chapter 134 of the Revised Statutes, as enacted by section 2 of chapter 362 of the public laws of 1961 is repealed.

STATE OF MAINE
SENATE
101ST LEGISLATURE

SENATE AMENDMENT "A" to H. P. 930, L. D. 1364, Bill, "An Act Relating to Operating Business on Sunday and Certain Holidays."

Amend said Bill in the 20th line of section 1 by adding after the underlined word and punctuation "**marinas;**" the underlined words and punctuation '**establishments primarily selling boats, boating equipment, sporting equipment, souvenirs and novelties;**'

Further amend said Bill in the 23rd line of section 1 by adding after the underlined word and punctuation "**facilities;**" the underlined words and punctuation '**real estate brokers and real estate salesmen;**'

Further amend said Bill in section 1 by striking out lines 26 to 30 and inserting in place thereof the following: '**those sections have been met; stores wherein no more than 5 persons, including the proprietor, are employed in the usual and regular conduct of business; stores which have no more than 5,000 feet of interior customer selling space, excluding back room storage, office and processing space.**'

Further amend said Bill in section 1 by striking out all of the 5th underlined paragraph of that part designated "**Sec. 38.**", which reads as follows:

"**In addition to the penalty imposed by this section, all property and commodities exposed for sale on the Lord's**

Day or any of the aforementioned holidays in violation of this section may be forfeited. Upon conviction of the offender, the court may issue a warrant for the seizure of the forfeited articles, which when seized, shall be sold on one day's notice and the proceeds paid to the municipality in which the offending store is physically located for the use of the poor of that municipality."

Further amend said Bill in the 9th and 10th lines from the end of section 1 by striking out the underlined punctuation and words ", **a mayor or city manager, a city council or the board of selectmen of a town.**"

Proposed by Senator ATHERTON of PENOBSCOT

Reproduced and distributed pursuant to Senate Rule #11A
(Filing No. S-240)

5-17-63

ANSWERS OF THE JUSTICES

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

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on May 23, 1963.

QUESTION (1): Is a classification based on the size of a store as set forth in Bill "An Act Relating to Operating Business on Sunday and Certain Holidays" Constitutional?

QUESTION (2): Is a classification based on the number of employees as set forth in Bill "An Act Relating to Operating Business on Sunday and Certain Holidays" Constitutional?

ANSWER: We answer both questions in the affirmative. It is apparent that the proposed bill, as amended by Senate Amendment A, is intended to provide an exception for what might be termed "small stores." The merchant would qualify for the exemption if his enterprise satisfied either or both of two clearly defined criteria, one related to the size of the premises and the other related to the number of employees "employed in the usual and regular conduct of business." The standards for reasonable classification have been fully set forth in *State* v. *Karmil Merchandising Corp.*, 158 Me. 450, 186 A. (2nd) 352; *McGowan* v. *State of Maryland* (1961), 366 U. S. 420, 81 S. Ct. 1101; *Gallagher* v. *Crown Kosher Super Mkt.* (1961), 366 U. S. 617, 81 S. Ct. 1122; *Two Guys* v. *McGinley* (1961), 366 U. S. 582, 81 S. Ct. 1135; *Braunfeld* v. *Brown* (1961), 366 U. S. 599, 81 S. Ct. 1144.

Sunday closing laws, so-called, are recognized as being intended to provide one day of rest and recreation in each week for the greatest possible number of our citizens. One purpose thereof is the elimination of concentrations of traffic and the hustle and bustle on Sundays caused by the business operations of large merchandising concerns which tend to create unreasonable interference with the efforts of the vast majority of citizens to find rest and leisure on those days. See *Vornado, Inc.* v. *R. H. Macy* (1963), 78 N. J. Super. 102; 187 A. (2nd) 620. The language employed in Two Guys from *Harrison-Allentown* v. *McGinley (supra)* at page 1140 of 81 S. Ct. seems pertinent. "It was within the power of the legislature to have concluded that these (substantial suburban retail) businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday and their large number of employees."

The Legislature might conclude that these adverse effects would be kept to a minimum if only small stores as defined

were permitted to open and that the public interest would be best served by excepting as a class the proprietors of small stores. The Legislature could properly take into account the economy of the State and the dependency of many small stores and shops on the patronage of vacationers and tourists.

That classes based on number of employees may be created without violation of constitutional limitations is evidenced by statutes which have long stood unchallenged. The Workmen's Compensation Law (R. S., Chap. 31, Sec. 4) is not applicable to employers of fewer than six employees. The Employment Security Law (R. S., Chap. 29, Sec. 3, Subsec. IX A-1 is not applicable to employers of fewer than eight employees. See *Unemployment Com.* v. *Androscoggin,* 137 Me. 154, 163.

In our view the proposed classification for exemption would stand the test of clarity and would not be so illusory, arbitrary or capricious or so unrelated to the purposes to be accomplished as to violate the requirements of due process and equal protection of the law.

In so answering we assume that the words "5000 feet" as used in the third paragraph of Senate Amendment A is intended to refer to "square feet" as used in the third paragraph of Sec. 1 of the bill as originally proposed. Since the phrase in its context may reasonably be so construed, we do not find the language so vague and ambiguous as to violate constitutional requirements. Nevertheless, the Legislature might properly consider the possibility of further amendment to remove even a possible doubt as to its intention.

The foregoing answers must be clearly understood as relating only to the specific inquiries addressed to us. As was stated in the *Opinion of the Justices,* 155 Me. 30, 49: "We

cannot well anticipate all of the questions that could arise under the Act in its present form."

Dated at Portland, Maine, this fifth day of June, 1963.

Respectfully submitted:

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

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

* * * * * *

QUESTIONS PROPOUNDED BY THE
HOUSE OF REPRESENTATIVES
IN AN ORDER DATED MAY 23, 1963
ANSWERED JUNE 5, 1963

HOUSE ORDER PROPOUNDING QUESTIONS
(New Title)

New Draft of: H. P. 846, L. D. 1233

ONE HUNDRED AND FIRST LEGISLATURE

Legislative Document **No. 1569**

H. P. 1094 House of Representatives, May 15, 1963

Reported by 5 members of the Committee on Taxation (Report "A") and printed under Joint Rules No. 10.

HARVEY R. PEASE, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED SIXTY-THREE

AN ACT Amending the Charter of the City of Portland Relating to Imposition of a General Business and Occupation Tax.

Be it enacted by the People of the State of Maine, as follows:

P. & S. L., 1961, c. 194, Art. VII-A, additional. Chapter 194 of the private and special laws of 1961 is amended by adding a new article VII-A, to read as follows:

'Article VII-A.

General Business and Occupation Tax.

Sec. 1. General Business and Occupation Tax. The city council shall have power by ordinance to levy and impose a tax upon persons carrying on or exercising for gain or profit within the City of Portland any trade, business, profession, vocation or commercial activity, imposed generally or upon selected types or classes thereof, measured by the gross receipts or gross income from such activities carried on either permanently or temporarily within the city, but not to exceed 1% of such gross receipts. Such tax, when imposed, shall be in place of all taxation, except excise taxes, levied by the City of Portland on the personal property of persons subject to such tax.

Sec. 2. Exemptions. Such ordinance shall specify exemptions, and no such tax shall be imposed upon the gross receipts or gross income of any corporation or association now or hereafter taxed on such gross receipts or gross income by the State of Maine or by the United States.

Sec. 3. Procedures; penalties. Such ordinance shall provide definitions, administrative procedures, and all such other matters as shall be necessary and pertinent to the imposition and collection of such tax including both civil and criminal penalties and punishment. In the case of criminal penalties and punishment, such ordinance shall provide for a fine of not less than $100 nor more than $1,000 or by imprisonment for not more than 11 months, or by both. In the case of civil penalties and punishment, such ordinance shall provide for a penalty of 10% of the amount of the tax when it is unpaid due to negligence and 25% of the amount

of the tax when it is unpaid due to fraud with intent to evade the tax.

Sec. 4. Referendum; effective date. Such ordinance shall not take effect unless and until it shall have been accepted by the legal voters of the City of Portland at a regular municipal election or at a special municipal election called and held for such purpose. Such election shall be called, advertised and conducted according to the law relating to municipal elections. For the purposes of such election, the clerk shall reduce the subject matter to the following question: "Shall 'An Ordinance Levying and Imposing a General Business and Occupation Tax' be accepted?" The voters shall indicate by a cross or check mark, placed against the words "Yes" or "No" their opinion of the same. The result of such election shall be declared by the municipal officers and due certificate filed by the clerk with the Secretary of State. If a majority of the votes cast by the legal voters of the City of Portland are in favor of the acceptance of such ordinance, such ordinance shall take full effect in said City of Portland within 30 days after the effective date as specified in such ordinance.'

STATE OF MAINE

In House

WHEREAS, it appears to the House of Representatives of the One Hundred and First Legislature that the following are important questions of law and that the occasion is a solemn one; and

WHEREAS, there is pending before the House the Bill entitled "AN ACT Amending the Charter of the City of Portland Relating to Imposition of a General Business and Occupation Tax" (H. P. 1094) (L. D. 1569); and

WHEREAS, the Constitutionality of said Bill has been questioned; and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of said Bill; now, therefore, be it

ORDERED, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

QUESTION 1. May the Legislature grant the right to one municipality to levy a tax by ordinance when such right is not granted at the same time to all other municipalities in the State?

QUESTION 2. If the answer to Question 1 is in the affirmative, may the Legislature grant the right to a municipality to levy a tax upon persons carrying on or exercising within such municipality any trade, business, profession, vocation or commercial activity measured by the gross receipts or gross income from such activities?

QUESTION 3. If the answers to the two foregoing Questions are in the affirmative, may the Legislature grant the right to such municipality to determine the rate of such tax upon selected types or classes of those persons subject to it, such tax not to exceed, however, one per cent of such gross receipts, in view of the provisions of the Constitution of Maine, Article IX, Section 8?

QUESTION 4. If the answers to the first two Questions are in the affirmative, may the Legislature grant the right to a municipality to specify exemptions from such tax?

QUESTION 5. If the answer to Question 1 is in the affirmative, would said Bill, if enacted into law and carried

out by an ordinance of the City of Portland enacted thereunder, be constitutional?

Name: (Libby)

Town: Portland

A true copy of an Order passed by the House of Representatives of the 101st Legislature, May 23, A.D. 1963.

ATTEST HARVEY R. PEASE
Clerk of the House

ANSWERS OF THE JUSTICES

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

In compliance with the provisions of Section 3 of Article VI of the Constitution of Maine, we, the undersigned Justices of the Supreme Judicial Court, have the honor to submit the following answers to the questions propounded on May 23, 1963.

QUESTION (1): May the Legislature grant the right to one municipality to levy a tax by ordinance when such right is not granted at the same time to all other municipalities in the State?

ANSWER: The subject matter of question 1 is complex and not amenable to a summary answer.

(a). The Legislature may not constitutionally grant to one sole municipality the right to levy by ordinance a tax upon real or personal property. The dictates of *Section 8 of Article IX of the Constitution of Maine* do not require the Legislature to impose taxes upon all property within the State but:

"Subject to the right to levy taxes for municipal and county purposes and to exceptions of the nature of those considered in *Hamilton v. Portland Pier Site District,* 120 Me. 15, and *Inhabitants of Sandy River Plantation v. Lewis and Maxcy,* 109 Me. 472 (Maine Forestry District Tax) permitting the assessment of special local taxes for special local purposes based upon local benefits, any and all taxes assessed upon real and personal property by the State must be assessed on all of the property in the State on an equal basis while that provision of the Constitution remains unchanged."

Opinion of the Justices, 146 Me. 239, 248.

By constitutional exception taxes upon *intangible personal property* need not be levied at the same rate as that applied to tangible personal property and to real property.

Opinion of the Justices, 102 Me. 527, 528; 133 Me. 525, 527; 141 Me. 442, 446.

Portland v. *Water Company,* 67 Me. 135, 136.

Shawmut Manuf. Co. v. *Benton,* 123 Me. 121, 129.

(b) The Legislature may constitutionally grant the right to one sole municipality to levy by ordinance reasonable and unoppressive *excise, business, occupational, gross receipts and gross business income taxes* when such right is not granted at the same time to all other municipalities in the State.

"- - - But our Constitution contains no provision limiting the legislative imposition of excise taxes or, to use the language of the Court: 'Our Constitution imposes no restriction upon the Legislature in imposing taxes upon business.' State v. Telegraph Co., 73 Maine 518, 531. Opinion of Justices, 123 Me. 576, 577, 578. See also, State v. Vahlsing, 147 Me. 417."

Opinion of the Justices, 155 Me. 30, 46.

"Further, the legislature can adopt such mode, or measure or rule as it deems best for determining

the amount of an excise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, the gross earnings, or the net earnings, or upon some other element."

Opinion of the Justices, 102 Me. 527, 529.

"The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern - - - -"

United States v. *New Orleans,* 98 U. S. 381, 392.

" - - - It must be conceded, on the other hand, that these constitutional provisions do not prevent a State diversifying its legislation or other action to meet diversities in situations and conditions within its borders. There is no inhibition against a State making different regulations for different localities, for different kinds of business and occupations, for different rates and modes of taxation upon different kinds of occupations, and generally for different matters affecting differently the welfare of the people. Such different regulations of different matters are not discriminations between persons but only between things or situations. They make no discriminations for or against anyone as an individual, or as one of a class of individuals, but only for or against his locality, his business or occupation, the nature of his property, etc. He can avoid discrimination by varying his location, business, property, etc."

State v. *Mitchell,* 97 Me. 66, 71.

"Whenever the law operates alike upon all persons and property, similarly situated, equal protection cannot be said to be denied. *Walston v. Navin,* 128 U. S. 578."

Leavitt v. *C. & P. Railway Co.,* 90 Me. 153, 159.

> "- - - And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions - - - -"
> *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205, 209.

QUESTION (2): If the answer to Question 1 is in the affirmative, may the Legislature grant the right to a municipality to levy a tax upon persons carrying on or exercising within such municipality any trade, business, profession, vocation or commercial activity measured by the gross receipts or gross income from such activities?

ANSWER: It will be noted that Question 1 necessitated a twofold answer, affirmative as to one element or phase and negative as to the other.

In response to Question 2 we answer that the Legislature may constitutionally grant the right to a municipality to levy a tax upon persons carrying on or exercising within such municipality any trade, business, profession, vocation or commercial activity measured by the gross receipts or gross income from such activities.

> "It is a fundamental principle of constitutional law that the legislative power over taxation for public purposes, including all questions of what shall be taxed or exempted from taxation and all questions of kinds, forms and modes of taxation, is limited only by the positive requirements or prohibitions of the Constitution. It is also a fundamental principle that no act of the legislature shall be adjudged unconstitutional unless it is plainly forbidden by some plain provision of the Constitution. The only provision in the Constitution of this State relating to the exercise of legislative power of taxation is that in sect. 8 of Art. IX - - - - This provision simply requires that any tax which shall

be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. Portland v. Water Co. 67 Maine 135 - - - -"
Opinions of the Justices, 102 Me. 527, 528.
Cooley, Taxation, 4th ed., Vol. 1, § 75.
Henderson Bridge Co. v. *Henderson City,* 173 U. S. 614, 43 L. Ed. 823 (a local purpose tax).
McQuillin, Municipal Corporations, Vol. 16, § 44.07.

QUESTION (3): If the answers to the two foregoing Questions are in the affirmative, may the Legislature grant the right to such municipality to determine the rate of such tax upon selected types or classes of those persons subject to it, such tax not to exceed, however, one per cent of such gross receipts, in view of the provisions of the Constitution of Maine, Article IX, Section 8?

ANSWER: We answer in the affirmative.

The establishment of selected types or classes by ordinance must of course satisfy constitutional requirements and may not be arbitrary, unreasonable, capricious or unrelated to the purposes to be served.

There is no State constitutional limitation upon the authority of the Legislature to levy a gross receipts or excise tax for governmental or public purposes, or to delegate such authority to a municipality. (See authorities under Answer 1 b.)

QUESTION (4): If the answers to the first two Questions are in the affirmative, may the Legislature grant the right to a municipality to specify exemptions from such tax?

ANSWER: We answer in the affirmative. The Legislature may grant the right to a municipality to specify by reasonable classifications exemptions from such tax.

> "Subject to constitutional restrictions, the legislature may delegate to municipalities the power to exempt certain property from municipal taxation, or it may itself exempt certain property from municipal taxation - - - -"
> *McQuillin, Municipal Corporations,* 3d ed., Vol. 16, § 44.65, P. 172.

QUESTION (5): If the answer to Question 1 is in the affirmative, would said Bill, if enacted into law and carried out by an ordinance of the City of Portland enacted thereunder, be constitutional?

ANSWER: We are here concerned only with the constitutionality of a proposed enabling act.

We can hazard no opinion as to the constitutional validity of an unseen and unenacted ordinance of the City of Portland.

The last sentence of *Sec. 1 of the Bill, H. P. 1094 - L. D. 1569,* reads as follows:

> "- - - - Such tax, when imposed, shall be in place of all taxation, except excise taxes, levied by the City of Portland on the personal property of persons subject to such tax."

The provision of that sentence exonerating from all personal property tax, — except excise taxes, — taxpayers subjected to gross receipt taxes is unconstitutional and violative of the mandate of *Section 8 of Article IX of the Constitution of Maine* enjoining that:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally according to the just value thereof; - - - -"

This Bill thus proposes a total tax exemption for all of a taxpayer's personal property. The Bill ignores such factors as how much of that personalty may have been employed

in that taxpayer's business or calling, what may be the value of the personal property so utilized in such business or calling and how much additional taxable property may be owned by the taxpayer or its value. There is no attempt to resort to any rationalized, equitable and equalizing formula such as can be found in *R. S., c. 16, §§ 115, 125, 127, 128 and 132,* all as amended, acts taxing railroads, telephone, telegraph companies, or to such formulae as have been approved in *State* v. *Western Union Telegraph Co.*, 73 Me. 518 and in *State* v. *Maine Central R. R. Co.*, 74 Me. 376, 384, 385.

See, also, *Sears, Roebuck* v. *Presque Isle,* 150 Me. 181, 185.

With the elimination of the last sentence of Sec. 1, as quoted above, the Bill proposed is constitutional.

Dated at Portland, Maine, this fifth day of June, 1963.

Respectfully submitted:

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

STATE OF MAINE
vs.
OWEN LADD

Kennebec. Opinion, October 1, 1963.

Carnal Knowledge. Criminal Law. Testimony. Motion for New Trial. Juries.

If testimony is contradictory to a convincing degree, unreasonable or incredible, it does not provide sufficient support for a verdict of guilty.

It is the province of the jury to resolve conflicting testimony and to determine where the truth lies.

The only question raised by appeal from the denial of a motion for a new trial in a criminal case is whether, in view of all the testimony, the jury was justified in believing beyond a reasonable doubt that the respondent was guilty.

ON APPEAL.

This is on appeal from the denial of a motion for a new trial, on two indictments. The issue is whether, in view of all the testimony, the jury was justified in believing beyond a reasonable doubt that the respondent was guilty. Appeals denied. Judgment for the State in each case.

Jon Lund, County Atty. and *Foahd Saliem,* Assistant County Atty., for State.

Lewis Levine and *Martin Brody,* for defendant.

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

TAPLEY, J. On appeal. The respondent, Owen Ladd, was indicted by separate indictments for carnal knowledge and sodomy at the February Term, 1963, at Augusta, for

the County of Kennebec. By agreement, the cases were tried together. After a verdict of guilty in each case, and before judgment, the respondent filed motions before the presiding Justice moving that new trials be granted. The motions were denied, whereupon the respondent seasonably appealed the rulings of denial to the Law Court.

The only question raised by appeal from the denial of a motion for a new trial in a criminal case is whether, in view of all the testimony, the jury was justified in believing beyond a reasonable doubt that the respondent was guilty. *State* vs. *McKrackern,* 141 Me. 194.

The prosecutrix was a young girl of the age of 15 years when the alleged crimes were committed. She was living at the home of the respondent and his wife, engaged in assisting in the care of a young grandson. The respondent was 50 years of age. The indictments alleged the offenses to have been committed in June and July of the year 1962. During the alleged commission of the crimes the wife of the respondent was in Massachusetts for various and extended periods of time. The only testimony presented by the State was that of the prosecutrix insofar as those acts were concerned which, if believed by the jury, would constitute the commission of the crimes alleged.

In a case of this nature, where the prosecution must depend largely upon the testimony of the prosecutrix, corroboration is often difficult to obtain. When lacking to any appreciable degree, the testimony must be scrutinized and analyzed with great care. If the testimony is contradicting to a convincing degree, unreasonable or incredible, it does not provide sufficient support for a verdict of guilty. *State* vs. *Wheeler,* 150 Me. 332; *State* vs. *Robinson,* 153 Me. 376; *State* vs. *Field,* 157 Me. 71.

Counsel for the respondent argues (1) that the girl's testimony is incredible and not to be believed because the

respondent's physical condition was such that the acts of carnal knowledge and sodomy could not possibly have taken place, particularly as often as the prosecutrix said they did; (2) that her testimony was inconsistent as to dates of the occurrences; and further, that she exhibited much confusion in some portions of her testimony.

