MAINE REPORTS

160

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1964 to DECEMBER 31, 1964

CHARLES B. RODWAY, JR.

REPORTER

AUGUSTA, MAINE
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AUGUSTA, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ROBERT B. WILLIAMSON, *Chief Justice*

HON. DONALD W. WEBBER

HON. WALTER M. TAPLEY, JR.

HON. FRANCIS W. SULLIVAN

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
[1] 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
[2] HON. HAROLD J. RUBIN

[1] Died March 30, 1964
[2] Qualified May 20, 1964

Attorney General

HON. FRANK E. HANCOCK

Reporter of Decisions

CHARLES B. RODWAY, JR.

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

MAINE AVIATION CORPORATION

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, January 14, 1964.

Sales and Use Tax. Sales Tax. Use Tax. Evidence.

In order that a use tax be imposed, there must be a retail sale or a sale at retail.

Transactions between a parent and subsidiary corporation were subject to the sales tax.

Sale of an aircraft used by a corporation in its business to another corporation for the latter's use and not for resale was a "casual sale" not subjected to use tax even though corporate seller was engaged in the business of selling and operating aircraft.

The party charged with the tax is entitled to show the facts of the transaction.

Consideration in fact has an important bearing upon the amount of tax.

ON REPORT.

This is an appeal from assessment of a use tax on transfer of an aircraft to appellant. The issue is whether or not the transfer of the aircraft was a "casual sale" and not subject to the use tax. Appeal sustained. Remanded for entry of judgment in accordance with this opinion.

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

Robert F. Preti, for Appellant.

John W. Benoit,
Carl O. Bradford,
Jon R. Doyle, Asst. Attys. Gen., for Appellees.

WILLIAMSON, C. J. On report. This is an appeal from the assessment of a use tax on the transfer of a Cessna 310B aircraft from Bar Harbor Airways, Inc. to the appellant, Maine Aviation Corporation, both Maine corporations. There is no dispute about the amount of the tax based on the value of the aircraft, if it be determined that a tax is due.

Maine Aviation was registered with the Tax Assessor as a corporation doing business in aviation sales and service and also operated aviation services in Auburn and Portland, conducting "the business of flight instruction, charter services, air taxi service, aircraft rentals." Bar Harbor Airways was likewise so registered and was similarly engaged in business in Trenton, Maine. Sales and Use Tax Law, R. S., c. 17, § 6.

In September 1958 Bar Harbor Airways purchased the Cessna aircraft in question for resale in the ordinary business of purchasing and selling aircraft. Subsequently, and before the transfer to Maine Aviation, it used the aircraft for "its own benefit and profit purposes" and paid a use tax thereon. In brief, the aircraft was taken from the stock in trade or inventory and used by Bar Harbor Airways for its general corporate purposes.

In February 1959 the aircraft was transferred to Maine Aviation for its use and not for resale. The transfer was evidenced by a bill of sale on a Federal Aviation Agency form used for registration purposes. The bill of sale exe-

cuted by Bar Harbor Airways named as the seller reads in part:

"FEDERAL AVIATION AGENCY
BILL OF SALE

For and in consideration of $1.00 A.O.C. the undersigned owner of the full legal and beneficial title of the aircraft described as follows:

Aircraft Make and Model
CESSNA 310B
* * * * * * * * * *

does . . . hereby sell, grant, transfer, and deliver all of his right, title and interest in and to such aircraft unto:

(Name and address of purchaser — same as on Parts A and B of this form)
MAINE AVIATION CORPORATION
* * * * * * * * * *

Name of Seller BAR HARBOR AIRWAYS INC.

By (Sign in ink) Joseph A. Caruso

(If executed for co-ownership, all must sign)

Title PRESIDENT . . . . ."

The letters "A.O.C." are an abbreviation of "and other consideration."

The two stockholders of Bar Harbor Airways, each of whom owned of record or equitably one-half of its outstanding capital stock, organized Maine Aviation to bring about, in the words of appellant's counsel, a "spin off" under Federal income tax law of a portion of their business assets to a new corporation. The purpose of the "reorganization" was to take advantage of income tax benefits of no interest to us in detail. The outstanding capital stock of the new corporation representing the book value of the aircraft was owned of record and equitably by the same two stockholders precisely as was the stock of Bar Harbor Airways.

The pertinent parts of the Sales and Use Tax Law (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 on and after July 1, 1957, at the rate of 3% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the Tax Assessor, showing that the seller has collected the sales or use tax, in which case the seller shall be liable for it."
>
> (The above rate was in effect at the time of the transaction.)

In order that a use tax be imposed, there must be a retail sale or sale at retail.

> "**Sec. 2. Definitions.** 'Retail sale' or 'sale at retail' means any sale of tangible personal property, in the ordinary course of business, for consumption or use, or for any purpose other than for resale, except resale as a casual sale, in the form of tangible personal property, . . . The term 'retail sale' or 'sale at retail' does not include . . . any other isolated transaction in which any tangible personal property is sold, transferred, offered for sale or delivered by the owner thereof, such sale, transfer, offer for sale, or delivery not being made in the ordinary course of repeated and successive transactions of a like character by such owner, such transactions being elsewhere sometimes referred to as 'casual sales' . . . "
>
> * * * * * * * * *
>
> " 'Sale' means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business. . . "
>
> * * * * * * * * *
>
> " '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."

"**Sec. 9. Presumption concerning sales.** The burden of proving that a transaction was not taxable shall be upon the person charged with tax liability."