The respondent took the stand and offered denial of the accusations. He stressed his physical condition and age as reasons why he was incapable of intercourse which he contends proves the girl's story as untrue and, in addition, gives support to his defense of denial. Mrs. Ladd, wife of the respondent, witnessed, among other things, that her husband was incapable of sexual intercourse. Dr. Craig Morris, a specialist in internal medicine, was called in rebuttal by the State. Dr. Morris testified that the respondent, Mr. Ladd, was his patient whom he saw intermittently over a period of 2½ to 3 years. The last time he saw him professionally was in January of 1963. At the January visit the doctor was asked by Mr. Ladd, in substance, if he could prove that he, Mr. Ladd, was incapable of sexual intercourse. The doctor testified:

"A. He asked me if I could prove that he would be incapable of sexual intercourse. And I told him that I could not prove it, and I felt that there was no other physician that could prove such a thing.

Q. Now, Dr., I would ask your medical opinion: whether or not it is possible for a person to be impotent with respect to one sexual partner but not impotent with respect to another?

A. That is absolutely possible."

The grounds of appeal are based substantially on the premise that because of the respondent's physical condition the prosecutrix' story is incredible and not to be believed. In order that this hypothesis prevail it would be necessary

for the jury to accept the respondent's testimony as to his physical condition to be the truth. This, apparently, the jury did not do.

In the case of *State* vs. *Lambert,* 97 Me. 51 this Court had occasion to concern itself with the functions of a jury in a criminal case when a question of jury error is reviewed by the appellate court. Justice Savage, in speaking for the court, wrote, on page 52:

> "We may say at the outset that in considering the weight of this testimony, depending as it does for its effect upon the credibility of the witnesses, we cannot put ourselves in the place of the jury, nor usurp that province of deciding questions of fact which the law imposed upon them. Their conclusions, if warranted by the evidence, are to stand. We have before us only the pages of a printed record, aided somewhat by an inspection of the exhibits which were introduced in evidence at the trial. The jury had before them the living, speaking witnesses. The degree of credence properly to be given to the story of a witness may depend much upon his appearance upon the stand, upon his air of candor and truthfulness, upon his seeming intelligence and honesty, upon his apparent want of bias or interest or prejudice. The want of such characteristics may render testimony of little value. And the appearance of such characteristics, or the want of them, is not always transcribed upon the record of a case. If the story of a witness is seemingly credible and probable, and not inconsistent with other admitted or proven facts, the listener has much better opportunity to judge correctly of its truthfulness than a reader has. From the bare record we might be in grave doubt as to which of two conflicting statements is true. The jury, seeing the witnesses, might have no reasonable doubt. And it follows that in cases like the one under consideration, as in all others, the jury must be the final arbiters of questions of fact, when the evidence in support of their con-

> clusions, considered in connection with all the other evidence, is of such a character, such a quality and such weight, as to warrant them in believing it. We shall endeavor to apply these principles in our consideration of this case."

The record demonstrates the fact that the veracity of the complaining witness was under attack; that there appeared no *disinterested* witness to testify that the acts described by the girl could not, for physical reasons, be performed by the respondent. These matters, as well as the question involving the girl's testimony as to times and dates of the alleged acts, were all questions for a jury to answer by its verdict.

It is the province of the jury to resolve conflicting testimony and to determine where the truth lay. *State* vs. *Brown,* 142 Me. 106.

We have read with much care the printed record and are of the opinion that there is sufficient evidence upon which the jury could properly find a verdict of guilty in each case.

The presiding Justice's denial of the motions for new trials was not in error.

Appeals denied.

Judgment for the State in each case.

ROBERT J. WELCH, SR.
vs.
MICHAEL JORDAN
and
ROBERT J. WELCH, JR.
vs.
MICHAEL JORDAN

Cumberland. Opinion, November 14, 1963.

Res gestae. Admissibility. Evidence. Juries. Joint Enterprise. Instructions.

Although spontaneity of a remark is an important element of *res gestae*, that element alone does not govern the admissibility of the statement.

Whether a statement was admissible as part of the *res gestae* is a matter within the sound discretion of the presiding justice; the determination of which is conclusive upon appeal in the absence of a clear abuse of that discretion.

The lapse of time between the injury and proffered statement is a factor to be considered in *res gestae.*

Evidence of a child's previous conduct as to his experience with matches and fire was relevant to aid the jury in determining his capacity to appreciate the potential of a match and the existence of risk in playing with fire.

If knowledge, experience, and discretion of the child were relevant, then mother's advice, instruction, and warnings were appropriate for jury information; it may be inferred that such words used were consistent with accompanying physical discipline and failure of the jury to receive words of the lecturer is not regarded as sufficient error to warrant a rehearing.

Propriety of an instruction must be determined from charge as a whole and not by isolation of one sentence of an instruction.

Doctrine of joint enterprise whereby negligence of one member of the enterprise is imputable to others does not apply in actions between members of the joint enterprise and does not prevent one member of the enterprise from holding another liable for personal

injuries inflicted by the latter's negligence in prosecution of the enterprise.

ON APPEAL.

These companion cases involving personal injury are on appeal from judgment entered upon jury considered verdicts for the defendant. Appeal denied.

Grover G. Alexander, for Plaintiff.

Berman, Berman, Wernick and Flaherty, by *Edward J. Berman.*

Arthur Chapman, Jr., for Defendant.

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

MARDEN, J. On appeal from judgment entered upon jury considered verdicts for the defendant. These are companion cases involving personal injury to Robert J. Welch, Jr., and the father's claim for consequential damages.

Plaintiff, Robert J. Welch, Jr., referred to at trial as Robbie, a boy of five years two months of age and the defendant, Michael Jordan, a boy of six years seven months of age on August 10, 1961, the date of the incident, were playing together at the Jordan home in South Portland. In the course of play either a match was "struck" by the defendant or a small fire was built of grass and twigs on the dirt floor of a Jordan building destined to be a garage. While the children were there together plaintiff's shirt was ignited, resulting in the injury for which complaint is made. Plaintiff ascribed the cause of the ignition of his clothing to be the defendant's act of throwing away from himself a lighted match which had burned his finger. Defendant states that the shirt was ignited by plaintiff's leaning forward over the burning grass and twigs.

The eleven points of appeal are from three areas in the conduct of the trial.

Points No. 1 and No. 3 have to do with trial controversy over the admission of a statement alleged to have been made by the plaintiff while en route to the hospital declaring the cause of his burns. Objection was seasonably made and the statement was excluded. These points will be hereinafter identified as involving *res gestae.*

Points No. 2 and No. 4 to No. 10, inclusive, are aimed at trial controversies over testimony having to do with the plaintiff's previous conduct identified with the use of matches and the building of fires. Plaintiff contends that this testimony was irrelevant, immaterial and served only to prejudice the position of the plaintiff. Defendant counters that such inquiry was proper, and its admission was without error, as bearing upon the experience of the child plaintiff, as an element which necessarily must be considered in determining the standard of self care to which the child properly could be held.

Point No. 11 challenges a jury instruction involving the legal status of co-adventurers as to negligence between themselves.

RES GESTAE (Points No. 1 and No. 3)

The record discloses that upon Robbie's shirt catching fire, he "ran out from underneath" the garage, that someone tried to tear the shirt off, without success, that Mrs. Jordan, defendant's mother, applied the sprinkler hose and called Mrs. Welch, Robbie's mother, by telephone, the Welch home being in the vicinity; that Mrs. Welch received the telephone call from Mrs. Jordan at 11:15 a.m., as a result of which she telephoned her husband at his office in Portland, then ran to a neighbor, Mrs. Hendry, "two houses" distant, to discover there was no one at home, then got into an

available automobile, drove to the Jordan home "up the street" and upon arrival met her son with evidence of body burns, found two Mrs. Jordans, mother and grandmother, in an hysterical condition, found smoke issuing from beneath the garage which mother Jordan "hosed down", placed plaintiff in the car, attempted to telephone a doctor (from the Jordan home) without success, returned to the car to meet a neighbor, who lived "across the street", and who offered medication, got into the car and returned to her home, sought Mrs. Hendry again, without success, moved the child from the car to her home and as she was about to go to another neighbor, Mr. Welch, her husband and father of the child, arrived. Thereafter Mrs. Welch got another neighbor "next door" to watch another younger child at home, and Mr. & Mrs. Welch, with Robbie started for the Maine Medical Center in Portland. Mother Jordan "thinks" that 10-15 minutes elapsed between her phone call to Mrs. Welch and Mrs. Welch's arrival at the Jordan home. It was during this journey to the Maine Medical Center, at which they arrived at 12:00 noon, that Robbie is alleged to have said, spontaneously, "Michael threw a match on me". The admissibility of this statement, which the jury was instructed to disregard, is in issue under the *res gestae* rule.

We had occasion to last consider this rule in *Hersum, Admr.* v. *Kennebec Water District,* 151 Me. 256, 270, 117 A. (2nd) 334, where it was said:

> "The true test of the admissibility of such testimony is, that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony."

In *Hersum* also was quoted 20 Am. Jur., Evidence § 662 wherein it is pointed out that the *res gestae* exception to

the hearsay rule comprehends a startling or unusual situation sufficient to produce a spontaneous and instinctive reaction and statements made under such circumstances as to show lack of forethought or deliberate design in the formulation of their content.

While spontaneity of remark is an important element of *res gestae,* that element alone does not govern the admissibility of the statement. Such statement may be in narrative form and in answer to a question (as was true in the *Hersum* case) if it meets other requirements of admissibility. 20 Am. Jur., *supra* § 668. The present case meets the element of spontaneity. The controversial aspect of this point is whether the time of utterance of the statement was such that the statement could be held so "intimately interwoven with the principal fact * * * as to be regarded a part of the transaction itself." The clock time of the utterance is not fixed except as it was determined to be subsequent to the series of events narrated above and twelve noon.

Whether upon the facts before the trial court the statement was admissible as part of the *res gestae* was a matter within the sound discretion of the presiding justice, the determination of which is conclusive upon appeal in the absence of a clear abuse of that discretion. *Callahan* v. *Chicago, R. & Q. R. Co.,* 133 P. 687, 689 (Col. 2) (Mont. 1913) ; *Cummings* v. *Illinois Cent. R. Co.,* 269 S.W. (2nd) 111, 117 [9-11] (Mo. 1954) ; *Potter* v. *Baker* 124 N.E. (2nd) 140, 147 [7] (Ohio 1955) ; 20 Am. Jur., *supra* § 663. See also Annot. 53 A.L.R. (2nd) 1245, 1260, § 5. The lapse of time between the injury and the proffered statement is a factor to be considered, Annot., *supra* 1265 § 7, and we are reminded that in *Barnes* v. *Rumford* 96 Me. 315, 323, 52 A. 844 it was held that a statement "three or four minutes after the accident happened" was not admissible under the *res gestae* rule for proof of the facts stated.

The court's discretion in the exclusion of this statement was not abused, and points of appeal No. 1 and No. 3 are not sustained.

PREVIOUS CONDUCT (Points No. 2, No. 4-10, inclusive).

Eight points of appeal have to do with testimony dealing with plaintiff's conduct, and seeming propensity, as to play with matches and the kindling of at least one fire. The exploration of this feature by the defendant upon cross-examination, over objection, developed contention by plaintiff that such testimony was irrelevant, that it opened immaterial collateral issues and was highly prejudicial. Defendant urged that such evidence was proper and the presiding justice admitted it, ruling that the background, experience and intelligence of the child were elements relevant to a determination of the standard of self care by which the plaintiff should be measured.

A determination of whether or not this evidence was "collateral" will dispose of eight points of appeal attacking cross-examination of Welch, Sr., Mrs. Welch, Robbie, the defendant, and defendant's mother, as to previous experience with matches and fires; testimony of a neighbor, Mrs. Pieffer, to show alleged inconsistency in Mrs. Welch's testimony in that regard, and the exclusion of Mrs. Welch's testimony as to what she had said to Robbie in what was characterized as a lecture coincidental to discipline of Robbie for the building of one previous fire.

A representative case on the materiality of evidence offered to establish the capacity of a child to exercise due care is *Chickering* v. *Power Company,* 118 Me. 414, 419, 108 A. 460 wherein it is said that "(t)he age and intelligence of a child are important factors in determining whether due care has been used. * * * The capacity, the intelligence, the knowledge, the experience and discretion of the individual

child are always evidentiary circumstances." Evidence of the child's previous conduct as to his experience with matches and fires was relevant to aid the jury in determining his capacity to appreciate the potential of a match and the existence of risk in playing with fire. See 38 Am. Jur., Negligence §§ 204, 205. This evidence, not being of collateral nature, and being material, was admissible. *Chickering, supra,*—and a statement at trial by plaintiff's witness allegedly inconsistent with a pre-trial declaration was properly a subject of rebuttal. 58 Am. Jur., Witnesses § 767, *Kolasen* v. *The Great Northern Paper Company*, 115 Me. 367, 369, 98 A. 1029, *State* v. *Hume*, 146 Me. 129, 141, 78 A. (2nd) 496. Point of appeal No. 2 bearing upon the same point and supporting objection to similar cross-examination of Welch, Sr., raises no issue, for all of Mr. Welch's replies were negative. Points of appeal No. 7 and No. 8 are aimed at similar cross-examination of the defendant and his mother, but no objection was recorded to such interrogation and no issues are raised. These conclusions dispose of points of appeal No. 2, No. 4, No. 6, No. 7, No. 8, and No. 10.

> "Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." *State* v. *Albee*, 152 Me. 425, 429, 132 A. (2nd) 559.

Mrs. Welch had testified that, following the building of a fire in the Welch garage, she had spanked him, "gave him a very good lecture" and made him stay in his yard. What was said in the lecture was excluded upon objection and gives rise to point of appeal No. 5. If the knowledge, experience and discretion of the child were relevant, and it was, the mother's advice, instruction, and warning was appropriate for jury information, but it may be inferred properly that the words used were consistent with the accompanying physical discipline from which the child must

have understood that building fires was wrong, and the failure of the jury to receive the words of the lecture is not regarded as sufficient error in this case to warrant rehearing.

Point of appeal No. 9 stems from the testimony of a neighbor who related, over objection, that in December of 1959,—when plaintiff was three years and six months old,—based upon his age as of August 10, 1961, upon a visit to the Welch home at 11:00 in the morning she found Mrs. Welch in bed and Robbie holding some kitchen matches. Our court in *Grant, Admx.* v. *Bangor Railway & Electric Company,* 109 Me. 133, 138, 83 A. 121 held, by adopting *Cotter* v. *R. R. Co.,* 180 Mass. 145, that a child of three years and ten months of age was incapable of exercising self care as a matter of law,—a status identified as "non sui juris" in *Woods* v. *U. S.,* 197 F. Supp. 841, 843 (D. C. N. Y. 1961). It is anomalous to charge the experience of this child with an act which, if proved, occurred when the child was, as a matter of law, incapable of appreciating its significance. This testimony was irrelevant but because of similar evidence to the same point offered and admitted legitimately, we cannot hold that this portion of the testimony was prejudicial.

CO-ADVENTURERS, NEGLIGENCE INTER SE (Point No. 11)

Seasonably before charge to the jury, defendant requested the following instruction:

> "If the jury finds that these children were both actively participating in making a bonfire and both were equally conscious of the dangers incident thereto, then they were engaged in a common enterprise and as such whatever negligence, if any, existed on the part of the defendant would be likewise, negligence on the part of the plaintiff, Robert Welch, Jr. and neither the infant plaintiff,

> or his father, can recover. This is an application of the rule of contributory negligence."

The court in discussing the principles of contributory negligence with the jury gave this instruction:

> "As a further elaboration of this rule of contributory negligence, if you find that these children were both actively participating in making a bonfire and both were equally conscious of the danger incident thereto, they would thus be engaged in an enterprise by mutual agreement and as such, whatever negligence, if any, existed on the part of the defendant would likewise be negligence on the part of the plaintiff. It would be a common act, and neither could recover against the other."

At the close of the charge to the jury, opportunity was offered to counsel to register objections to the charge. No objection was entered by the plaintiff.

Point No. 11 of the appeal attacks this instruction.

Plaintiff urges that the instruction injects the doctrine of imputed negligence incident to a joint enterprise into this case erroneously. It is the law that "(t)he doctrine of joint enterprise whereby the negligence of one member of the enterprise is imputable to others, * * * does not apply in actions between members of the joint enterprise and does not, therefore, prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise." 38 Am. Jur., Negligence § 238. Also stated in Shearman and Redfield on Negligence Vol. IV, § 695, Restatement, Torts § 491 comment (a), 65 C. J. S., Negligence § 158, *Campbell* v. *Campbell,* 162 A. 379 (Vt. 1932), and *Smith* v. *Williams,* 178 P. (2nd) 710, 718 [7, 8] (Ore. 1947).

It is urged that the jury must have concluded that once a common enterprise or adventure between these children

was established, that because of the common enterprise, and not because of the applicability of the usual principles of contributory negligence, there could be no recovery. Such would not have been a valid conclusion, but the accuracy of the charge is not to be determined by the isolation of the last sentence of the instruction as given, but from the charge as a whole. *Dulac* v. *Bilodeau*, 151 Me. 164, 169, 116 A. (2nd) 605. From study of the entire charge, we do not find that the allegedly offending sentence, given without seasonable objection by plaintiff, has demonstrated "prejudice or error of such sufficiently harmful gravity as to render permissible or appropriate" the sustention of an appeal within the principles of *Thompson* v. *Franckus*, 150 Me. 196, 201, 107 A. (2nd) 485, *Johnson* v. *Parsons*, 153 Me. 103, 110, 135 A. (2nd) 273, and very recently reiterated in *Neal* v. *Bowes*, 159 Me. 162, 167, 189 A. (2nd) 566.

Appeal denied.

MARY GRIFFIN BARTON
vs.
WINIFRED M. BECK ESTATE

Cumberland. Opinion, November 20, 1963.

Confidential Relationship.
Wills. Testimony. Undue Influence. Testamentary Capacity.

Findings of fact of the justice of the Supreme Court of Probate stand unless clearly erroneous.

A confidential relationship does not create a presumption compelling a finding of undue influence in the absence of contrary evidence.

When the court is unable to separate the possibly good from the bad, the entire will must fail.

A person who was not a witness to a will is entitled to give his observations, but not his opinions.

Testamentary capacity is concerned with the "sound and disposing mind" and not with undue influence operating upon such a mind.

ON APPEAL.

On appeal from the disallowance of a will in the Supreme Court of Probate, the sole issue being whether there was evidence warranting the finding of undue influence and the disallowance of the will in its entirety. Appeal denied.

Richard M. Sanborn, for plaintiff.

Arthur A. Peabody, for defendant.

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

WILLIAMSON, C. J. This case is before us on appeal from the disallowance of the will of Winifred M. Beck in the Supreme Court of Probate. The will was allowed in the Probate Court without a contest. On appeal to the Court

below the contestant, an heir of the deceased, raised issues of testamentary capacity and undue influence.

First: At the outset before reaching the merits the proponent of the will contends that the presiding Justice in the Supreme Court of Probate found (a) lack of testamentary capacity, and (b) undue influence; that such findings are irreconcilable and inconsistent; and that without more the judgment should be vacated.

From our review of the opinion of the Justice, we are satisfied that he did not base his decision on a finding of lack of testamentary capacity. On the contrary, we conclude that undue influence was the ground for disallowance of the will.

Under the heading "testamentary capacity" the Justice said:

> "The testimony [of the contestant's witnesses] imposed upon the proponent the burden of satisfying the Court that the will was the free, untrammeled and intelligent expression of the wishes and intention of the testatrix. To the contrary, the explanation given in the testimony of the principal beneficiary and his attorney satisfies the Court that the will was not the untrammeled expression of the testatrix, but was the product of a weakened mind imposed upon by those in whom she had placed her trust."

Under the heading "undue influence" the Justice repeated the quoted statement with insignificant differences.

This is the language of *undue influence* not of testamentary capacity. "Was there proof of facts from which the presiding justice could properly infer and conclude that the mind of Christos Dilios at the time he executed the instrument now before us for interpretation was not free and untrammelled?" *Casco Bk. & Tr. Co. and Tomuschat, Applts.*, 156 Me. 508, 537, 167 A. (2nd) 571.

"Fraud and undue influence in this connection mean whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire." *Neill* v. *Brackett,* 234 Mass. 367, 126 N. E. 93, 94.

Testamentary capacity is concerned with the "sound and disposing mind" and not with undue influences operating upon such a mind. *Waning, Applt.,* 151 Me. 239, 250, 117 A. (2nd) 347; *Royal et al., Appellants,* 152 Me. 242, 245, 127 A. (2nd) 484. This of course does not deny the bearing of susceptibility to influence in determining the strength of the mind under consideration.

The principle stated by the Justice was not applicable to testamentary capacity but to undue influence. It is unnecessary, therefore, to consider questions of irreconcilability or inconsistency raised by the proponent. The factual premise on which the issue rests does not here exist.

Second: With the elimination of the issue of testamentary capacity, the decisive issue is whether there was evidence warranting the finding of undue influence and the disallowance of the will in its entirety.

The governing principles of law are well established. The findings of fact of the Justice in the Supreme Court of Probate stand unless clearly erroneous.

> "Unless the decrees of the presiding justice of the Supreme Court of Probate are clearly erroneous, there is no other course for us to follow except to overrule the exceptions and affirm the decrees.
>
> "This is the admonition given us by Rule 52 (a) M.R.C.P. which reads in part as follows:
>
> > 'Findings of fact shall not be set aside *unless clearly erroneous,* (emphasis supplied) and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

> "As pointed out in the very recent decision of *Harriman* v. *Spaulding,* 156 Me. 440, this rule now spells out in definite and positive language the applicable standard previously set forth in a long line of decisions of this court, and applies to findings of a single justice sitting in the Supreme Court of Probate." *Casco Bk. & Tr. Co. and Tomuschat, Applts., supra,* at 537.

"Undue influence" has been defined in language repeatedly approved by our Court, as follows:

> "By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was contrained to do that which was not his actual will but against it." *Rogers, Appellant,* 123 Me. 459, 461, 123 A. 634; *Casco Bk. & Tr. Co. and Tomuschat, Applts., supra,* at 513; *Thibault, Applt.* v. *Est. Fortin,* 152 Me. 59, 61, 122 A. (2nd) 545; *Royal et al., Appellants,* 152 Me. 242, 250, 127 A. (2nd) 484.

The burden of proof of establishing undue influence is upon the contestant. *Casco, supra.*

When there exists a confidential or trust relationship on the part of a beneficiary with the alleged testator, the law requires "the closest scrutiny and most careful examination of all of the surrounding circumstances. . . Such a condition might, as a matter of fact, cast upon the proponent the burden of explanation, and the absence of satisfactory explanation would be an additional fact of more or less weight." *O'Brien, Appellant,* 100 Me. 156, 169, 60 A. 880.

The risk of persuasion, that is to say the burden of proof, is not thereby changed. At most, the confidential

or trust relationship on the facts as they develop in the given case may permit, but may not require, a finding of undue influence. As the Court said in *O'Brien, supra,* at 169: "The issue is one of fact, to be determined by the tribunal to which it is submitted, and we do not approve of a statement to the effect that any particular evidence is sufficient to change the issue from one of fact to one of law." See also *Mooney* v. *McKenzie,* 324 Mass. 685, 88 N. E. (2nd) 546; *Reilly* v. *McAuliffe,* 331 Mass. 144, 117 N. E. (2nd) 811; 57 Am. Jur., *Wills* § 389.

> "*Extent of evidence to rebut presumption.* Inferences of undue influence which arise from the fact that testator and beneficiary were in relations of trust and confidence, are inferences of fact, and may be rebutted by any competent evidence. If the evidence makes out a strong case of undue influence, the proponent must meet such evidence with a high degree of proof." 3 Bowe-Parker: Page on Wills § 29.82.

See *In Re Hess's Will* (Minn.) 31 Am. St. Rep., 665, with annotation at p. 670.

The Justice could properly have found as follows:

Miss Winifred M. Beck, eighty years of age, executed the purported will at Freeport on March 24, 1960. For many years prior to 1959 she lived in Boston where she had been employed as a secretary until retirement. Occasionally she had made visits to Freeport where she was born.

In 1959 on the death of two cousins she returned to Freeport. Russell G. Jeannotte (the proponent), an undertaker in Freeport, and Miss Bertha E. Rideout, his attorney, brought her from Boston. She occupied a house formerly belonging to a deceased cousin and then owned by Mr. Jeannotte at a rental of $150 a month, an amount fixed by the rental she had been paying in Boston. Mr. Jeannotte arranged that Mrs. Langley who had served as

housekeeper for the deceased cousins should continue in a like capacity with Miss Beck. Within a few days he became Miss Beck's confidential advisor. He took over the management of her affairs. For example, he did her banking, kept financial records, and prepared checks for her signature. There was ample evidence to satisfy the Court that Mr. Jeannotte acted in a fiduciary capacity with relation to Miss Beck and her affairs.

From 1959 Miss Beck's mind was deteriorating. She was forgetful, easily confused, and did not see well. Her mind was seriously weakened.

In March 1960 Mr. Jeannotte informed his attorney, Miss Rideout, that Miss Beck wanted to see her. The attorney met with Miss Beck at her home on the housekeeper's "day out". A week later, again on the housekeeper's "day out," the purported will drafted by the attorney was executed. A former will obtained by the attorney was destroyed. There was no evidence introduced of its provisions.

Miss Beck owned securities of substantial but unstated value and also received an annuity of an unstated amount. In December 1960 Mr. Jeannotte received from Miss Beck securities including 93 shares of American Telephone & Telegraph Co. stock and 165 shares of General Motors Corporation common stock. The transfer of the securities was handled by Miss Rideout. His explanation that he had no knowledge of the gift prior to its receipt was not accepted by the Justice.

Mr. Jeannotte continued to act as Miss Beck's confidential advisor and trusted friend, plainly in a fiduciary capacity, until her death on September 11, 1961.

Under the purported will Mr. Jeannotte received the entire estate inventoried at about $13,000, apart from a bequest of $1,000 to Mrs. Philbrick, a lifelong friend. He was also named executor without bond.

Mr. Jeannotte in petitioning for probate of the will stated that there were no known heirs, although neither he nor Miss Rideout had made any inquiries to this end. He was acquainted with Mary G. Barton, the contestant, and at her request had notified her of Miss Beck's death. There was no evidence, however, that he in fact knew that she was the daughter of a cousin of the deceased and an heir.

It will serve no useful purpose to rehearse the facts in more detail. The plain fact is that the confidential and trusted advisor of this elderly spinster with weakened mind from the time of her return to the place of her birth until her death, under a will drawn by his attorney and not by an independent advisor, winds up with the entire estate, except the $1,000 bequest to an old time friend.

We are satisfied that the facts which the Justice was entitled to find with the inferences reasonably drawn therefrom warranted a judgment disallowing the will on the ground of undue influence. The proponent has failed to establish that the findings of fact were "clearly erroneous." The will fails.

In reaching the result, we do not agree wholly with the reasoning of the Justice. For example, we do not agree that a presumption of undue influence arose from the facts. In the *O'Brien* case, *supra,* we have noted that a confidential relationship does not under our law create a presumption compelling "a finding of the presumed fact (i.e. undue influence) in the absence of contrary evidence." *Hinds* v. *John Hancock Ins. Co.,* 155 Me. 349, 354, 155 A (2nd) 721. Here we have the confidential relationship as a fact from which with other facts the fact finder could properly infer undue influence.

It is apparent from the findings that the Justice applied the correct rule and did not rely on a presumption. He was affirmatively satisfied "that the will was not the un-

trammeled expression of the testatrix, but was the product of a weakened mind imposed upon by those in whom she had placed her trust."

The attack is directed against the entire will. There is obviously nothing in itself unusual, improper, or suspicious in a legacy of $1,000 to Mrs. Philbrook an old friend. We are unable, however, on this record to separate the possibly good from the bad, and so the entire will must fail. See *Mooney* v. *McKenzie, supra; Old Colony Trust Co.* v. *Bailey,* 202 Mass. 283, 88 N. E. 898; *Harrison's Appeal from Probate,* 48 Conn. 202.

The proponent contends that certain evidence was erroneously received and was prejudicial. From our study of the record we are satisfied that, even assuming error in admission, there was no prejudice therefrom to the proponent.

Whether the petition for probate of the will was properly before the Court can hardly have been prejudicial. Certainly questions relating to knowledge or lack of knowledge of the existence of heirs were relevant and were based in part at least upon the statement "no known heirs" in the petition itself signed by Mr. Jeannotte, the named executor. The failure to search for heirs, and to inquire, for example, of the contestant about the family and relatives of the deceased, were facts bearing upon the conduct of the proponent in his relationship with Miss Beck.

The death certificate was improperly admitted to establish by itself the cause of death as arteriosclerosis. This fact, however, was of little significance. There was ample evidence to establish Miss Beck's mental and physical condition at the time the will was drawn and executed.

The evidence of the housekeeper as to the soundness of Miss Beck's mind was erroneously admitted. The housekeeper was not a witness to the will. She was entitled to

give her observations, and did so, but not her opinion. *Mitchell, et al., Re: Will of Emma J. Loomis,* 133 Me. 81, 174 A. 38; *Martin, Appellant,* 133 Me. 422, 179 A. 655; *Heath et al., Applts.,* 146 Me. 229, 237, 79 A. (2nd) 810. In the light of her evidence the receipt of the opinion was not prejudicial. Likewise, there was no prejudicial error in the evidence of a beauty parlor operator about the competence of Miss Beck.

Lastly, it is urged that evidence of gifts of securities some months following the execution of the purported will had no bearing on the issue of undue influence. In our view, the evidence had some bearing in establishing the mental condition of this aged woman and the influences at work upon her from 1959 to her death. The full story of the influence of Mr. Jeannotte and of his attorney upon Miss Beck when she made the purported will, properly includes a chapter devoted to the receipt of such a substantial gift by the confidential and trusted advisor. The weight given to evidence before and after the execution of the purported will was for the determination of the Justice in the Supreme Court of Probate. The proponent gains nothing from his objections to the evidence.

The entry will be

Appeal denied.

STATE OF MAINE
vs.
ROBERT JACKMAN BEAN

Kennebec. Opinion, November 21, 1963.

Assessments. Laches. Legislative Intent. Public Laws.

If a defendant relies upon laches, that defense is available only where the action is brought to enforce an equitable claim or right.

It cannot be supposed that the legislature intended to annul existing assessments by the very act by which the same assessments were continued.

A state furnishing care and maintenance to the veteran in a state mental institution is not a "creditor" within the meaning of U. S. Code, Sec. 3101.

In the instant case P. L. 1961, ch. 304 was intended to be a revision and condensation of the statutes relating to the Department of Mental Health and Corrections by which the substance of the right of the State of Maine to reimbursement for care and support from the criminally insane in accordance with "means" or ability to pay remained undisturbed.

ON REPORT.

This case is on report for a determination of correct monetary payments. The issue is whether the enactment of P. L. 1961 ch. 304 terminated any liability of the defendant for board and care furnished prior thereto and whether counterclaim filed by defendant constitutes an action from which the sovereign is immune. Remanded for entry of judgment for the plaintiff for $6,279.12, upon its complaint and for $262 upon its counterclaim, with costs but without interest, and for the entry of judgment for plaintiff on defendant's counterclaim. So ordered.

Courtland D. Perry, Ass't. Atty. Gen., for plaintiff.

Thomas E. Needham and *John H. Needham,* for defendant.

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

WEBBER, J. On report. The defendant was committed to the Augusta State Hospital on September 21, 1949 by order of court after he had been found not guilty of the commission of a crime by reason of insanity. On April 25, 1950 a guardian was appointed for the defendant and in the following month the regular payment of benefits to the guardian was commenced by the Veterans' Administration of the United States. Until December 11, 1959 no bills for board and care of the defendant were submitted by the Hospital and no payments were made by the guardian. Under date of December 11, 1959 the Business Manager of the Hospital wrote to the guardian the following letter:

> "Dear Madam: ROBERT BEAN
>
> In accordance with an opinion written by the Attorney General's Department, November 6 of this year, this hospital may make charges for persons committed to the hospital as a result of prosecution for a criminal offense wherever means of payment exists. We will start charges as of December 1 for board and care at $14.00 per week."

On January 13, 1960 the guardian paid the amount due for the period from December 1, 1959 through January 31, 1960. On January 20, 1960 a bill was sent to the guardian for board and care from September 21, 1949 through December 31, 1959 in the amount of $6651.72. The fixed maximum rate changed on November 1, 1953 from $10.00 per week to $2.00 per day. As of April 26, 1962 the estate of the defendant in the hands of the guardian, all derived from veteran's benefits and the accrued income thereon, amounted to $13,291.70 and at all material times exceeded the charges alleged by plaintiff to have then accrued. On October 26, 1962 the plaintiff brought its complaint seeking

to recover the sum of $6589.72 to December 1, 1959. The defendant by answer denied liability and specifically asserted by way of defense

1. That the only assets of the defendant are funds derived from the Veterans' Administration claimed as exempt from the claims of creditors.

2. That the claim of the plaintiff for support furnished prior to December 1, 1959 was expressly waived by the letter of December 11, 1959.

3. That the plaintiff is estopped to press its claim by delay and laches.

Later by leave of court the defendant filed his counterclaim noting payments made by the guardian in 1962 of $1744 and claiming that these payments with the payment made in 1960 resulted in an overpayment of $558.

In response the plaintiff filed its answer and compulsory counterclaim by which the plaintiff asserted that after allowance for all proper credits, the defendant yet owed the sum of $262 for the period from December 1, 1959 through October 31, 1962. The parties have agreed that if the plaintiff can recover for board and care furnished prior to December 1, 1959 the correct amount therefor is $6279.12 to which might be added the agreed sum of $262 for the period through October 31, 1962. The plaintiff waives any claim to interest.

The statute providing for payment to the State for such board and care in the form as it existed prior to September 16, 1961 was on that date, the defendant contends, effectively repealed. It is agreed that if this be so and as a result the defendant has overpaid, the amount of such overpayment is $560 to which may be added interest.

To the issues specifically raised by the defendant by answer as above noted must be added two others: (a) Whether

or not the effect of the enactment of P. L. 1961, Ch. 304 was to terminate any liability of the defendant for board and care furnished prior thereto; and (b) Whether or not the counterclaim filed by the defendant constitutes an action from which the sovereign is immune.

Issue I

Has the State waived its claim to reimbursement or is it estopped by delay and laches to prosecute its claim? The claim is in the nature of an account for goods and services rendered. The defendant frankly concedes that the Statute of Limitations could not be successfully raised in defense in this case against the sovereign. If the defendant relies upon laches, that defense is available only where the action is brought to enforce an equitable claim or right. In the instant case the claim is not of that nature. Even if that were not so, the defendant would still be precluded by the fact that the State of Maine is in the exercise of its police power in institutionalizing the criminally insane and furnishing them with board and care. While thus engaged in a governmental function, the sovereign is not vulnerable to a charge of laches. In *State* v. *Josefsberg,* (1957) 275 Wis. 142, 81 N. W. (2nd) 735, 741, the court was satisfied that the great weight of authority supports this view. See cases noted under 19 Am. Jur. 342, Sec. 495 and 30 C. J. S. 526, Sec. 114.

If the defendant relies upon the doctrine of equitable estoppel, the facts disclose no change of position on the part of the defendant. "Furthermore, the facts relied on to establish an equitable estoppel must be such as to have caused the party asserting them to have changed his position in reliance thereon and to his injury." *Town of Milo* v. *Water Company,* 131 Me. 372, 379. Moreover the defense of equitable estoppel is not available against the State

when it is engaged in the exercise of sovereign powers. See *Town of Milo* v. *Water Company, supra.*

We are satisfied that the Business Manager was without authority to waive any portion of the claim in the discharge of his public duty and if the letter of December 11, 1959 may fairly be construed as an attempted waiver of any sums legally collectible, it may not be given that effect.

Issue II

Title 38, United States Code, Sec. 3101 provides in part: "Payments of benefits due or to become due under any law administered by the Veterans' Administration * * * shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary, * * *."

In a well reasoned opinion the Wisconsin court determined that a state furnishing care and maintenance to the veteran in a state mental institution is not a "creditor" within the meaning of Sec. 3101. The court noted that in *Lawrence* v. *Shaw* (1937), 300 U. S. 245, 250, 57 S. Ct. 443, 445 the Supreme Court had declared that such payments are intended primarily for the maintenance and support of the veteran. The Wisconsin court was satisfied that "in view of the long history of state court decisions permitting reimbursement by states in situations like that in this case," the failure of Congress to make any substantial change in the law indicated tacit approval of the construction placed thereon by such decisions. *In Re Bemowski's Guardianship,* (1958) 3 Wis. (2nd) 133, 88 N. W. (2nd) 22. Reaching a like result upon the same reasoning *Savoid* v. *District of Columbia,* (1961) 288 F. (2nd) 851, 110 U. S. App. D. C. 39; *Auditor General* v. *Olezniczak,* (1942) 302 Mich. 336, 4 N. W. (2nd) 679, 681.

It becomes unnecessary, therefore, to consider whether or not upon the record in this case the exemption would not be lost because the funds have been invested to produce income. See *Hale* v. *Gravallese,* (2 cases) (1959) 162 N. E. (2nd) (Mass.) 817 and (1960) 166 N. E. (2nd) (Mass.) 557.

Issue III

With respect to the care and maintenance of the criminally insane lodged at a state hospital, R. S. Ch. 27, Sec. 121 provided: "The person so committed shall be there supported at his own expense, if he has sufficient means; otherwise, at the expense of the state." This section was expressly repealed by P. L. 1961, Ch. 304, Sec. 17. With respect to insane patients generally, R. S. Ch. 27, Sec. 139 provided: "The state may recover from the insane, if able, or from persons legally liable for his support, the reasonable expenses of his support in either insane hospital." This section was expressly repealed by P. L. 1961, Ch. 304, Sec. 26. By P. L. 1961, Ch. 304, Secs. 4 and 5, the Legislature simultaneously enacted amendments which in the case of Sec. 4 thereof charged the Department of Mental Health and Corrections with the duty of determining the ability of the patient to pay for his support and of establishing rates and fees therefor, and in the case of Sec. 5 provided: "Such fees charged shall be a debt of the patient or any person legally liable for his support, * * *."

The defendant vigorously contends that the repeal effectively destroyed the prior existing right to reimbursement by the plaintiff, no action therefor then having been instituted. Our attention is directed to R. S. Ch. 10, Sec. 21 which provides in part: "Actions pending at the time of the * * * repeal of an act are not affected thereby." In effect defendant urges that this language is exclusive and unless an action is pending at the time of repeal, all claims

which arose under the repealed statute are destroyed. No such effect has heretofore been given to the statute. Although the same language was in effect in 1878 (R. S. 1871, Ch. 1, Sec. 3) the court in *Maine* v. *Waterville Savings Bank,* 68 Me. 515, determined that an assessment due the state under a statute subsequently repealed before any action was instituted for collection was recoverable. The court deemed that the right of the state to collect the debt owed to it was "vested" and unaffected by the repeal. The court said at page 519: "The act of 1877 (which contained the repealing clause) is a consolidation of previous laws relating to savings banks. Such a law, being prospective in its operation, cannot affect acquired rights. It cannot be imagined that it was the intention of the legislature to surrender uncollected dues. * * * It matters not whether it be a revision of statutes or a condensation of statutes on a particular subject. As a question of intention, it cannot be supposed that the legislature intended to annul existing assessments by the very act by which the same assessments were continued." So in the instant case P. L. 1961, Ch. 304 was intended to be a revision and condensation of the statutes relating to the Department of Mental Health and Corrections by which the substance of the right of the State of Maine to reimbursement for care and support from the criminally insane in accordance with "means" or "ability" to pay remained undisturbed. We are satisfied that it was the intention of the Legislature that there should be no moment when the right to such reimbursement did not exist. We think the governing principle was well stated in 50 Am. Jur. 559, Sec. 555:

> "It is a general rule of law that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed act which are thus re-enacted continue in force without interruption, and all rights

> and liabilities incurred thereunder are preserved and may be enforced. Similarly, the rule of construction applicable to acts which revise and consolidate other acts is, that when the revised and consolidated act re-enacts in the same or substantially the same terms the provisions of the act or acts so revised and consolidated, the revision and consolidation shall be taken to be a continuation of the former act or acts, although the former act or acts may be expressly repealed by the revised and consolidated act; and all rights and liabilities under the former act or acts are preserved and may be enforced."

We are satisfied that, the right of the State to reimbursement having accrued and vested prior to the repeal, revision and condensation, and the substance of the right having been preserved by the provisions simultaneously enacted, the State is not precluded from recovery by the effect of the repeal.

We conclude that the plaintiff is entitled to recover for the period commencing with the appointment of the guardian the stipulated sums due upon its complaint and upon its compulsory counterclaim. It therefore becomes unnecessary to consider the defense raised to the defendant's counterclaim, there being no factual overpayment.

Remanded for entry of judgment for the plaintiff for $6279.12 upon its complaint and for $262 upon its counterclaim, with costs but without interest, and for the entry of judgment for plaintiff on defendant's counterclaim. So ordered.

NEIL L. PARSONS
vs.
RICHARD L. CHASSE, ET AL.

Lincoln. Opinion, November 21, 1963.

Licenses. *Mandamus.*

If plaintiff doctor's conduct in *turning in* his license eventuated in a perfected surrender, resignation or revocation and cancellation of his professional certificate and license, the Board of Registration in Medicine had no jurisdiction for plaintiff's reinstatement; mandamus would not be accessible for the plaintiff.

If event effected a suspension of plaintiff's license, the Board of Registration in Medicine had no jurisdiction to terminate the suspension; nor did the hearing officers have the jurisdiction to lift a suspension.

The omission of plaintiff to secure a declaratory ruling, precludes attempt to seek mandamus as to the failure of the Board of Registration in Medicine to have pronounced innocuous the turning in of the certificate.

ON APPEAL.

Plaintiff appeals the denial of his petition for a hearing for reinstatement as a licensed physician and surgeon. Appeal sustained. Case remanded to the Superior Court for appropriate consideration in accordance with this opinion.

Richard B. Sanborn, for plaintiff.

Leon V. Walker, Jr., Ass't. Atty. Gen., for defendant.

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

SULLIVAN, J. Plaintiff, a physician and surgeon, filed a complaint against the members of the Board of Registration in Medicine. *R. S. c. 66, as amended.* Defendants re-

sponded by filing a motion, asserting a lack of jurisdiction in the Superior Court to review a decision of the Board, which had denied the Plaintiff's petition for reinstatement as a licensed physician and surgeon. *Maine Rules of Civil Procedure, Rule 12(b), (1),* 155 Me. 500. The parties at the hearing upon the motion sought from the Court the subjection of the complaint to the more comprehensive test, whether Plaintiff had stated any claim upon which relief could be granted. *M. R. C. P., Rule 12 (b) (6).* The Justice of the trial court granted Defendants' motion and dismissed Plaintiff's complaint with prejudice.

The complaint is extensive almost to prolixity and in certain important details is neither helpfully informative nor expositive. Therefore in preference to the hazarding of a condensed statement we elect to quote verbatim here the body of the complaint.

> "1. The Petitioner-Plaintiff graduated from Tufts Medical School in 1922, was licensed to practice as a physician and surgeon in Maine in 1924, and carried on a very active and respected medical practice in Damariscotta and its region for about 33 years.
>
> "2. On or about the year 1955 a small group of local doctors complained against him before said Board seeking revocation of his license.
>
> "3. On July 12, 1955 the Board, acting upon the recommendation of the Attorney General's department, voted that the matters were not grounds for a revocation of license and that no hearing should be held.
>
> "4. On July 10, 1956 following further pressure from said small group the Board voted that said doctors be informed that the Petitioner had done nothing to warrant revocation.
>
> "5. On March 14, 1957 after further complaint on the same matters from the same group the

Board tabled the complaint in consideration of the Petitioner voluntarily leaving his practice and the state, which he did.

"6. On May 27, 1957 the Board stated 'it has no charges of any kind pending against him at this time,' that 'he is a licensed practitioner in this State,' and 'is a bright man, well trained, intelligent and very personable.'

"7. The Petitioner in 1957-1959 attempted to practice in Massachusetts, but was denied access to use of hospital facilities because of action taken by the above local group of doctors.

"8. Following further pressure to the Board by said group, on July 8, 1958 the Board stated to them that it 'could not revoke his license at the present time inasmuch as we have insufficient evidence under our Law of Revocation.'

"9. On March 10, 1959 after the renewal of pressure by said doctors the Petitioner, discouraged and under duress, turned in his certificate to the Board, no findings being made.

"10. As a result said Petitioner has not practiced his profession in Maine for approximately 5 years and has sustained a penalty in the loss of income of about $100,000.

"11. In June, 1961 said Petitioner contacted the Secretary of the Board with regard to reinstatement and was informed that he had paid sufficient penalty and that if he could secure the consent of the Damariscotta doctors, his certificate would be reinstated.

"12. The Damariscotta doctors refused to give their consent upon being requested to do so.

"13. Over 900 residents of the Damariscotta region have filed petitions with the Board requesting that the Petitioner be permitted to practice, they stating they have complete confidence in his ability as a practicing physician and surgeon.

"14. On December 16, 1960 when said Petitioner filed a petition with the Board for a hearing and reinstatement, the Board without giving the Petitioner any hearing tabled the same for several meetings and then after a year of delay denied it without hearing or without giving any reason on January 10, 1962.

"15. On June 12, 1962 when again said Petitioner filed a petition with the Board for reinstatement, the matter was delayed until November 13, 1962, at which time the Board refused to permit the Petitioner to present any witnesses to testify on his behalf, informed him that the Damariscotta doctors still objected to his reinstatement and then on said date denied his petition without giving any reason therefor.

"Said Petitioner is entitled to practice his profession in the State of Maine and actions of the Board in denying his right to practice and in refusing reinstatement are null and void, unreasonable, arbitrary, an abuse of discretion, and contrary to the statute and to due process, for the following reasons:

"1. The alleged charges against the Petitioner do not constitute grounds for suspension or revocation under Ch. 66, Sec. 6 of the Revised Statutes.

"2. Said Petitioner was never served with proper specific charges thereof.

"3. The Board acknowledged and well knew it had no valid charges of any kind pending against him, yet improperly brought pressure to bear to force an alleged 'resignation.'

"4. The alleged 'resignation' on March 10, 1959 was invalid and incomplete as even were it to constitute revocation of the certificate it did not constitute cancellation of the registration, as required by Ch. 66, Sec. 6.

"5. The action of the Board on March 10, 1959 was invalid as the Board's records indicate

the meeting was called without proper notice and the 2/3 vote of the entire Board required by said statute was not obtained.

"6. The alleged 'resignation' was invalid as said statute provides for suspension and revocation, but not for resignation.

"7. Said actions of the Board are invalid as it never enacted proper rules and regulations for the enforcement of its authority and the performance of its duties as required by Ch. 66, Sec. 2, nor followed the same.

"8. Said actions of the Board are invalid as it has always failed and refused to file with the office of the Secretary of State a record of the names and residences of all persons registered by it, as required by Ch. 66, Sec. 5, and there is no valid registration of doctors in the State, for the Petitioner or for anyone, the Petitioner being registered as much as any doctor.

"9. Said actions of the Board are invalid as it has always failed and refused to file annually with the Governor a report containing a full and complete account of all its official acts during the preceding year, as required by Ch. 66, Sec. 5, and its alleged official acts are invalid.

"10. Even if the tabling of the complaint against the Petitioner in 1957 and the 'resignation' in 1959 were valid and even if they constituted a denial of his right to practice his profession, which is herein denied, the loss of the right to practice from then to date constitutes an unjust and unfair penalty and punishment the severity of which is far heavier and is not commensurate with the alleged charges, considering the Petitioner's tremendous financial loss, his wife and five children, and his present age and life expectancy.

"11. The consideration of the Board in leaving the Petitioner's right to practice dependent upon his securing assent of his competitors and particu-

larly a group who have been antagonistic to him for years renders the action of the Board null and void and prevents an impartial decision.

"12. The action of the Board in his 1960 petition for reinstatement in delaying consideration of the same, refusing a hearing, and denying the same without cause or giving reasons is arbitrary and contrary to due process.

"13. The action of the Board on his 1962 petition for reinstatement in refusing him the right to present his own witnesses, in considering improper evidence, and in denying the same without cause or giving reasons is arbitrary and contrary to due process.

"14. The actions of the Board are invalid and arbitrary for various and sundry other reasons.

"WHEREFORE, your Petitioner prays that,

"1. This Court enter its decree that the Petitioner is authorized to practice as a licensed physician and surgeon, both hithertofore and after the date hereof.

"2. That a writ issue from this Court to said Richard L. Chasse, George E. Sullivan, Stephen A. Cobb, J. Paul Nadeau, Martyn A. Vickers and George L. Maltby, commanding them to appear before this Court and show cause, if any they have, why the Petitioner should not have a certificate and registration as a physician and surgeon.

"3. That he may have such other relief as may be reasonable and proper."

The issues trajected here are commemorative of that unmourned era of the demurrer and joinder. Under our sagacious civil rules more definite statement, discovery devices, clarifying amendment, accommodative rapprochement and pretrial exchange probably would have obviated the expenditure of the pains and time here demanded for the determination of a merely liminal problem as to wheth-

er the encompassing complaint in this case, suggestive of a medley of problems and alternatives discloses fairly a claim supportive of litigation.

Certain rules of procedure are regulative for the performance of our abstruse and confused task.

> "- - - - They (the civil rules) shall be construed to secure the just, speedy and inexpensive determination of every action." *Rule 1 M. R. C. P.*, 155 Me. 479.

> "- - - - All pleadings shall be so construed as to do substantial justice." *Rule 8 (f), M. R. C. P.*, 155 Me. 496.

Maine Civil Practice, Field and McKusick, P. P. 167, 168, comments with respect to *Rule 12 (b), M. R. C. P.*, 155 Me. 500, in part, as follows:

> "- - - - All well-pleaded material allegations are taken as admitted for the purposes of the motion, but not conclusions of law from the facts alleged.
>
> "- - - - On a motion to dismiss, pleadings are construed in favor of the pleader. It is not necessary, as in the past, to state all the facts necessary to constitute a good cause of action - - - - The complaint must 'contain - - - a statement - - - *showing* that the pleader is entitled to relief.' This can scarcely mean that dismissal will result only if there is an affirmative showing in his complaint that he cannot recover. What is intended, - - - is that if fair notice of the claim is given, the complaint is not fatally defective because of the failure to allege in non-conclusory form every fact essential to recovery. The 'showing' that the pleader is entitled to relief must be made, but it may be in general terms which would not have survived a demurrer under prior practice. The objective is to avoid wasting time fighting over mere deficiencies of statement, easily corrected in

> any event by amendment, which do not go to the real merits of the claim - - - -"
>
> See, *Blackstone* v. *Rollins,* 157 Me. 85, 96.

The defendants by their motion for dismissal of the complaint expressly challenge only the jurisdiction of the Superior Court to review the decision of the Board. But it is incumbent upon this Court to ascertain also if the plaintiff by a fair construction of his complaint has propounded any provable claim susceptible of any relief sought.

By his complaint in the case at bar the plaintiff does provide elements which may be abstracted from the textual matter to achieve a statement of a claim upon which relief could be granted.

Prayer 1 of the plaintiff's petition inferentially requests a declaratory judgment, *R. S. c. 107, § 39,* to have determined *"his rights, status or other legal relations"* as *"affected by a statute,"* to wit, *R. S. c. 20-A,* as amended, *C. 66,* as amended. Plaintiff petitions to have his controverted rights, status and legal relations as a licensed physician authoritatively adjudicated.

Plaintiff alleges that he *"under duress turned in his certificate to the Board, no findings being made."* Potentially these allegations are of multiple import without the benefit of fixations from judicious discovery, pretrial or other explication. These averments must be *"construed in favor of the pleader"* and *taken as admitted for the purposes of the motion." Maine Civil Practice,* P. P. 167, 168, *supra.*

For all we are enabled to divine here, *"duress"* as employed could impute common-law duress, *Campbell* v. *Chabot,* 115 Me. 247, 249, or *"duress"* of the less drastic sort recognized in the so-called modern equitable doctrine which this court has had no formal and recent occasion to evaluate or reconsider and as to which we indicate no attitude here.

(Cf. *Fairbanks* v. *Snow,* 145 Mass. 153, 154, 13 N. E. 596, *Restatement of the Law of Contracts,* §§ 492, 493 and comment; *17 C. J. S., Contracts,* § 173 et seq.)

The plaintiff narrates that complaints against him were lodged with the Board by some doctors who exerted *"pressure"* against the plaintiff. No details are supplied as to the gravamen of the complaints or as to the nature of or mode of application of the *"pressure."*

For want of amplification the affirmation that the plaintiff *"turned in"* his physician's certificate and that the Board indulged in no relative consequential or responsive findings neither necessitates nor sufficiently warrants a conclusion that the plaintiff surrendered or resigned his license to practice his profession. We cannot surmise but for the restricted scope of this decision we will resolve the purport of his diction in favor of the plaintiff and concede that the actuality of a surrender or resignation is issuable. Whether the integrants to constitute surrender or resignation in law were concomitant and availing or were wanting in the action when the Doctor *"turned in"* his certificate will require resolution by hearing, considered finding and reduction to declaratory judgment by the trial court.

The clausal appendage, *"no findings being made"* could debatably be deemed to express either that the Board remained passive and did not act or acted but refrained from entering any memorandum or record of its action. Plaintiff does not assert that no formal or informal *vote* was taken by the Board. Not *"findings"* but rather *acceptance* would have been a more apt designation if the plaintiff sought to imply that on March 10, 1959 he under compulsion was surrendering or resigning or temporarily relinquishing his license in suspension. No finding *of fact* need be occasioned or impelled by a voluntarily tendered resignation, surrender or suspension. The plaintiff's language does

not impart a negation that an *order* or *entry* was made by the Board cancelling plaintiff's certificate of registration.

It could be that the plaintiff pursuant to his allegation that he *"turned in his certificate to the Board, no findings being made"* stands prepared to establish by satisfactory proof that his leaving of his certificate with the Board was legally inoperative and inefficacious to effect suspension, surrender or resignation and consequentially that he the plaintiff continues to enjoy the status of a practicing physician with a right to possession of his certificate.

Upon hearing were the reality proved to be that the plaintiff in 1959 of his own volition had *"turned in"* his certificate to the Board in such a manner and under such circumstances that he thereby effectually induced a voluntary suspension of his certificate and registration and that the Board responsively and in compliance had accepted plaintiff's overtures although the Board entered no memorial of the action there could justifiably ensue a court finding of suspension rather than of cancellation of the plaintiff's certificate and registration.

Available evidence might decide the trial court that the incident of March 10, 1959 resulted in a consummated voluntary resignation or surrender of plaintiff's license.

If in conformity with the evidence and law the trial court should permissively conclude that the return of the plaintiff's certificate to the Board in 1959 is voidable because of proximately operative and nullifying coercion or duress exerted upon the plaintiff and if such court should compel avoidance, a declaratory judgment could be rendered confirming plaintiff's right to practice medicine.

Plaintiff by his complaint has supplied fair notice of a claim, justiciable at least, that his conduct on March 10, 1959 was without prejudice to his right to resume the practice of medicine.

The complaint states that by his petition dated June 12, 1962 the plaintiff sought reinstatement. If plaintiff's conduct in *"turning in"* his license on March 10, 1959 eventuated in a perfected surrender, resignation or revocation and cancellation of his professional certificate and license the Board in 1962 had no jurisdiction for plaintiff's reinstatement. R. S. c. 66, § 6, as amended, P. L. 1961, c. 394, § 22; Rule 80 B (a), M. R. C. P., 155 Me. 592. Mandamus would not be accessible for the plaintiff. *Burkett* v. *Secretary of State,* 137 Me. 42, 47.

If the event of March 10, 1959 effected a suspension of plaintiff's license the Board after September 16, 1961 had no jurisdiction to terminate the suspension. R. S. c. 66, § 6, as amended by P. L. 1961, c. 394, § 22; P. L. 1961, c. 394, § 1. Nor did the hearing officer have the jurisdiction to lift a suspension. R. S. c. 20-A, § 12, P. L. 1961, c. 394, § 1. Mandamus would not lie. *Burkett* v. *Secretary of State, supra.*

If the affair of March 10, 1959 had been of no true significance with respect to plaintiff's license there was no occasion for reinstatement in 1962. If such were the situation plaintiff might have requested of the Board the restoration to him of his certificate or a duplicate thereof and for refusal or neglect have invoked mandamus. *Steves* v. *Robie,* 139 Me. 359, 362; *Baker* v. *Johnson,* 41 Me. 15, 20.

Plaintiff's petition of June 12, 1962 may be logically and legitimately considered an abandonment of his prior petition of December 16, 1960. The petition of 1962 requested a "reinstatement." Plaintiff did not request the Board to make a "declaratory ruling" in respect to his turning in of his license certificate in 1959 although plaintiff could have sought such a ruling. R. S. c. 20-A, § 6, P. L. 1961, c. 394, § 1. This omission of the plaintiff to secure a declaratory ruling now precludes him from successfully seeking man-

damus as to the failure of the Board to have pronounced innocuous the turning in of the certificate in 1959.

> "The writ of *mandamus* is not a writ grantable of right, but by prerogative, and amongst other things it is the absence of a specific legal remedy which gives the court jurisdiction to dispense it. It cannot be granted to give an easier or more expeditious remedy, but only where there is no other remedy, being both legal and specific. Tapping's Mandamus, 18." *Baker* v. *Johnson,* 41 Me. 15, 20.

Suffice it to say, for the purposes of this opinion, that we are not persuaded that the plaintiff could not under fitting circumstances have voluntarily suspended or resigned his certificate or that the failure of the Board to enact rules or regulations or to file records, duplicates or reports with State officials, R. S. c. 66, §§ 2, 5, nullified the Board's doings.

Plaintiff's allegations are sufficient to negate that any lawful hearing was accorded him by the Board in 1962. It is impossible for us to know from the state of the record in this case whether a hearing for reinstatement in 1962 would have been purposeful, unnecessary, or beyond the jurisdiction of the Board.

We conclude that the Plaintiff in general terms has shown by his pleading that he is entitled to a hearing and a declaration of his rights and status, if any he may be found to have, in accordance with the provisions of the *Uniform Declaratory Judgments Act,* R. S. c. 107, § 38, ff.

The mandate must be: Appeal sustained; Case remanded to the Superior Court for appropriate consideration in accordance with this opinion.

STATE OF MAINE
vs.
DOUGLASS BIDDISON

Kennebec. Opinion, November 29, 1963.

Indecent Liberties. *Witnesses.*

A complaining witness's promiscuous falsification, does not disqualify or incapacitate him as a witness.

It does not follow that because a witness has a reputation for lying outside, that he will violate the sanctity of an oath in Court.

Unless respondent told untruths intrinsically related to offense with which he is charged, extended scrutiny by Respondent's counsel as to complainant's other extrinsic prevarications are unserviceable and objectionable.

ON EXCEPTIONS.

Respondent takes exceptions to rulings of presiding Justice, who at two junctures during trial denied to Respondent's counsel leave to protract the cross-examination of the complaining State witness concerning the latter's credibility and mendacity and who upon the close of all the evidence denied Respondent's motion for a directed verdict of not guilty. Exceptions overruled; judgment for the State.

Jon Lund, County Atty.,
Foahd Saliem, Ass't. County Atty., for plaintiff.

Casper Tevanian, for defendant.

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

SULLIVAN, J. Respondent had been accused by indictment of having taken indecent liberties with a male child of the age of 13 years. Respondent was tried by a jury

whose verdict was guilty. Respondent here prosecutes exceptions to rulings by the presiding Justice who at two junctures during trial denied to Respondent's counsel leave to protract the cross-examination of the complaining State witness concerning the latter's credibility and mendacity and who upon the close of all the evidence denied Respondent's motion for a directed verdict of not guilty.

The statutory text is pertinently as follows:

> "Whoever, being 21 years or more of age, takes any indecent liberty or liberties - - - with the sexual parts or organs of any other person, male or female, under the age of 16 years, either with or without the consent of such male or female person, - - - shall, upon conviction thereof, be punished - - - -" R. S. c. 134, § 6, P. L. 1961, c. 60.

EXCEPTION 1.

In support of the criminal charge the alleged youthful victim had under direct examination imputed to the Respondent acts committed upon the witness by the Respondent in violation of statute quoted above. Thereafter during cross-examination the following colloquy ensued:

Mr. Tevanian (for Respondent)

"Q. David, do you go to school now?

A. No.

Q. Why?

A. Because I skipped a day the week before last and I got expelled.

Q. Did you have any difficulty with the authorities - - -

MR. SALIEM: I object, your Honor.

THE COURT: Of course, that question has been answered. Now, don't answer the next question until the County Attorney has a chance to object, if he wishes.

MR. SALIEM: I wish to object, your Honor. I know this is cross-examination and Brother Tevanian should be allowed certain leeway, but I don't see the relevancy of this line of questioning.

MR. TEVANIAN: If your Honor please, I am sure that this matter boils down to a question of credibility, and I think that I have a right to go into the credibility of the witness as to his background, present circumstances, and so forth.

THE COURT: I would say you may proceed to examine him with relation to anything connected with his meeting Mr. Biddison, or anything along that line. On collateral matters, I would want to know what they were before I could say that they could be gone into.

MR. TEVANIAN: May we have a conference, your Honor?

(Conference at the bench.)

THE COURT: The jury may be excused. This is in the nature of an offer of proof, so you may go ahead.

(Jury retires to jury room.)

MR. TEVANIAN: I would like to ask some other questions to lay the foundation for the offer of proof.

THE COURT: Go ahead.

MR. TEVANIAN: David, isn't it a fact that you are not attending school now and someone is working with you to try and rehabilitate you?

THE WITNESS: My father is going to take me down there and show me carpenter work, yes.

Q. Where is your father?

A. He is down in Connecticut right now.

Q. And did you run away from your father's home about a month ago?

A. No.

Q. Or two months ago?

A. No.

Q. Didn't your mother have to go down to Connecticut to bring you back?

A. No.

Q. Now, isn't it a fact, David, that you were expelled from school for lying repeatedly and continuously?

A. That isn't what he told me.

Q. That isn't what who told you?

A. Mr. Kinney, the Principal of Schools.

Q. And it is your position here that the only time that you - - -

MR. SALIEM: May it please the Court, I object to the way that question is phrased, 'it is your position here.' This boy is not the Respondent.

MR. TEVANIAN: Well, I will withdraw the question. You say that the only reason you were expelled from school is because you played hooky on one day?

THE WITNESS: That is all I can see that I did.

Q. That is all you can see. Now, you told us on direct examination that you lied some in the past?

A. I did, yes.

Q. Did you lie often?

A. Not continuously, no.

Q. Not continuously?

A. No.

Q. Now, who would you lie to generally?

A. I have lied to my mother at times.

MR. TEVANIAN: If your Honor, please, I submit to the Court that this is all relevant evidence and proper cross-examination to go before the jury. It is my position that if allowed to cross-examine in this line, which you have overruled, that I could show that this boy is not credible of belief. I don't believe I am going into specific acts of lying, but I think the jury has a right to know.

THE COURT: Well, I think we are getting into collateral matters. In my nine years on the bench I have never heard of an attorney asking a witness on a similar criminal case if they had lied on prior occasions. The Court will exclude it, and your objections and exceptions may be noted."

The questions and the offer of proof by Respondent's counsel manifest that the interrogator was intent upon the enterprise of discrediting the witness by evincing directly that the witness had been expelled from school, had been a runaway and was addicted to habitual falsehood. The objective of Respondent's counsel was the testimonial impeachment of the witness. The test is whether the questioning constituted cross-examination or an exercise in eliciting evidence to impugn and contradict the witness upon collateral matters.

The complaining witness independently of expulsion from school or of flight from home might or might not have been violated by the Respondent as the indictment charges.

Respondent's counsel inquired of the complaining witness concerning the latter's past conduct with respect to the telling of untruths. Counsel's motive was obviously to expose any chronic moral irresponsibility in the witness as to veracity.

In treating of the testimonial qualification or incapacity of a witness concededly prone to lying Professor Wigmore states a sound general principle.

> "*General Principle.* A quality which affects only the element of Communication is *Moral Depravity.* One who is wholly capable of correct Observation and of accurate Recollection may still be so lacking in the sense of moral responsibility as to be likely to tell his story with entire indifference as to its correspondence with the facts observed and recollected by him. The question is whether any person should upon such grounds be deemed to lack the fundamental capacity of a witness.
>
> "There are two objections to any attempt to establish such an incapacity. The first is that in rational experience no class of persons can safely be asserted to be so thoroughly lacking in the sense of moral responsibility or so callous in the ordinary motives of veracity as not to tell the truth (as they see it) in a large or the larger proportion of instances; or, in more accurate analysis, no such defect, if it exists, can be so well ascertainable as to justify us in predicating it for the purpose of exclusion. The second reason is that, even if such a defect existed and were ascertainable, its operation is so uncertain and elusive that any general rule of exclusion would be as likely in a given instance to exclude the truth as to exclude falsities. It is therefore not a proper foundation for a rule of exclusion."
>
> *Wigmore on Evidence,* 3rd ed., Vol. 2, § 515, P. 602.

The complaining witness's promiscuous falsification, if such there had been, did not disqualify or incapacitate him as a witness. And unless he had told untruths intrinsically related to the offense with which the Respondent in this case is charged extended scrutiny by Respondent's counsel as to complainant's other and extrinsic prevarications would

have been unserviceable and objectionable. At the trial the Justice presiding had become reasonably satisfied that the witness appreciated the solemn nature of an oath. The witness thereupon had been sworn and all of his court testimony was oath bound. When telling any extrinsic untruths outside of court prior to the trial there is no reason to suppose that he was at any time under oath.

It is quite conceivable that in the witness's relations with his scholastic superiors and even with his mother there had been some agitating clash of personalities, factors of embarrassment, fear, resentment, perturbed conscience, etc. To probe such motivating circumstances would have been unpredictably and incalculably digressing, time consuming and experimental.

The cross-interrogation and generalized offer of proof of Respondent's counsel for all that the record discloses were addressed to matters perceptibly collateral to the issues tried in the instant case. The circumstances thus placed in requisition the exercise of a sound discretion by the presiding Justice.

> "- - - - How far or how long counsel may proceed with a witness to test memory or to show lack of veracity, bias, prejudice, etc., is a matter of the court's discretion - - - -" *State* v. *Whitehead,* 151 Me. 135, 141.

> "How far the cross-examination of a witness may be deemed helpful and relevant to the issue being tried, as well as to what extent the accuracy, veracity or credibility of witnesses may be tested, must be left largely to the sound discretion of the presiding judge, and is not open to revision, unless it is shown that such discretion has been exercised in a way that results in the prejudice of a party to the cause by reason either of too narrow restriction or too great breadth of inquiry. - - - -" *Jennings* v. *Rooney,* 183 Mass. 577, 579.

> " 'It is a well established rule, that the evidence offered must correspond with the allegations and be confined to the point in issue.' 1 Greenl. Ev., § 51. 'And the rule excludes all evidence of collateral facts.' Ibid, 448. 'In cross-examination, however, the rule is not applied with the same strictness; on the other hand great latitude is allowed by the Judge, in the exercise of his discretion, when, from the temper and conduct of the witness, such course seems essential to the discovery of truth.' 'And, as the general course of cross-examination of witnesses, is subject to this discretion of the Judge, it is not easy to establish a rule which shall do more than guide, without imperatively controlling the exercise of this discretion' - - - -" *State* v. *Kimball,* 50 Me. 409, 414.

The presiding Justice acted judiciously and soundly in his ruling which was the occasion of Exception 1.

EXCEPTION 2.

During subsequent cross-examination of the complaining witness the Respondent's counsel inquired of the former if it were true that the witness had been expelled from school because he had drawn a knife "on the principal." Witness denied the insinuation. The Justice presiding, upon protest from the State's counsel, denied to Respondent's counsel leave to continue the specific interrogation. We quote from the record:

> "MR. TEVANIAN: David, you told this Court that you were expelled from school because you played hooky, is that correct?"
>
> THE WITNESS: That is all I did. I did not lie.

Q. Did you pull a knife on the principal?
A. No.

Q. You are sure of that?
A. No.

Q. You didn't have a knife in your hand - - - -

MR. SALIEM: I object to this line of questioning, your Honor, as bringing in collateral matters, or collateral issues.

MR. TEVANIAN: If this boy was expelled from school because he did draw a knife on the principal of the school, and he just told us that all he remembers being expelled for, or all he knows of, is that he played truant on one day, I think it goes to the credibility of his very testimony on this stand. Well, may I see the Court at the end of the bench, please? (Conference at bench.)"

Respondent's counsel having introduced a collateral issue had received a responsive and negative answer from the witness. The Justice ruled well within the bounds of a sound discretion.

> "It is true that a witness cannot be cross-examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony - - - -" *State* v. *Kouzounas,* 137 Me. 198, 199.

Exception 2 must be overruled.

EXCEPTION 3.

At the close of all the evidence the Respondent filed a motion for a directed verdict of not guilty. The Court denied the motion and Respondent thereupon excepted to that ruling.

In June of 1962 the evidence narrates that the Respondent was more than 40 years of age and that the complaining witness, David, was 13. David testified that the Respondent in June, 1962 at Gardiner in Kennebec County at least twice had taken indecent liberties with David's sexual parts and organ. The Respondent testifying stoutly denied such criminations. The testimony of David was uncorroborated as to the intimate acts of personal outrage but

was confirmed in many details of time, loci, conduct of the Respondent, opportunity and peripheral particulars. *State* v. *Newcomb,* 146 Me. 176, 181, 182. No instigation of the prosecution, no vindictiveness or motive upon the part of the complaining witness is discernible in the evidence. David had been reticent at first. He did not tell his mother or the Police of the Respondent's illicit acts until David's mother by some ruse succeeded in deciding the lad to inform the officers of Respondent's immoral and abusive conduct. The Respondent admitted a singular, impromptu and repeated show of interest in David who was a young stranger to the Respondent. David in testifying told of having suffered 3 distinct sexual violations from the Respondent. A police officer testified that to him David had recounted only 2 such incidents. There was some inconsistency and discrepancy in David's testimony as to the sequence of some of the criminal events which had happened in a period of two days and as to the locations where they had occurred. Some 4 months elapsed between the date of the alleged crime and the time of trial. The 13 year old boy remained insistent in his declarations that the Respondent had perpetrated the definitive criminal acts within the time and area circumscribed by the indictment.

The jury observed the witnesses, heard the testimony and made their grave findings. As this Court said in *State* v. *Hume,* 131 Me. 458, 460:

> "We are of the opinion that, if the testimony of the State's witnesses was believed, it was sufficient to establish the guilt of the respondent beyond a reasonable doubt. - - - -"

There was no error in the overruling of Respondent's motion for a directed verdict.

The mandate must be: Exceptions overruled; Judgment for the State.

ARTHUR OGDEN
vs.
REGINALD W. LIBBY, ET AL.

York. Opinion, December 2, 1963.

Admissibility. Negligence. Motion for New Trial. Juries.

It is for the jury to determine whether a plaintiff met the standard of the reasonably prudent man.

Time taken by a jury in determining a verdict does not imply that the jury was influenced by prejudice, bias, passion or mistake.

Fact that plaintiff sought and obtained unemployment benefits after accident was not an admission by plaintiff of his ability to work and did not destroy his claim for loss of income in personal injury action.

ON APPEAL.

This is on appeal from denial of defendant's motion for entry of judgment *n.o.v.* or a new trial. Appeal denied.

John J. Harvey, for Plaintiff.

Julian G. Hubbard,
Hilary F. Mahaney, for Defendants.

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

WILLIAMSON, C. J. This is an action by the plaintiff, a customer in defendants' hardware store, to recover for injuries sustained in falling through an opening in the floor. The case is before us, after a jury verdict and judgment for the plaintiff, on appeal from denial of defendants' motion for entry of judgment *n.o.v.*, or in the alternative for a new trial. Under the familiar rules the verdict stands unless manifestly wrong and we take the evidence in the light most

favorable to the successful party. *Neal et al.* v. *Linnell,* 156 Me. 1, 157 A. (2nd) 231; *Fossett et al.* v. *Durant,* 150 Me. 413, 113 A. (2nd) 620.

The jury could have found as follows:

The plaintiff entered the defendants' store to purchase a spade. On inquiry to this end, he was directed to a display of garden tools including spades and shovels hanging on the store wall by one of the defendants who was seated at a desk. The plaintiff saw the display of tools and, to use his words, "what appeared to be paper on the floor under them." He started toward the display, stepped on what he believed to be the floor covered with white paper and fell into the cellar with resulting serious injuries. In fact, he stepped in a stair well covered by the defendants with white canvas "to keep the wind out." The stairway had been removed or had fallen in the course of repairs to the building. There were no signs or warnings of an opening in the floor. The area was, however, guarded or "blocked" or "barricaded," on one side by the wall and on two sides by plywood strips four feet in height.

With reference to the fourth side from which the plaintiff approached the wall, the evidence was in sharp conflict. The evidence offered by the defendants was to the effect that they had placed a heavy chain rack and cartons of merchandise in position to block the stair well, and that anyone "would have had to go over the wall of the enclosure" to reach the display of tools. The plaintiff denied that he moved a chain rack or that his approach to the wall was barred in any way. The jury was entitled to accept the plaintiff's evidence of these critical facts.

After the plaintiff started for the shovel, he did not look again at the floor. In his words, "I couldn't have. I had my mind on that shovel."

The defendants argue that the accident could not have happened in the manner described by the plaintiff. They place, however, too much reliance upon exactness in detail; for example, the distance between desk and wall or opening, or the exact course of the plaintiff on approaching the display. It is not surprising that the plaintiff's testimony does not meet tests of mathematical precision. The entire action from the time that the plaintiff turned to the display on the wall to the fall through the opening in the store floor covered only moments.

The plaintiff was a customer in the defendants' store. His status as an invitee to whom the defendants owed a duty of due care is not in issue. Indeed, the defendants do not — and understandably so — question the sufficiency of the evidence to establish their negligence.

A major point on appeal touches contributory negligence of the plaintiff. It is urged that the failure of the plaintiff to look at the floor from the time he started toward the display on the wall was negligence as a matter of law. With this view we do not agree.

The failure of the plaintiff to look at the floor was of course a fact of importance, but it was not controlling. A storekeeper attracts customers not only into his store but as well from place to place within the doors, by display of merchandise. To require as a matter of law that a customer must keep watch every moment on the condition of the store floor would create a standard beyond that of our common experience. We do not have here the case of an open stairway suitably indicated to a customer, but an opening in the floor covered only with canvas at a place to which the customer was attracted by a display and was indeed specifically directed. It was for the jury to determine whether the plaintiff met the standard of the reasonably prudent man under the circumstances. We cannot say the jury erred as

a matter of law in placing liability on the defendants. *Temple* v. *Congress Sq. Garage, Inc.*, 145 Me. 274, 75 A. (2nd) 459; *Shaw* v. *Piel*, 139 Me. 57, 27 A (2nd) 137; *Bingham* v. *Marcotte, Cote & Company*, 115 Me. 459, 99 A. 439; *Holmes* v. *Clear Weave Hosiery Stores* (N. H.), 66 A. (2nd) 702; *Grogan* v. *O'Keefe's, Inc.*, 267 Mass. 189, 166 N. E. 721; Annot. 66 A. L. R. (2nd) 376; Restatement, Torts § 343; 2 Harper & James, Torts § 27.13, p. 1491, note 11.

The defendants also attack the verdict of $9850 on the ground that damages were erroneously assessed. They contend (1) that the proof of $807 for medical expenses was based only on the plaintiff's testimony without introduction of the doctors' bills; (2) that the plaintiff did not establish whether $490 of the total medical expense was in whole or in part for treatment of a condition existing prior to the accident; and (3) that in seeking and obtaining unemployment benefits after the accident, the plaintiff thereby admitted his ability to work and destroyed his claim for loss of income.

It is unnecessary to rehearse the evidence of damages in detail. The plaintiff's injuries were serious. At the time of trial in December 1962, four and one-half years after the accident in May 1958, he remained under constant medical treatment. Prior to his injuries the plaintiff was a "rig-up man" . . . "(setting up) machines for other fellows to operate . . ." in the Saco-Lowell shop with earnings of approximately $115 a week. As a result of the accident he was out of work about seven months. During a period of about twenty weeks commencing shortly after the accident he received unemployment benefits of $30 a week, which he credited against his claim for loss of income.

The defendants gain nothing from the three points with respect to damages. The first and second points, relating to medical expenses, reach only the sufficiency of evidence

properly admitted and subject to exploration and explanation by the defendants.

On the third point the defendants sought to establish that the plaintiff in seeking and receiving unemployment benefits thereby admitted he was physically able to work during the claimed period of disability. The evidence was clearly part of the total evidence on disability and loss of income. Statements and certifications by the plaintiff to the Maine Employment Security Commission properly were admitted as they bore upon the validity of plaintiff's claim. In his turn the plaintiff was entitled to explain why he applied for and accepted benefits, and he did so it would appear to the satisfaction of the jury.

We are not here concerned with whether the benefits were rightly or wrongly received. It should also be noted that the defendants do not in their reasons of appeal argue that the damages in general were excessive. The error asserted is limited to the particular points under discussion.

A further claim of error by the defendants that the jury reached a verdict in forty-five minutes is without merit. There is not the slightest inference from this fact that the jury was influenced by prejudice, bias, passion or mistake.

The defendants also contend there was error in the charge to the jury relating to damages arising from aggravation of the plaintiff's physical condition existing prior to the accident. Any suggestion of error was fully corrected at the close of the charge, as follows:

> "THE COURT: Members of the jury, I believe I have already covered it, but counsel called to my attention the possibility that I may not have and that is in relation to the prior-existing condition. Of course if you find there is no evidence that there was any aggravation of the prior-existing condition and that any pain the plaintiff may be suffer-

> ing now from that prior-existing condition is in no way connected with the injury he sustained in this accident, if you find he did sustain injuries, then of course you will not consider it in your damages, if you reach that point, or any damage for the prior-existing condition that you find was not aggravated by this accident. Does that cover it?
>
> "MR. HUBBARD: Thank you your Honor."

Lastly, there was no abuse of discretion in the denial of defendants' motion for a view. As the presiding justice well said:

> "The defendants further complain that the presiding justice refused to grant the defendants' request for a view by the jury. The accident occurred four years prior to trial and at the time of occurrence the premises involved were under repairs. It appeared to the court that a view after the repairs were completed might well be more misleading than helpful to the jury."

This was a typical jury case. We meet the everyday contradictions in testimony with questions of credibility, of opportunity and ability to observe and describe, of interest and the like to be resolved by the jury. We meet the everyday issues of negligence and due care, calling for the jury to apply the law's standard of the reasonably prudent man under the circumstances, and on finding liability to measure damages in dollars.

The entry will be

Appeal denied.

RAMIE MICHAUD AND DELIA R. MICHAUD
vs.
CITY OF BANGOR

Penobscot. Opinion, December 20, 1963.

Nuisance. "Due Process." Municipal Corporations. Tort Liability. Constitutional Law.

Terms "law of the land" and "due process of law" are constitutional terms and are identical in meaning.

Notice which constitutes "due process" is notice that "is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard."

Participation by building inspector and members of fire department in destroying a "nuisance" was not within the scope of their duties as public officers in their respective capacities.

A municipal corporation is liable in tort for unlawful acts done by special agents at its direction.

Notice and opportunity for hearing are of the essence of due process of law.

ON APPEAL.

This case is on appeal from judgment entered upon verdict directed for the defendant. Case remanded for assessment of damages.

Blanchard and Blanchard, for Plaintiffs.

Abraham J. Stern, for Defendant.

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

MARDEN, J. On appeal from judgment entered upon verdict directed for the defendant.

The City of Bangor, a municipal corporation, acting under its building code having to do with unsafe buildings, purported to condemn, as a nuisance, a building belonging to the plaintiffs. The city ordinance incorporates verbatim Sections 25-28, inclusive, of Chapter 141 of the Revised Statutes of 1954, Nuisances. The proceedings were instituted by the introduction of an order at the council meeting of the City of Bangor held on September 25, 1961 which order called for an adjudication that the building belonging to the plaintiff, Ramie Michaud, "be a nuisance or dangerous and that the same should be demolished." The order was tabled on September 25, 1961 and a hearing thereon assigned for the council meeting of October 23, 1961. Although the building inspector of the defendant city knew Ramie Michaud's address by reason of Mr. Michaud's having previously recorded it when he sought permission to tear down the building in question and although the identification of Delia R. Michaud as a joint owner was determinable by inquiry or examination of the records at the Registry of Deeds, notice of the October 23, 1961 meeting was given only by three successive weekly publications in the local newspaper. On October 23, 1961, no one appearing in opposition thereto, the City Council passed an order "that the building * * * owned by Mr. Ramie Michaud of 105 Pine Street, is adjudged to be a nuisance or dangerous and that the same should be demolished * * *." A copy of this order was delivered to Ramie Michaud on October 24, 1961, who sought no "appeal" provided for in the ordinance and statute referred to below. On April 4, 1962 the Chief of the Fire Department, who in return had received orders from the Building Inspector, after allegedly removing the contents of the building, burned the building.

Plaintiffs seek compensation for the building, for the destruction of grass and shrubbery incidental to the burning and for the value of personal property claimed to be within the building at the time of its incineration.

At the close of the evidence, upon motion, a verdict was directed for the defendant from which the plaintiffs appeal.

The basis of the action resulting in the intentional destruction by fire of the plaintiffs' building is the order introduced before the City Council on September 25, 1961, and passed on October 23, 1961 and we are faced first with the question of whether there were a valid determination of the character of the plaintiffs' building as a nuisance upon which all subsequent action was premised. Section 25 of Chapter 141, R. S., 1954, incorporated in Chapter IX, Art. I, subsection 105 of the building code of the City of Bangor, provides, in its pertinent part, that when the municipal officers of a Town "after personal notice in writing to the owner of any burnt, dilapidated or dangerous building, or by publication in a newspaper in the same county, if any, 3 weeks successively, otherwise in the state paper, and after a hearing of the matter, adjudge the same to be a nuisance or dangerous, they may make and record an order prescribing what disposal shall be made thereof, * * *."

The sufficiency of the notice to the plaintiff owners by this publication is challenged as being insufficient within the requirements of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, and Section 6, Article 1, of our State Constitution. The cited section of our State Constitution guarantees to the citizen the right not to be deprived of his property "but by judgment of his peers, or the law of the land." *Bennett* v. *Davis*, 90 Me. 102, 105, 37 A. 864. The terms "law of the land" and "due process of law" are constitutional terms and are identical in meaning. *Jordan* v. *Gaines*, 136 Me. 291, 8 A. (2nd) 585. Notice and opportunity for hearing are of the essence of due process of law. *Randall* v. *Patch*, 118 Me. 303, 305, 108 A. 97. Did the terms of Section 25, Chapter 141, R. S., 1954, which upon its face offers alternatively personal notice in writing to the owner of the building, or

notice by publication, meet in its publication provisions, the constitutional test of "due process"? The notice to which one is entitled under "the law of the land" as expressed in the Maine Constitution, and to constitute "due process" under the federal Constitution is notice that "is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard." *Milliken* v. *Meyer,* 61 S. Ct. 339, 343 (under headnotes 6-10), rehearing denied, 61 S. Ct. 548; *Mullane* v. *Central Hanover Bank & Trust Co.,* 70 S. Ct. 652, 657 (under headnote 8); *Schroeder* v. *City of New York,* 83 S. Ct. 279, 282 (under headnotes 2-4).

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder, supra.*

The notice in the present case purporting to inform Ramie Michaud and Delia R. Michaud that one of their buildings was charged with being a nuisance and subject to demolition did not satisfy constitutional requirements and the determination of nuisance and danger attributable to the reference building, and that the same should be "demolished," was a legal nullity. The reference ordinance of the City of Bangor and the statute incorporated therein (Sections 25-28, Chapter 141, R. S., 1954) must be read as requiring, within the circumstances of this case, personal notice to the building owners.

We have at this point a vote by the City Council of Bangor to do an illegal act, which act was executed by the city building inspector and the city fire department.

The act of demolition, properly premised, was within the ordinant power of the city and was, therefore, not *ultra vires,* McQuillin on Municipal Corporations, 2nd Ed. 1947, Vol. 6, § 2808, *Bator et al.* v. *Ford Motor Co.,* 257 N. W. 906,

913 (under headnotes 6, 7) (Mich. 1934), *Hathaway* v. *Osborne,* 55 A. 700 (R. I., 1903), — with resultant nonliability. *Seele* v. *Deering,* 79 Me. 343, 347, 10 A. 45, and *Wilde* v. *Madison,* 145 Me. 83, 91, 72 A. (2nd) 635.

What, then, of the relation, under these circumstances, of the building inspector, personnel of the fire department, and the City of Bangor? The participation by the building inspector and members of the fire department, upon the record before us (absent the City Charter), was not within the scope of their duties as public officers in their respective capacities.

The provisions of the statute (Sections 10-19, inclusive, Chapter 97, R. S.) which require a city of the size of Bangor to appoint an inspector of buildings and which fix his duties, charge such appointee with no responsibility for action upon a "burnt, dilapidated or dangerous building" (Section 25, Chapter 141, R. S.). The provisions of Chapter 97, R. S., Fire Departments and Fire Prevention, §§ 21-23, do not charge the chief of a fire department, and ex officio a fire inspector, with any responsibility as to a "burnt, dilapidated or dangerous building," under Chapter 141, *supra.* The action of these individuals here was not, as public officers within the scope of their authority legally declared. Their respective conduct was instigated by the City Council order directing that the Michaud building be "demolished," by a "letter" order from the Building Inspector to the Chief of the Fire Department and a verbal order from the Chief of the Fire Department to fire department employees. Additionally, in pre-trial interrogatories prepared by plaintiffs, the defendant replies "yes" to the question "Did the defendant through its agent, agencies or departments start the fire * * * that destroyed * * * buildings * * * of the plaintiffs?"

The subject of tort liability for municipal corporations has been one of controversy in both text and case law. See

Annot. 120 A. L. R. 1376 and Annot. 60 A. L. R. (2nd) 1198. The diversity among respective state statutes, municipal charters, ordinances, and court decisions upon them, have resulted in great confusion in the application of a given set of facts to governmental, legislative, propriety, and ministerial functions, with the result that it is very difficult to recognize cases on point from other jurisdictions. This comment applies to cases briefed by counsel and not adopted herein.

The line of cases which we hold governs the present controversy begins with *Woodcock* v. *Calais,* 66 Me. 234, wherein the city government of Calais passed an order "that the street commissioners be directed forthwith to cause all fences now on the public streets to be removed." In an action of trespass arising out of an act of the street commissioner under this order the court discusses the character of municipal corporations and their peculiar liabilities and states (p. 235) that:

> "The two phases of character presented by municipal corporations, and the peculiar liabilities which attach to each, (in reference to the different capacities of officers, whether as agents of the town, or public officers) are fully recognized * * * in this state * * *.
>
> "These, (referring to cited cases) * * * maintain the general doctrine that municipal corporations, so far as their public character is concerned, * * *, are not liable to a private action for the unauthorized or wrongful acts of their officers, even while acting in the line of their official duties, unless made so by statute; * * * that their powers and duties are prescribed and imposed by general statute alike on all such officers, and not by the cities and towns which choose them; that their official tenure, and the manner of performing their official duties do not depend upon the will of their immediate constituencies; and that in a word they are strictly public officers, and when in the discharge

of their public duties, they in no legal sense sustain to their corporation the relation of servant or agent.

* * * * * * * * *

"* * * These decisions would have been decisive of the case at bar had the commissioner acted solely in his public capacity, and upon his own responsibility. * * * The orders which he may have received from the mayor or city solicitor, * * * could not affect his relative status to the city; for they were but public officers themselves, and could not bind the city in respect to the commissioner's acts. * * * But the fact that he was expressly 'directed' by the city government to cause all fences on the street to be removed, and that while attempting to follow these directions he committed the trespass * * *, withdraws this case from the application of the principle applicable to cases of public officers. For while he was a public officer, * * * still the city * * * chose by positive, formal vote to direct the commissioner. * * * He did act; and in his action he became *quoad hoc* the city's agent; and we are of the opinion that the superior must respond." *Woodcock, supra.*

"The distinction between the two classes of cases is clear. In the one class the municipality has interfered by giving directions or taking charge of the work by its own agents, as in *Woodcock v. Calais,* * * *. In the other class, the municipality has not interfered 'but has left the work to be performed by the proper public officers, in the methods provided by the general laws.'" *Goddard* v. *Harpswell,* 84 Me. 499, 502, 24 A. 958.

"* * * (U)nquestionably a town may render itself liable even for the unauthorized or unlawful acts of such officers in the performance of corporate duties imposed by law upon the town, provided such acts are done by its direct authority * * *.

"This, however, is not upon the ground that the officers, as such, were the agents or servants of the town, but that by the town's interference and di-

> rection it has made them such, and therefore rendered itself liable for their acts." *Bryant* v. *Westbrook,* 86 Me. 450, 453, 29 A. 1109.

See also *Bulger* v. *Eden,* 82 Me. 352, 19 A. 829 for discussion.

The defendant specifically authorized the demolition of plaintiffs' property and sought to accomplish it by subordinates acting not as public officers, but as special agents for whose acts it is responsible.

The imposition of tort liability upon a municipal corporation under these circumstances is not peculiar to Maine. See 38 Am. Jur., Municipal Corporations §§ 583, 597; *Thayer* v. *City of Boston,* 19 Pick. 511 (Mass. 1837); *Ashley* v. *Port Huron,* 35 Mich. 296 (1877); 24 Am. Rep. 552, 556; *Hathaway, supra; Albert* v. *City of Muskegon,* 109 N. W. 262, 263 (Mich. 1906); *Persons* v. *Valley City,* 144 N. W. 675, 677 (N. D. 1913).

The parties have stipulated that if this appeal is sustained a new trial is limited to the assessment of damages only.

Appeal sustained.
Remanded for assessment of damages.

MYRON S. HERRICK
vs.
STATE OF MAINE

Knox. Opinion, December 20, 1963.

False Pretenses. Fraud. False Representation. Caveat Emptor. Juries.

A promise, if unconditional and made without present intention of performance, will constitute a false pretense.

If any one of several pretenses are of fact falsely made with intent to deceive, the indictment is good and there is no error.

If a seller possesses or assumes to possess superior knowledge of the property and asserts it to his vendee who has not had equal opportunity to gain knowledge, his asserted opinion may be equivalent to an affirmation of fact and therefore actionable fraud.

Whether a statement was an expression of opinion by its nature or under the circumstances peculiar to this case rather than its specific phrasing is a jury question.

Whether a statement as to value is opinion or a false fact depends upon the circumstances; if made with the design that it shall be acted upon as a statement of existing fact it may be so regarded.

Though value rests upon opinion, it is a fact and one constantly found by juries.

Where a confidential relationship could be found to exist between the complainant and the accused the ordinary doctrine of "puffing" does not apply if there is an intent to defraud.

A confidential relationship exists when one has gained the confidence of the other and purports to act or advise with the other's interest in mind.

When the misrepresentation is the basis of a criminal charge the doctrine of *caveat emptor* has no application and gives no relief from intentional misrepresentation.

ON REPORT.

This case is reported upon a writ of error; petitioner contends that the indictment charges no crime and seeks to

have his conviction and sentence "reversed, recalled and corrected." Writ dismissed. Conviction and sentence affirmed.

Christopher S. Roberts, for Plaintiff.

John W. Benoit, Asst. Atty. Gen., for State.

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

MARDEN, J. Upon writ of error reported from the Superior Court.

To an indictment under the provisions of Section 11, Chapter 133, R. S., as amended, the pertinent portions of which read as follows:

> "The Grand Jurors for said State upon their oath present that Gerard L. Freve and Harold S. Soper, * * * and Alton G. Harrington and Myron S. Herrick, * * * feloniously, designedly and with intent to defraud did falsely pretend to one Ada M. Durell that certain repairs were necessary on the roof and chimney of the home of said Ada M. Durell, there situate, and that they, the said respondents, had performed certain labor and furnished certain materials, and would perform certain labor and would furnish certain materials, all for the repair of said roof and chimney, and that all of said repair and materials performed and furnished and to be performed and furnished as aforesaid had an aggregate value of six hundred fifty dollars, which was then and there due and owing to the said respondents from the said Ada M. Durell, whereas in truth and in fact the said repairs were not necessary as represented by said respondents, and the said respondents had not performed and furnished and did not intend to perform and furnish any labor and materials for said repairs of the aggregate value of six hundred fifty dollars, or even ap-

> proaching that aggregate value, but did perform and furnish and intended to perform and furnish labor and materials for said repairs of an aggregate value not exceeding two hundred dollars, all of which the said respondents then and there well knew, * * *,"

with further usual allegations that the representations were made with intent to defraud, that Ada M. Durell believed the representations, relied upon them, was deceived and did pay to the respondents six hundred fifty dollars, the petitioner entered a plea of guilty and was sentenced. By petition for writ of error he now contends that the indictment charges no crime and seeks to have his conviction and sentence "reversed, recalled and corrected." The indictment is to be tested as though challenged by demurrer.

Petitioner urges that the indictment purports to charge two false pretenses of fact, —

(1) That certain repairs were necessary on the roof and chimney of the home of said Ada M. Durell * * * whereas in truth and in fact the said repairs were not necessary.

(2) That the respondents had performed and would perform labor and had furnished and would furnish materials for repairs of the value of six hundred fifty dollars, whereas in truth and in fact they had not and did not intend to so perform and furnish repairs of the value of six hundred fifty dollars, but had and did accomplish repairs not exceeding two hundred dollars in value.

That these representations were made with an intent to defraud and that Ada M. Durell was defrauded is not in issue.

> "A false pretence is such a fraudulent representation of an existing or past fact, by one who knows

> it not to be true, as is adapted to induce the person to whom it is made to part with something of value." Bishop, Criminal Law 9th Ed. § 415, ¶ 3 (Vol. 2).

To this common law definition embodied in our statute has been added, "A promise if unconditional and made without present intention of performance, will constitute a false pretense * * *".

If any one of several pretenses are of fact falsely made with intent to deceive, the indictment is good and there is no error. *State* v. *Dunlap,* 24 Me. 77, 78; *State* v. *Smith,* 324 S. W. (2nd) 702, 706 [2, 3] (Mo. 1959); *Whitaker* v. *State,* 75 S. E. 258, 260 [6] (Ga. 1912).

In contending that the indictment pleaded no false representations of fact within the provisions of the reference statute it is urged that the allegation that repairs were "necessary" was only an expression of opinion, and as such could form no basis for a criminal charge. Wharton's Criminal Law & Procedure, § 591, *State* v. *Deschambault,* 159 Me. 216, 218, 191 A. (2nd) 119, and on the civil side in deceit, *Shine* v. *Dodge,* 130 Me. 440, 443, 157 A. 318.

As to the second allegation, if we understand petitioner's position correctly, it is argued that charging six hundred fifty dollars for two hundred dollars worth of work is in itself no crime, under the principles of *caveat emptor.*

ALLEGATION AS TO NECESSITY OF REPAIRS

> "The word 'necessary' must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. * * * It * * * may express mere convenience or that which is indispensable * * *. * * * (I)ts

> force and meaning must be determined with relation to the particular object sought, and is a relative and comparative term, depending upon its application to the object sought, * * *." *Kay County Excise Board* v. *Atchison, T. & S. F. Ry. Co.*, 91 P. (2nd) 1087, 1088 (Okla. 1939).

To the same effect *Illinois Bell Telephone Company v. Fox, et al.*, 85 N. E. (2nd) 43, 51 [12, 13] (Ill. 1949); and as illustrated in *Cushing* v. *Gay*, 23 Me. 9, 16 (indispensable); *Sullivan* v. *Maine Central Railroad Company*, 82 Me. 196, 198, 19 A. 169 (proper); *Buck* v. *Biddeford*, 82 Me. 433, 437, 19 A. 912 (appropriate); *Cleveland* v. *Bangor*, 87 Me. 259, 266, 32 A. 892 (propriety); *Eaton* v. *Atlas Accident Insurance Company*, 89 Me. 570, 573, 36 A. 1048 (suitable); *State* v. *Conwell, Jr.*, 96 Me. 172, 173, 51 A. 873 (conducive to the end sought); *State* v. *Beaudette*, 122 Me. 44, 46, 118 A. 719 (indispensable), and in *Webster, et al.* v. *Seekamp, et al.*, 4 Barn. & Ald. 352 such repairs as a prudent owner would order. See also Webster's Third New International Dictionary and 65 C. J. S. Necessary p. 266.

> "The mere expression of an opinion *which is understood to be only an opinion* (emphasis added) does not ordinarily render the person expressing it liable * * * for obtaining property by false pretenses, at least where the opinion expressed is upon a matter concerning which a difference of opinion is likely to arise. * * * *But, if one knows an opinion to be erroneous, the matter is as to him, not an opinion, but a subsisting fact; and, if he makes a statement contrary to what he knows to be the fact, he should not be allowed to escape the consequences on the theory that his statement concerns a matter of opinion.*" (Emphasis added). 22 Am. Jur., False Pretenses, § 15.

See also *State* v. *Grady*, 111 So. 148, 149 [2-4] (Miss. 1927); *Whatley* v. *State*, 31 So. (2nd) 664, 666 [2, 3] (Ala. 1947) dictum; *People* v. *Gordon*, 163 P. (2nd) 110, 123

[26-31] (Dist. Ct. of Appeal, Cal. 1945); and *Williams* v. *State,* 83 N. E. 802 (Ohio 1908).

In *Thompson* v. *Phoenix Insurance Co.,* 75 Me. 55, 61, a case of deceit, the distinction is made between the falsehood of stating one opinion when the speaker held another and putting a statement in the form of an opinion when the speaker had positive knowledge to the contrary, the latter being actionable.

Further "if a seller * * * possesses or assumes to possess superior knowledge of the property and asserts it to his vendee who has not had equal opportunity to gain such knowledge, his asserted opinion may be equivalent to an affirmation of fact and therefore actionable fraud." *Gordon, supra* at pp. 123-124 [26-31].

For the allegation that "repairs were necessary" on the Durell roof to be held inadequate as a false pretense it would require determination that the statement was expressed as an opinion and subject it to the law recited above, or hold that the statement that "repairs were necessary" on the Durell roof was, as a matter of law, an expression of opinion.

We have no basis for finding that the statement of "necessity" was expressed as an opinion,— "In our opinion repairs are necessary on your roof." If such statement as was made were not an opinion in its express terms, the word "necessary" could have meant one of many things, — that repairs were indispensable, proper, appropriate or conducive to good husbandry, and that such statement represented that the condition of the Durell roof was factually such that repairs were demanded by a requirement ranging from prudence to indispensability, which condition is negated.

It can be inferred from the indictment that some one, or all, of the respondents had already been or done work on

the Durell roof, that they were in a position to know the conditions, which then and there existed and in whatever sense they used the word "necessary" the indictment charges a false statement of condition, quality, of existing fact. *State* v. *Stanley,* 64 Me. 157, 159.

It cannot be held that the challenged statement was by its nature an expression of opinion as a matter of law.

> "Where one represents as true a thing which he knows not to be true, such a representation falls within the statute, even though in some situations the truth or untruth of the statement might be a matter of opinion." 35 C. J. S., False Pretenses, § 11.

See *People* v. *Staver,* 252 P. (2nd) 700, 704 [4, 5] (Cal. Dist. Ct. of Appeal 1953); and *Holton* v. *State,* 34 S. E. 358, 360 (Col. 1) (Ga. 1899).

Whether the statement were an expression of opinion, by its nature or under the circumstances peculiar to this case rather than its specific phrasing, is a jury question.

> "There is a point at which mere opinion ends and fact begins. * * * Plainly the test must be the common sense of judge and jury, applied to the special facts of the case." *Bishop, supra,* § 429, ¶ 10.

It is so held in the companion field of civil deceit *Thompson, supra,* at p. 60; *Hotchkiss* v. *Bon Air Coal and Iron Company,* 108 Me. 34, 44, 78 A. 1108; *Ross* v. *Reynolds,* 112 Me. 223, 226, 91 A. 952; and *Shine, supra,* at p. 444. And generally "the sense in which they (the representatives) were used" is for the jury. *People* v. *Blanchard,* 90 N. Y. 314, 320 (1882).

The jury question on this issue has been resolved by the plea of guilty.

ALLEGATION AS TO WORK AND MATERIALS

What has been said as to a pretense of "necessity" as an opinion applies also to a statement of value. In substance the second allegation in this indictment says that the accused persons represented that they had and were intending to supply to the complainant materials and labor worth $650.00 when in truth they knew that they had not supplied and did not intend to supply materials and labor worth more than $200.00 and so knowing made it a false pretense within the terms of our statute.

Whether a statement as to value is opinion or a false fact depends on the circumstances. If made with the design that it shall be acted upon as a statement of existing fact it may be so regarded. 22 Am. Jur., False Pretenses, § 16; 35 C. J. S., False Pretenses, § 14; *State* v. *Nash,* 204 P. 736, 739, [3] (Kan. 1922); *Grady, supra,* at p. 149; and *Williams, supra,* at p. 803. "Though value rests upon opinion, it is a fact, and one constantly found by juries." *Commonwealth* v. *Coshnear,* 194 N. E. 900, 903 (Col. 1) (Mass. 1935).

Here also the plea answers the jury question.

It is contended that the principles of *caveat emptor* prevent, as a matter of law, this allegation of value of work and materials supplied and to be supplied being a reliable representation.

Upon an inference properly drawn from the indictment, the respondents had begun work on the Durell roof and were either employees of, or independent contractors for, Ada Durell when the alleged false pretenses were made.

Where a confidential relationship could be found to exist between the complainant and the accused the ordinary doctrine of "puffing" does not apply if there is an intent to defraud. *Commonwealth* v. *Stuart,* 93 N. E. 825, 827, Par. 6

(Mass. 1911); *Nash, supra,* at p. 738 [1, 2] and the following civil cases having to do with deceit consider the relationship between the complainant and the accused as pertinent and that the rule of *caveat emptor* should have no application. *Fourth Nat. Bank in Wichita* v. *Webb, et al.,* 290 P. 1, 3 (Kan. 1930) and to the same point without using the term *caveat emptor* see *Melgreen* v. *McGuire,* 327 P. (2nd) 1114, 1118 [4] (Ore. 1958); and *Shepherd* v. *Woodson,* 328 S. W. (2nd) 1, 6 [5] (Mo. 1959).

> A "confidential relationship" exists when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. *Thorne* v. *Reiser,* 60 N. W. (2nd) 784, 788 [7, 8] (Iowa 1953). See also *Peoples First National Bank and Trust Company* v. *Ratajski,* 160 A. (2nd) 451, 454 [6] (Pa. 1960) and *Anderson* v. *Lybeck,* 154 N. E. (2nd) 259, 262 [1-4] (Ill. 1958).

When the misrepresentation is the basis of a criminal charge the doctrine of *caveat emptor* has no application. *People* v. *Bennett,* 264 P. (2nd) 664, 668 [1, 2] (Cal. Dist. Ct. of Appeal 1953); *Nash, supra,* at p. 738 [1, 2] and we have held in *Pelkey* v. *Norton,* 149 Me. 247, 250, 99 A. (2nd) 918 (deceit) that it gives no relief from intentional misrepresentation.

Petitioner argues that *State* v. *Binette,* 159 Me. 231, 190 A. (2nd) 744, is decisive of the issues here presented. We do not agree. *Binette* raised questions of pleading not here involved.

Neither of the representations pleaded and dealing with necessity and value can be held as a matter of law to be expressions of opinion. The sense in which the alleged statements were used and understood by the complainant

presents jury problems, which problems were resolved by the plea. There is no error.

Writ dismissed.

Conviction and sentence affirmed.

MARY B. STRATER
vs.
NICHOLAS A. STRATER

York. Opinion, December 20, 1963.

Jurisdiction. Divorce. Statutes. Legislative Intent. Counsel Fees. Alimony. Support.

The jurisdiction and authority of the court in matters pertaining to divorce are derived from the Statute; jurisdiction is confined within the purpose and intent of the statutes.

The authority of the court to order the husband to pay counsel fees of the wife is derived from the statutes.

The right to attorney's fees is dependent upon the statutory provisions.

The legislature intended to provide the wife with sufficient funds, at the husband's expense, to obtain legal counsel for her defense or prosecution of the complaint of divorce then pending and not for any legal services relating to separate support on other marital problems that might arise from the marriage relationship.

The statutory authorization for the allowance of sufficient money for the prosecution or defense of a divorce complaint cannot be construed to provide for services rendered previous to the pendency of the divorce, however during pendency, allowance may be made for some past expense if it were shown that its payment was necessary to enable the wife to properly prosecute or defend the pending divorce action.

The Superior Court retains jurisdiction of a divorce case until final judgment and until final judgment the action is a pending divorce action.

A wife is entitled to counsel fees on appeal of a divorce action.

ON APPEAL.

The defendant appeals the decision of presiding justice on questions of child support, alimony and counsel fees. Appeal denied as to award of $75,000 in lieu of alimony and $50 per week child support. Appeal denied as to counsel fees and disbursements for Maine counsel for appellee. Appeal allowed as to counsel fee for New York counsel for appellee. Case remanded to Superior Court for the purpose of entertaining a motion for counsel fees for services and disbursements rendered on appeal in behalf of appellee.

Pierce, Atwood, Scribner, Allen and McKusick,
by *Horace Hildreth, Jr.* for Plaintiff.

Sewall, Strater, Erwin and Winton,
by *Robert J. Winton and James S. Erwin,*
for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ. MARDEN, J., does not concur.

TAPLEY, J. On appeal. This is an action of divorce heard by a single justice of the Superior Court. He granted a divorce to the complainant, Mary B. Strater, for the cause of cruel and abusive treatment and further ordered and decreed that the defendant, Nicholas A. Strater, pay the sum of $50.00 per week for the support of a minor child, the sum of $75,000.00 in lieu of alimony and, as counsel fees to complainant's Maine counsel, the sum of $6,000.00 with $183.40 disbursements and to her New York counsel the sum of $4,500.00. The defendant seasonably filed notice of appeal as to that part of the judgment relating to the award

of the lump sum in lieu of alimony and to the amounts decreed as counsel fees. The decision of the justice below granting the divorce was not appealed.

The points of appeal are as follows:

"1. Award lump sum:

"a. Excessive under circumstances surrounding marriage.

"b. Excessive because Plaintiff had no part in accumulating any part of said Defendant's estate.

"c. Excessive because said findings consider Defendant's possible future share in mother's estate.

"d. Excessive because said amount found according to New York standards of living, rather than standards of marital RES; to wit: State of Maine.

"2. Counsel fees:

"a. Excessive.

"b. Defendant should not be liable to pay for the counsel fees of two separate law firms to represent Plaintiff in said action."

Hearing was had on the divorce complaint at the September Term, 1962 of the Superior Court, within and for the County of York, without contention as to the merits of the divorce. The presiding justice, after a hearing on the merits, decreed a divorce to the complainant for the cause of cruel and abusive treatment. The questions of child support, alimony and counsel fees were contested.

The jurisdiction and authority of the court in matters pertaining to divorce are derived from the statute. *McIntire* v. *McIntire,* 130 Me. 326; *Stratton* v. *Stratton,* 73 Me. 481. Jurisdiction is confined within the purpose and intent of the statutes. *Poulson* v. *Poulson,* 145 Me. 15.

COUNSEL FEES

The authority of the court to order the husband to pay counsel fees of the wife is derived from the statutes.

> "*Pending a divorce action,* the court may order the husband to pay to the wife, or to her attorney for the wife, sufficient money for *her defense or prosecution thereof,* - - - - -." (Emphasis supplied.) Chap. 166, Sec. 59, R. S., 1954, as amended.

> "This statute guarantees the wife full and complete relief, and provides the avenue through which her prosecution or defense of a libel may be maintained and the services of an attorney may be secured." *Meaher* v. *Mitchell,* 112 Me. 416-419.

The right to attorney's fees is dependent upon the statutory provisions. *Vishner* v. *Vishner,* 271 P. (2nd) 68 (Cal.); *Maston* v. *Maston,* 229 P. (2nd) 756 (Kan.); *Fordice* v. *Fordice,* 132 N. E. (2nd) 618 (Ind.).

Mrs. Strater consulted her New York counsel on June 23, 1961 which resulted in the preparation of the necessary papers for an application for temporary alimony and counsel fees in the New York jurisdiction. After some preparation for the New York procedure Mrs. Strater informed New York counsel, on August 2nd, that she had decided to go back to her husband. Apparently her effort at reconciliation met with failure because on February 2, 1962 she again consulted New York counsel, whereupon counsel prepared new papers for a separation and for temporary alimony, as the only way jurisdiction could be obtained in New York in order to get an award of alimony was by an order of sequestration. After further investigation it was discovered that Mr. Strater had no assets in New York that were attachable so it was decided that Mrs. Strater should proceed in the jurisdiction of Maine. It was at this point the case was referred to Maine counsel for divorce pro-

cedure. After date of referral there was some participation of New York counsel involving conferences.

Maine counsel, after referral by the New York attorneys, proceeded with the case by commencing divorce action, performing those functions necessary and incidental to the prosecution of a divorce complaint. There were conferences with the client, with New York attorneys, the working out of temporary support pending complaint and research of the law as affecting tax problems; then came the hearing of the divorce which was contested only as to the issue of alimony, child support and counsel fees. Maine counsel submitted evidence at the hearing as to time consumed in the preparation, prosecution and defense of the case. New York counsel presented evidence as to services rendered Mrs. Strater before and after the commencement of the divorce action.

In this case counsel fees are not sought on the basis of a contractual relationship between attorney and client but under the provisions of statute providing that the wife may have benefit of counsel whose fees shall be paid by the husband. The reason for this statutory provision is obvious as there are numerous cases where the wife would be at a disadvantage if unable to have counsel because of a financial inability to employ one. The statute is explicit in its language when it provides that "pending a divorce action, the court may order the husband to pay to the wife, or to her attorney for the wife, sufficient money for her defense or prosecution thereof."

The question arises under the circumstances of the case at bar as to whether or not the services performed by Mrs. Strater's New York counsel before commencement of the divorce action in Maine were such as to come within the contemplation of the Legislature when it enacted the statute wherein it is provided that *pending a divorce action* the

court may order the husband to pay the wife's counsel fees. The divorce action must be pending as a jurisdictional requisite for a counsel fee order.

The case of *Stibbs* v. *Stibbs*, 231 P. (2nd) 310 (Wash.), concerns an order for the payment of counsel fees in a separate maintenance action. A statute in many respects similar to the Maine statute is involved. On page 311, the pertinent portion of the statute is quoted:

> " 'Pending action - - - - the Court may make - - - - such orders relative to the expenses of such action, including attorney's fees, as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof - - - -'."

The court observed, at page 311:

> "*All expenses reasonably incurred during the pendency of the action,* - - - - may be provided for by the Superior Court. - - - - The action is 'pending' until its final disposition." (Emphasis supplied.)

The court obviously construed a statute similar to the Maine statute as authorizing the court to allow counsel fees reasonably incurred and rendered during the period of the pendency of the action.

The basic reason underlying the allowance of counsel fees to the wife is to provide her with counsel so that her legal rights in the prosecution or defense of the divorce action shall be assured. It is apparent from the language employed in Sec. 59, Chap. 166, R. S., 1954 that the Legislature intended to provide the wife with sufficient funds, at the husband's expense, to obtain legal counsel for her defense or prosecution of the complaint of divorce then pending and not for any legal services relating to separate support or other marital problems that might arise from the marriage relationship. This is particularly so in the instant case where New York counsel was employed by the wife to ob-

tain temporary alimony for her. The statutory authorization for the allowance of sufficient money for the *prosecution or defense* of a divorce complaint cannot be construed to provide for services rendered previous to the pendency of the divorce complaint excepting, however, that during pendency allowance may be made for some past expense if it were shown that its payment was necessary to enable the wife to properly prosecute or defend the pending divorce action. *Beadleston* v. *Beadleston,* N. E. 8, 735, 736 (N. Y.).

> "The right to counsel fees does not obtain in every action brought by a wife against her husband. The right is a matter of statutory regulation. The existence of statutory provisions with respect to the allowance of counsel fees in actions for divorce or separation has been regarded as limiting the power of the court to grant such relief." *Ravand* v. *Ravand,* 78 N. Y. S. (2nd) 138, 140.

The services of New York counsel were, in the most part, directed to obtaining financial relief for their client, Mrs. Strater, under New York procedure and before the institution of a divorce action in the State of Maine. They were in no way related to or concerned with the preparation of the action of divorce which was commenced and prosecuted in Maine. Allowance to the wife of counsel fees is governed by statute which, according to our interpretation, authorizes allowance of expenses and fees for preparation and trial of a pending complaint for divorce. We find error in the presiding justice's allowance of counsel fees in the sum of $4,500.00 for New York counsel.

We now give our attention to counsel fees allowed to Maine attorneys representing Mrs. Strater. In the first instance, the case came to Maine counsel by referral on the part of New York counsel. The complaint was served, case was prepared and hearing was had. There were numerous conferences previous to hearing as would naturally be ex-

pected where a substantial amount of money and property were concerned. There was no controversy or contest as to the merits of the divorce or for custody of the child. Alimony, support of child and the amount of counsel fees became the focal points of contest. The evidence shows a necessity for counsel to represent the wife and the financial ability of the husband to pay. We have carefully examined and reviewed the record and are of the opinion that the awarding of $6,000.00 as counsel fees and disbursements of $183.40 to Maine counsel was not an abuse of discretion.

ALIMONY

The appellant complains, according to his points of appeal, that the amount of $75,000.00 awarded to Mrs. Strater as a specific sum in lieu of alimony is excessive under the circumstances of the marriage; that it is excessive because appellee had no part in accumulating any portion of appellant's estate; that the findings of the court below considered appellant's possible future share in mother's estate and, further, that the amount is excessive because it was based on New York standards of living rather than the standards of living in Maine.

The presiding justice in making the award in lieu of alimony and for support of the child stated as follows:

> "In making its order respecting alimony and support, the Court considered evidence relating the financial worth of the parties, the fact that practically all the Defendant's property was accumulated before their marriage, their relative earning capacities, their age, social backgrounds, the duration of the marriage, the circumstances under which it took place, the locations at which the parties lived during their marriage and the manner in which they lived."

It should be noted, with emphasis, that the dissolution of the marriage was caused by the fault of the husband; that

the wife stands without blame for the dissolution of the marriage. She presented her case to the presiding justice without contest as to the merits but met with contention on the questions of alimony, support of the child and counsel fees. It is obvious that the husband was content with the dissolution of the marriage. Insofar as the divorce itself is concerned, the testimony of Mrs. Strater and her witnesses stands unimpeached and uncontradicted. There is not a case where a young woman designedly marries a young man of wealth with a preconceived idea that sometime in the near future she would obtain a divorce, resulting in the award of substantial alimony. The record bears testimony to the desire of the wife to save her marriage, if possible.

"Q. Did you enter this marriage merely to give the child a name, or did you enter it with the idea of making a real marriage of it?

A. I entered it to make a real marriage of it. I was in love with Mr. Strater, and I hoped that he was in love with me. He convinced me that he was.

- - - - - - -

"Q. And did he tell you that he wanted you to go ahead and get a divorce, that there was no sense of —

A. We didn't discuss it until after the child was born. He never brought the subject up, and I thought I would try and be as pleasant and amenable as I could to see if we could get back together again. - - - - ."

The awarding of alimony is in the sound discretion of the court.

"The discretion of the Court in awarding alimony is not subject to exceptions, *Call v. Call, 65 Me., 407*; and the same rule would of course apply to any subsequent action of the Court in altering the decree. But, as in analogous situations, an abuse

> of such discretion raises an issue of law." *Bubar* v. *Plant,* 141 Me. 407, 409, 410.

The appellant must demonstrate by the evidence, as shown by the record, that the presiding justice abused his discretionary powers by awarding the appellee $75,000.00 in lieu of alimony.

Some courts have spoken regarding certain considerations a judge may have in mind in determining the allowance of alimony.

> "Different judges have set different standards by which to measure the amount to be allowed a divorced wife for support. Probably the most widely accepted expression of judicial thought is that the alimony should be such as to maintain the wife in the station in life to which she belongs, and in the style which the resources and the social standing and pecuniary faculties and future prospects of the husband entitle her." *Schwent* v. *Schwent,* 209 S. W. (2nd) 546, 457 (Mo.).

> "- - - the court may always give consideration to securing for the wife the same social standing, comforts, and luxuries of life as she probably would have enjoyed had there been no separation." *Wills* v. *Wills,* 111 S. E. (2nd) 355, 357 (Ga.).

The granting of alimony is within the sound discretion of the court determined by many factors, including the husband's ability to pay, the wife's station in life and her financial worth and income. *Davis* v. *Davis,* 51 So. (2nd) 876 (Ala.).

In fixing the amount of alimony the court should consider the size of the husband's estate and his earning capacity; the wife's estate and her necessities measured by the social position in which her marriage has placed her. *Oliver* v. *Oliver,* 258, S. W. (2nd) 703 (Ky.).

The amount of alimony is based on the husband's income and the needs of the wife from the standpoint of the manner in which they had been accustomed to live. *Walters* v. *Walters,* 94 N. E. (2nd) 726 (Ill.).

The court in determining the amount of alimony may take into consideration the wife's age, condition of her health, her former position in the community as wife of the defendant, her material resources and her income. The court may give heed to husband's ability to pay, his age, the condition of his health, his material resources and his present income. *Fried* v. *Fried,* 84 S. E. (2nd) 576 (Ga.).

See *Eno* v. *Eno,* 65 N. W. (2nd) 145, 148 (Neb.), which states the Nebraska rule for determining the amount of alimony.

In granting alimony the court may give attention to the comparative conduct and relative responsibility of the husband and wife for the breach of the marriage tie. *Flood* v. *Flood,* 194 S. W. (2nd) 166 (Ky.).

As to circumstances affecting the allowance of alimony, attention is directed to 27A C. J. S. — Divorce — Sec. 233 (1), (2), (3), (4), (5), (6), (7), (8).

The testimony discloses the fact that Mr. Strater's net worth in securities was $937,457.00 and that his estimated net income for the year 1962, before Federal income taxes, would be $91,982.00. This was the financial evidence, insofar as Mr. Strater was concerned, presented to the justice below which, of course, constituted one of the considerations upon which he based the amounts of $75,000.00 in lieu of alimony and $50.00 per week for the support of the child.

There is no universal standard which a judge may apply in determining the amount of alimony in any given case. The nature of a divorce action, with all the human, economic and social problems flowing from it, makes it impossible to

establish a rule of thumb applicable to the determination of the amount of money a husband should pay as alimony and for the support of children. Every divorce action is different in its alimony and support aspects. Seldom, if ever, are found two cases with identical or even comparable facts. Lack of fixed standards requires a judgment based on the exercise of a sound discretion.

The case of *Spalding* v. *Spalding,* 94 N. W. (2nd) 810 (Mich.), is one treating the amendment of a divorce decree as to a child's support. The decision of the presiding justice was appealed on the grounds that he abused his discretion in establishing the amount of support. With the exercise of discretion in issue, the court, on pages 811, 812, had this to say:

> "Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

> "When the determination of any questions 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 ab-

> sence 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.
>
> " 'Discretion' denotes an absence of a hard and fast rule, and when invoked as guide to judicial action, it means a sound discretion which is not exercised arbitrarily but is exercised with regard to what is right and equitable under the circumstances and the law, and directed by the reasoning conscience of the judge to a just result. *U. S. v. Schneiderman, D. C. Cal., 104 F. Supp. 405, 409, 410." Words and Phrases,* Vol. 12A, 343.
>
> "- - - it is well settled that judicial discretion must be exercised soundly according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion." *Bourisk* v. *Mohican Company,* 133 Me. 207, 210.

See *Wagner, Pet'r. from Decision of Judge of Probate,* 155 Me. 257. See also *5A C. J. S. — Appeal and Error,* Sec. 1583 (b).

A careful review and analysis of the evidence leads us to the conclusion that the presiding justice, in awarding Mrs. Strater the amount of $75,000.00 in lieu of alimony and in setting the amount of child's support at $50.00 per week, did not abuse his judicial discretion.

Counsel for the appellee have requested, in their reply brief, that the case be remanded to the Superior Court for the purpose of having that court entertain a motion for counsel fees for services rendered on the appeal. Although there appears to be no precedent for this action in the Maine jurisdiction, other courts have so ordered.

We are of the opinion that the Superior Court retains jurisdiction of this case until final judgment and that until

final judgment the action is a pending divorce action within the purview of Sec. 59 of Chap. 166, R. S., 1954, as amended.

> "It is no longer open to question but that a wife has a right to prosecute or defend an action for divorce and when a trial court dismisses the wife's petition for divorce, she should not be deprived of her right to appeal or of means to prosecute it during pendency. Our courts have frequently said, since the husband usually holds the purse strings, he must furnish her the means of attack or defense, else she may be left in a helpless and defenseless condition." *Bevier* v. *Bevier,* 132 S. W. (2nd) 1044, 1048, 1049 (Mo.).

Wife is entitled to counsel fees on appeal of a divorce action. *Bowler* v. *Bowler,* 31 So. (2nd) 751 (Fla.).

The appellee was granted a divorce, a substantial sum in lieu of alimony and an amount for support of a child. The appellant saw fit to appeal that portion of the justice's decision having to do with the financial aspect of the case. It is as equally important that the appellee have benefit of counsel on the appeal as it was that she be represented at the original hearing. To determine otherwise would be inconsistent with the principle as established by provisions of Sec. 59 of Chap. 166, R. S., 1954, as amended, wherein the Legislature, in order to safeguard the rights of a wife, authorized counsel be provided for her benefit at the expense of her husband. As was said in *Meaher* v. *Mitchell, supra:*

> "This statute guarantees the wife full and complete relief."

In the instant case the appellee would not be receiving full and complete relief unless she was provided with counsel for a defense of the appeal. As an appellee she had no alternative but to defend and, with such vital and serious consequences for herself and child at stake, the need of counsel was paramount.

The Superior Court has jurisdiction to consider a motion on the part of the appellee for counsel fees as the case is a pending action and remains so until final judgment. (Chap. 166, Sec. 59, R. S., 1954, as amended), (M. R. C. P., Rule 80 (c), as amended).

It is ordered:

Appeal allowed as to the amount of $4,500.00 decreed to James V. Ryan, Esq., New York counsel for appellee.

Appeal denied as to the amount of $6,000.00 and disbursements in the sum of $183.40 decreed to Pierce, Atwood, Scribner, Allen & McKusick, Esqs., Maine counsel for appellee.

Appeal denied as to the award of $75,000.00 in lieu of alimony and $50.00 per week for support of child.

Case remanded to the Superior Court for the purpose of entertaining a motion for counsel fees for services and disbursements rendered on appeal in behalf of appellee.

MEMO TO CLERK OF COURTS

The following pages contain Rules and Proceedings for Post-Conviction Relief plus commentary thereon. Also included are necessary Amendments to Civil Rule 81. These Post-Conviction Rules and the Amendments to Rule 81 have been officially promulgated by the Supreme Judicial Court effective September 21, 1963.

The Post-Conviction Rules are based upon P. L., 1963, Chapter 310 which amends R. S., 1954, Chapter 126, by adding seven new sections numbered 1-A through 1-G. Reference to P. L., 1963, Chapter 310 is necessary.

An action under the Post-Conviction Rules will be commenced by the filing of a verified petition, and two copies, addressed to the Superior Court in the County where the conviction took place. The Clerk will file and docket the original petition upon the Superior Court Civil Docket, and forthwith mail one of the copies to the Chief Justice of the Supreme Judicial Court and the other copy to the Attorney General. No entry fee is required for the filing of the petition.

FREDERICK A. JOHNSON
Clerk, Law Court

FINAL DRAFT OF PROPOSED RULES IN PROCEEDINGS FOR POST-CONVICTION RELIEF AND AMENDMENTS TO THE MAINE RULES OF CIVIL PROCEDURE.

I. Proposed Amendments to Maine Rules of Civil Procedure. (Material to be added is underlined, material to be omitted in brackets)

Me. R. Civ. P. 81 (b) (1).

"Proceedings [under the writs of coram nobis or coram vobis to review] for post-conviction relief in criminal actions, or under the writs of mandamus, prohibition, certiorari, quo warranto, and habeas corpus and for replevying a person . . . "

Commentary

The change in 81 (b) (1) is necessary to conform to the change in terminology adopted by the new post-conviction relief statute. The use of the words "for post-conviction relief" and retention of the words "habeas corpus" further on in the section is to distinguish the post-conviction habeas corpus authorized by P. L., 1963, c. 310, from other situations in which habeas corpus might be employed.

Next to last paragraph **Me. R. Civ. P. 81(b).**

"In respects not covered by statute or the Rules in Proceedings for Post-Conviction Relief, the practice in these proceedings shall follow the course of the common law, but shall otherwise conform to these rules, except that depositions shall be taken or interrogatories served only by order of the court on motion for cause shown."

Commentary

This amendment is to carry out the intent of the draftsmen of the Rules of Civil Procedure that those rules have limited applicability in proceedings for post-conviction relief. See, *Field, McKusick, Maine Civil*

Practice, § 81.2; Reporter's Notes to Me. R. Civ. P. 81 (b). For example, the new statute provides that the attorney general must respond to the petition within 20 days, the computation of time would be in accord with the method established by Me. R. Civ. P. 6(a).

II. Proposed Rules in Proceedings for Post-Conviction Relief

Rule 1. Form of Petition. A petition for writ of habeas corpus:

(a) Shall conform to the requirements of R. S., c. 126, § 1-C additional (P. L., 1963, c. 310).

(b) Shall conform to the requirements of Rule 10 of the Maine Rules of Civil Procedure, except that the State of Maine shall be named as respondent in all proceedings, and if the petitioner is in custody, the individual having custody of the petitioner shall also be named as a respondent.

(c) Shall, if petitioner is imprisoned or in custody of any type, contain the name of the individual having custody of petitioner and the place of confinement, if any.

(d) Shall be verified by the petitioner.

(e) May include a request that counsel be appointed to represent the petitioner, if indigent, but the failure to include such a request in the petition shall not bar an indigent petitioner from requesting the court to appoint counsel.

(f) Shall concisely set forth the facts upon which the petition is based, and if the petition alleges errors of law appearing of record in a court other than the court with which the petition is filed, there shall be attached as an exhibit to the petition a certified copy of the record in such other court.

(g) Need not specify the precise relief requested, but shall be sufficient if it states that petitioner requests that he be granted any relief to which he may be entitled.

Commentary

(a) refers to the portion of the statute setting out the required contents of the petition.

(b) carried out the intent to have these proceedings, to the extent possible, governed by the Rules of Civil Procedure. The provision with reference to the title of the action is to avoid confusion. The new statute combines under the name habeas corpus, three different forms of procedure: i.e., habeas corpus, coram nobis, and writ of error. While in habeas corpus proceedings the respondent is usually the individual having custody of the petitioner, in coram nobis and writ of error it is usually the state. When the petitioner is in custody, for reasons discussed below, it is suggested that the writ be directed to the individual having custody. This becomes confusing if the State is named as the respondent in the proceeding. On the other hand, under the new statute a petitioner need not be in custody in order to seek relief, therefore, it will not always be possible to name as respondent an individual. To simplify the proceeding for the petitioner, the State shall always be a respondent, and if the petitioner is in custody he shall also name as respondent the individual having custody.

(c) enables the court to know to whom to direct its writ, and to identify the named respondent. Cf. R. S., c. 126, § 8.

(d) is merely a restatement of the provision in the statute: "Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct."

(e) makes it easier for the indigent petitioner who prepares his own petition, by eliminating the necessity for preparing other documents. There seems no reason why the request for appointment of counsel should not be incorporated in the petition. It must be made clear, however, that this is not the only method by which appointment of counsel may be requested.

(f) is an expression of hope that petitioners will confine statements to factual matters and thereby re-

duce the length of petitions and enhance their clarity. The second part is to assure that a certified copy of the record is before the Court when the petition is to review errors of law of record in a Municipal Court, District Court, or before a trial justice.

(g) avoids technicalities. As mentioned above, the new statute combines three different types of proceeding, which can result in a variety of forms of relief. Apparently, the statute was designed to simplify the procedure and avoid the injustice which results when relief is denied because the petition is given the wrong name or the wrong type of relief is requested. This provision is to make these proceedings as simple as possible, and assure that a petitioner is afforded the relief to which he is entitled despite the formal inadequacies of his petition.

Rule 2. Form of Verification. The verification to a petition for writ of habeas corpus shall be subscribed and either sworn to or affirmed by the petitioner; shall reflect that petitioner has read the petition, or that he is unable to read the English language, that the petition and verification have been read to him, and that he understands the same; and that all the matters therein within his personal knowledge are true.

Commentary

Apparently Me. R. Civ. P. 11, would permit signing of the petition by the attorney, whereas, the statute requires verification by the petitioner, thus the requirement of a signed verification. Cf. R. S., c. 126, § 8.

An alternative form of verification is provided for those unable to read the English language.

Rule 3. Form of Writ. A writ of habeas corpus shall:

(a) If petitioner is imprisoned or in custody of any type, and is to be produced at the time of hearing, be directed to the person having custody of petitioner; otherwise, the writ should be directed to the State of Maine.

(b) Contain notice of the time and place of hearing; if petitioner is imprisoned or in custody of any type, it may direct that he be produced at the time and place of hearing.

(c) Specify the grounds alleged in the petition upon which hearing is to be held.

(d) Be signed by the justice issuing the writ.

Commentary

(a) attempts to preserve the classic and traditional form of writ of habeas corpus. Traditionally, the Great Writ is directed to the individual having custody of the petitioner, directing that he produce the petitioner before the court in order that an examination may be made into the reasons for the restraint. Although the post-conviction relief statute contemplates a variety of forms of relief, the writ to be issued is by the statute denominated a writ of habeas corpus. Because of the great significance attached to the writ of habeas corpus in Anglo-American jurisprudence, it seems unwise to down grade its importance by turning it into a mere citation to the state to appear at a hearing. When the petitioner is not in custody, the writ can be nothing more than a notice of hearing.

(b) attempts to preserve the classic function of the writ of habeas corpus, i.e., production of the petitioner before the court. This eliminates the necessity for issuing a writ of habeas corpus ad testificandum pursuant to R. S., c. 126, §37, in those situations in which the petitioner's testimony is required. Since, if he is represented by counsel, the presence of the petitioner is not essential in every type of proceeding under the new statute: e.g., review of errors of law appearing of record, the rule permits the court to issue a writ which does not require the production of the petitioner. It is to be anticipated that the writ will direct production of the petitioner whenever there is to be a fact hearing, or whenever the petitioner is not represented by counsel.

(c) Specification of the grounds alleged in the petition is not usual in a writ of habeas corpus, though

generally found in the writs of coram nobis and error. In regard to the form of coram nobis and writ of error, see: *Dwyer* v. *State*, 151 Me. 382 (1956); *Galeo* v. *State*, 107 Me. 474, 476 (1911). A fairly standard writ of habeas corpus may be found in *West's Federal Forms*, § 8037. Since a petition for relief may allege a number of grounds for relief and the writ issued grant a hearing only upon some of those grounds, the grounds upon which the hearing is to be held should be specified in the writ. This keeps the record clear, as well as giving the parties accurate notice of the exact purpose of the hearing.

(d) The statute provides: "Such justice . . . may issue a writ . . ." apparently contemplating issuance of the writ by the justice and not the clerk. Cf. R. S., c. 126, § 7.

Rule 4. Forms. The forms contained in the Appendix of Forms are sufficient under the rules.

Commentary

This is based on Me. R. Civ. P. 84.

Rule 5. Title and Application. These rules shall be known as the Maine Rules in Proceedings for Post-Conviction Relief. In respects not covered by statute, these rules, together with the Maine Rules of Civil Procedure where applicable, shall govern practice in proceedings brought pursuant to R. S., c. 126, § 1-A to 1-G additional (P. L., 1963, c. 310).

Commentary

This brings these rules into harmony with the proposed amendment to Me. R. Civ. P., § 81(b). See commentary to that proposed amendment, supra.

It also clearly establishes that these rules govern only post-conviction relief habeas corpus, and have no application to habeas corpus used for other purposes.

Rule 6. Effective Date. These rules will take effect on September 21, 1963.

Commentary

The rules should be effective immediately upon the court's rule making power coming into effect, which date is set out above. Thus the rules would be effective, for practical purposes, simultaneously with the new statute.

III. Appendix of Forms

FORM 1. PETITION FOR WRIT OF HABEAS CORPUS

State of Maine Superior Court
_____, ss

_____,
Petitioner
v.
THE STATE OF MAINE,
[_____]
Respondents

Petition for Writ of Habeas Corpus

Petitioner _____ respectfully alleges that:

Count I

1. Petitioner was the respondent in a criminal proceeding before the _____ Court at _____, entitled State of Maine v. _____, bearing Criminal Docket No. _____, in which proceeding petitioner was convicted of the crime of _____, judgment having been entered on the _____ day of _____ 19____, and petitioner sentenced to _____.

[2. Petitioner is presently in custody of _____ at _____ pursuant to said sentence.]

[3. Petitioner does not have sufficient funds with which to retain counsel to represent him in this proceeding.]

[4. Petitioner did heretofore, on the _____ day of _____ 19____ petition _____ for a _____, which petition was _____. No other proceeding for relief from the above described conviction has been taken.]

5. Petitioner is [was heretofore] illegally imprisoned in that

(here set forth facts relied upon to establish illegal imprisonment).

Count II

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. There were errors of law of record in the above described proceedings, in that

(here set forth alleged errors of law).

[3. A certified copy of the record in the proceedings described above is attached hereto and marked Exhibit A.]

Count III

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. Petitioner's sentence was imposed in violation of the Constitution of the United States, in that

(here set forth alleged violation of constitution rights)

Count IV

1. Petitioner repleads all and singular the allegations set forth in paragraphs 1, 2, 3, and 4 of Count I of this petition.

2. There were errors of fact not of record which were not known to the petitioner or the court and which by the use of reasonable diligence could not have been known to the petitioner at the time of trial and which, if known, would have prevented petitioner's conviction. Said facts are:

(here set forth the facts relied upon).

WHEREFORE, petitioner prays:

A. That a Writ of Habeas Corpus issue pursuant to R. S., c. 126, § 1-D additional (P. L., 1963, c. 310) and a hearing be had upon said Writ.

B. That petitioner be afforded any further relief to which he may be entitled.

[C. This Honorable Court appoint counsel to represent petitioner in this proceeding.]

Dated: _____

_____
Petitioner

(Verification)

NOTE: The material enclosed in brackets in the preceding form of Petition for Writ of Habeas Corpus, is to be included only when applicable.

Although the form is in several counts, alleging a variety of grounds for relief, it is not to be anticipated that every petition will allege all of the grounds alleged in the form. The petitioner should use the particular form of allegation which suits the grounds he relies upon for relief.

Commentary

It is recommended that the above Note be included in the Appendix of Forms as explanation for those petitioners who will prepare their own petitions.

FORM 2. VERIFICATION

State of Maine

_____, ss

_____ being first duly sworn deposes [affirms] and says:

He is the petitioner named in the foregoing petition; that he has read the same; that all matters set forth therein are true, except such matters as are alleged on information and belief, and as to those matters he alleges that he believes them to be true.

s/_____

Subscribed and sworn to [affirmed] before me this _____ day of _____ _____ 19____.

s/_____
(office of person authorized to administer oaths)

FORM 2A. ALTERNATIVE FORM OF VERIFICATION FOR THOSE UNABLE TO READ ENGLISH

State of Maine

_____, ss

_____ being first duly sworn deposes [affirms] and says:

He is the petitioner named in the foregoing petition; that he is unable to read the English language, that the petition and this verification have been read to him and that he understands the same; that all matters set forth therein are true, except such matters as are alleged on information and belief, and as to those matters he alleges that he believes them to be true.

s/_____

Subscribed and sworn to [affirmed] before me this _____ day of _____ _____ 19____.

s/_____
(office of person authorized to administer oaths)

FORM 3. WRIT OF HABEAS CORPUS WHEN PETITIONER IN CUSTODY

(Title of court and cause)

Writ of Habeas Corpus

To _____:

We command you, that you have the body of _____, under your custody, before me, on the _____ day of _____ 19____, at _____ o'clock in the _____ noon, in the Courthouse in _____ county, for hearing on said _____'s petition, wherein it is alleged:

(here set forth, in substance or by reference, those grounds alleged in the petition upon which the hearing is to be held)

that we may cause justice to be done in accordance with the laws and customs of the State of Maine

Done at _____ this _____ day of _____ 19____.

(Seal of Court)

_____

Justice of the _____

FORM 3A. ALTERNATIVE WRIT OF HABEAS CORPUS WHEN THE PETITIONER IS NOT IN CUSTODY OR WHEN PETITIONER IS NOT TO BE PRODUCED AT THE TIME OF HEARING.

(Title of court and cause)

Writ of Habeas Corpus

To the Sheriffs of the respective counties of the State of Maine, and their deputies:

We command you, that you make known to the State of Maine, that it may appear, if it sees cause, before me, on the _____ day of _____ 19____, at _____ o'clock in the _____noon, in the Courthouse in _____ county, for hearing on the petition of _____, wherein it is alleged:

(here set forth, in substance or by reference, those grounds alleged in the petition upon which the hearing is to be held)

that we may cause justice to be done in accordance with the laws and customs of the State of Maine

Done at _____ on this _____ day of _____ 19____.

_____

Justice of the _____

(Seal of Court)

INDEX

DECEIT

DIRECTED VERDICTS

DISCRETION

FALSE PRETENSES

A promise, if unconditional and made without present intention of performance, will constitute a false pretense.

Herrick v. State of Maine, 499.

A mere expression of opinion will not suffice to support a criminal prosecution for cheating by false pretenses; there must be a direct and positive assertion negating the truth of the alleged false pretenses.

"When a representation embraces no details or particulars, it should not be relied on."

A respondent can be compelled to answer only to an indictment which charges him clearly and explicitly with having made false pretenses as to matters of fact, which are directly and positively alleged not to be true. (See R. S., Chap. 133, § 11, as amended for statutory exception not pertinent here.)

Test of false pretenses is not that defendant obtained property from which one cheated was induced to part by false representation; it is sufficient if property is delivered to someone other than the one cheated, whoever may be benefited thereby. R. S., 1954, Chap. 133, § 11.

(3810) *State* v. *Deschambault*, 216.

A false pretense as to future acts or events will not support a conviction for obtaining property under false pretenses.

In the absence of a statute authorizing prosecution upon a promise made without a present intention of performance, a false pretense to be indictable must be an untrue statement of a past or an existing fact.

State of Maine v. *Austin*, 71.

See Public Laws.
Indictments.

The pretense must relate to a past event; a past event is an existing fact.

One who enters into a contract with a municipal officer does so at the peril of the officer's authority; however, it does not mean that a municipal officer may with impunity deceive others as to the extent of authority granted to him by the municipality.

A pretense or representation of authority may well be a pretense or representation of fact.

(3811) *State of Maine* v. *Deschambault*, 223.

FALSE REPRESENTATION

Plaintiff must show that he relied upon the representations, was induced to act upon them, did not know them to be false, and by the exercise of reasonable care could not have ascertained their falsity.

Actual fraud is characterized by an intent to deceive and the defendant must have actual knowledge of the falsity of his representations and the facts related must be particularly within his own knowledge and neither inherently absurd or incredible.

The Plaintiff in an action of deceit, must prove a material misrepresentation which is false, known by the defendant to be false, or made by the latter recklessly as an assertion of fact without knowledge as to its truth or falsity, made with the intention that it shall be acted upon and acted upon with damage.

Public Finance Corp. v. *Scribner*, 150.

FRAUD, STATUTE OF

Any promise to pay debt, having been made after the creation of the debt, is not an original promise to pay debt; it constitutes no more than a promise to answer for the debt of another, and it is required by the statute of frauds to be in writing.

Bartkus v. *Gilman*, 69.

The underlying element in all definitions of unfair competition is that no person shall be permitted to palm off his own goods or products as the goods of another; the ground of the action is fraud.

Hubbard v. *Nisbet*, 406.

Whether a statement as to value is opinion or a false fact depends upon the circumstances; if made with the design that it shall be acted upon as a statement of existing fact it may be so regarded.

Herrick v. *State of Maine*, 499.

If a seller possesses or assumes to possess superior knowledge of the property and asserts it to his vendee who has not had equal opportunity to gain knowledge, his asserted opinion may be equivalent to an affirmation of fact and therefore actionable fraud.

Where a confidential relationship could be found to exist between the complainant and the accused the ordinary doctrine of "puffing" does not apply if there is an intent to defraud.

Herrick v. *State of Maine*, 499.

See False Representation.
False Pretenses.

HUSBAND AND WIFE

Legal unity of husband and wife will not be observed where to do so would inflict injustice on the wife or inflict injustice upon outsiders and deprive them of their legal rights.

Reciprocal spouses may not maintain causes of action, the one against the other, for negligent tort.

Bedell v. *Reagan*, 292.

ILLEGITIMACY

Presumption that child conceived during wedlock is legitimate is not conclusive.

Illegitimacy must be proved beyond a reasonable doubt.

Woman, whose child was conceived during wedlock but was born after her divorce, could maintain bastardy proceedings against alleged father of child.

Ventresco v. *Bushey*, 241.

INDICTMENT

If the statute does not sufficiently set out the facts which constitute the crime, then the pleadings must contain a more definite statement of the facts.

Although a respondent has a constitutional right to have the written allegation of the accusation full and complete, the prosecutor is not required to make averments in indictments or complaints to the degree that they become a recital of evidence.

State of Maine v. *Charette*, 124.

PUBLIC LAWS

After the effective date of the enactment of P. L., 1961, Chap. 40, the failure to perform a promise, if unconditional and made without present intention of performance, constitutes a false pretense within the meaning of the statute; however, the State must allege and prove that the promise was unconditional and was made without a present intention of performance.

State of Maine v. *Austin*, 71.

See False Pretenses.

A state furnishing care and maintenance to the veteran in a state mental institution is not a "creditor" within the meaning of U. S. Code, Sec. 3101.

P. L., 1961, Chap. 304 was intended to be a revision and condensation of the statutes relating to the Department of Mental Health and Corrections by which the substance of the right of the State of Maine to reimbursement for care and support from the criminally insane in accordance with "means" or ability to pay remained undisturbed.

State of Maine v. *Bean*, 455.

PUBLIC SERVICE COMMISSION

Fact that extension of Public Utilities Commission certificate would reduce volume of carriage and revenue of competing carriers was not controlling in determining whether extension was in "public interest" under statute.

Public Utilities Commission is not permitted to base decision on facts outside record.

Factual finding, on which decree of Public Utilities Commission granted extension of certificate to transport baggage, mail, and express, was final if supported by such evidence as taken alone would justify conclusion.

B. & A. R.R. Re: P. U. C. Certificate J #44, 86.

See Statutes.

REAL ESTATE

See Relocation.
See Mortgages.

RELOCATION

Relocation of condemnees was not a condition precedent to divestment or possession of their ownership of property taken by Renewal Authority for purpose of clearing blighted area.

Portland Renewal Auth. v. *Reardon*, 31.

RES GESTAE

Although spontaneity of a remark is an important element of *res gestae*, that element alone does not govern the admissibility of the statement.

Whether a statement was admissible as part of the *res gestae* is a matter within the sound discretion of the presiding justice; the determination of which is conclusive upon appeal in the absence of a clear abuse of that discretion.

The lapse of time between the injury and proffered statement is a factor to be considered in *res gestae*.

Welch, Sr. v. *Jordan; Welch, Jr.* v. *Jordan*, 436.

SALES AND USE TAX

The mere existence of certain rights or powers in the owner-lessor reserved by the lease would not suffice to subject him to taxation if he failed to or refrained from exercising any such right or power in Maine.

South Shoe Machine Co. v. *Johnson*, 74.

The exercise of any right or power over leased equipment within the state by the owner will subject such equipment to a use tax under the statute, and such taxation is constitutional.

Automatic Canteen Co. v. *Johnson*, 189.

SARDINE

Only a whole herring, less head and under certain conditions the tail, packed in a can is a "sardine."

State v. *Milbridge Canning Corp.*, 1.

SLANDER

A plaintiff is entitled to damages sufficient to compensate for humiliation and injury to feelings and reputation as have been proved or may reasonably be presumed.

Punitive damages are allowable if actual malice is shown.

The plaintiff is not entitled to damages for publicity which the trial has caused.

Provocation, though no excuse for slander, may be a mitigating factor when punitive damages are assessed.

Only to the extent that the defendant may be penalized for malice by imposition of exemplary damages may plaintiff be penalized for having provoked the wrong by mitigation of the recovery.

Farrell v. *Kramer*, 387.

SLUM CLEARANCE

See Relocation.

STATUTE

If the statute does not sufficiently set out the facts which constitute the crime then the pleadings must contain a more definite statement of the facts.

State of Maine v. *Charette*, 124.

See Constitutional Law.

STATUTES

The jurisdiction and authority of the court in matters pertaining to divorce and derived from the Statutes; jurisdiction is confined within the purposes and intent of the statutes.

The right to attorney's fees is dependent upon the statutory provisions.

Strater v. Strater, 508.

The statutory authorization for the allowance of sufficient money for the prosecution of defense of a divorce complainant cannot be construed to provide for services rendered previous to the pendency of the divorce, however during pendency, allowance may be made for some past expense if it were shown that its payment was necessary to enable the wife to properly prosecute or defend the pending divorce action.

TORTS

TROVER

Damages in an action of trover are determined as of the date of conversion.

Public Finance Corp. v. *Puritan Chev. Co.*, 237.

UNDUE INFLUENCE

A confidential relationship does not create a presumption compelling a finding of undue influence in the absence of contrary evidence.

Testamentary capacity is concerned with the "sound and disposing mind" and not with undue influence operating upon such a mind.

Barton v. *Beck Estate*, 446.

UNEMPLOYMENT

Time of unemployment and prospects for returning to original job do not make job recommended by Commission unsuitable to claimant.

Lowell v. *Me. Emp. Sec. Comm., et al.*, 177.

UNIONS

Assuming the union to be a competent contracting party, the contract between the union and the employer is a completed contract in itself, enforceable in the interest of the union as an organization or in the interest of individual employees as third parties.

The authority of the union as a given employee's bargaining agent is presumed to continue following the execution of the contract, in the absence of anything to show its termination.

Curry v. *Portland Terminal Co.*, 305.

USE

The word "use" as employed in the language of R. S., 1954, Chap. 17, §§ 2 and 4, would be given its ordinary meaning and the lessee in Maine under a lease giving him full possession and control of the property would be deemed to be the sole user; the nonresident lessor would be deemed to "use" the property in Maine within the meaning of the statute only if he exercised some right or power over the property within this state incident to his ownership.

South Shoe Machine Co. v. *Johnson*, 74.

VALUE

Whether a statement as to value is opinion or a false fact depends upon the circumstances; if made with the design that it shall be acted upon as a statement of existing fact it may be so regarded.

Though value rests upon opinion, it is a fact and one constantly found by juries.

Herrick v. *State of Maine*, 499.

VERDICT

Conjecture and surmise will not substitute for evidence and a scintilla of evidence will not support a verdict.

Stanley v. *Tinsman*, 17.