The decisive issue in our view is whether the transfer of the aircraft was a "casual sale," and hence not subject to the use tax.

The appellant strongly urges that we look behind the corporate entities to find no more than a splitting off of certain property from one corporation to a newly created corporation with precisely the same ownership of stock. It argues that there was no sale within the meaning of the Sales and Use Tax Law.

We see no reason, however, for disregarding the corporate entities. In *Bonnar-Vawter, Inc.* v. *Johnson,* 157 Me. 380, 173 A. (2nd) 141, we held transactions between a parent and subsidiary corporation were subject to the sales tax. We said at pp. 387, 388:

"Generally, courts have been reluctant to disregard the legal entity of a corporation, and have done so with caution and only when necessary in the interest of justice. The corporate entity will be disregarded when used to cover fraud or illegality, or to justify a wrong. It will not be disregarded when to do so would promote an injustice, give an unfair advantage, or contravene public policy."

* * * * * * * * *

"In the field of retail sales tax legislation and similar tax legislation, courts have generally refused, for various reasons, to separate the corporate entities of the parent company and the wholly owned subsidary in order to grant relief from such taxes at the expense of the state."

In the instant case there were substantial reasons for the transfer of the aircraft to a new corporation. The ap-

pellant tells us the "reorganization" was intended to accomplish income tax benefits.

We have here in terms the sale of an aircraft by the owner Bar Harbor Airways to a purchaser Maine Aviation for its use and not for resale. There was a consideration stated for the sale, which on examination appears to have been stock representing the book value of the aircraft.

If we go behind the corporate entities we enter the thicket of income tax law. This we are not prepared to do. The stockholders chose to operate their business through two corporations and not one. They must accept the burdens with the benefits of their course of conduct. We recognize Bar Harbor Airways and Maine Aviation as separate corporate entities under the Sales and Use Tax Law.

The question becomes whether the sale of the aircraft was a casual sale removed from the category of the taxable retail sale. We restate the facts briefly. Bar Harbor Airways, engaged in selling and operating aircraft, took from its stock the Cessna aircraft in question, used it in the corporate business, paid a use tax thereon, and sold the aircraft to a third party, Maine Aviation, for the latter's use and not for resale. This transaction, in our view, is an isolated transaction or casual sale, as defined in Section 2, *supra.* It was a sale "not being made in the ordinary course of repeated and successive transactions of a like character by such owner . . ."

From the point of view of Bar Harbor Airways the transaction was not of "like character" with other sales of aircraft purchased and retained for resale. The corporation was engaged in selling aircraft, but was not engaged in the business of selling aircraft *used by it* for its own business purposes.

The appellee urges that a sale of an aircraft by one registered dealer to another registered dealer is in the ordinary

course of business and not a casual sale. In our opinion the case is analogous to that of the grocer's casual sale of his cash register.

The fact that the seller is engaged in the selling of aircraft does not require a finding that a sale of this particular aircraft held for use and not resale was not a casual sale within the Act. That difficult problems of proof might arise in a given situation does not destroy the validity of the analogy.

There is nothing in the record to indicate that this was one "of repeated and successive transactions of a like character." No one suggests that Bar Harbor Airways had ever sold an *aircraft used by it* for its corporate business.

In *Pacific Pipeline Construction Company* v. *State Board of Equalization* (Cal.), 321 P. (2nd) 729, cited by the Tax Assessor, the California Court held that the transfer of machinery and equipment pursuant to the reorganization of certain corporations was a sale at retail and hence taxable. The court said, at p. 731:

> "Section 6006.5 defines an occasional sale as follows: 'Occasional sale' includes: (a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit; . . "
>
> * * * * * * * * *
>
> "The undisputed evidence shows that the sale was one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit and was therefore not an occasional sale under subdivision (a) of section 6006.5. Plaintiff's own evidence shows that in 19 separate sales, in addition to the sale in question, it sold at various times from 1947 through 1950, 65 items of equipment for a total of $41,879.22."

The court also found the reorganization did not bring the sales within another provision of the "occasional sale" statute.

We are aware that the Tax Assessor in his Sales and Use Tax Instruction Bulletin No. 9, revised July 1, 1955, adopted the view of the California statute. The Tax Assessor said:

> "**Non-taxable casual sales.** The following sales will be deemed casual and thus, except as to motor vehicles, not subject to sales or use tax:
>
> "a. Isolated sales of a non-recurring nature made by a person not engaged in the business of selling tangible personal property;
>
> "b. Sales of used articles of tangible personal property originally acquired for use or other consumption by a retailer or seller which are not sold in the regular course of any business engaged in by such retailer or seller.
>
> "Examples of non-taxable sales:
>
> "A grocer selling his cash register. . . "

The interpretive bulletin does not, of course, have the force of law. This does not deny recognition of the value such bulletins play in the administration of the law. *Sampson-Sawyer Co.* v. *Johnson,* 156 Me. 544, 552, 167 A. (2nd) 1.

The State contends that evidence was not admissible (1) to show the reorganization plan between the two corporations from the records of Bar Harbor Airways, and (2) to establish consideration or lack of consideration in fact in view of the stated consideration in the bill of sale.

We see no error in admission of the evidence. The party charged with the tax is entitled to show the facts of the transaction. Acts of Bar Harbor Airways obviously bore upon the issue of the sale which the State seeks to tax.

Insofar as the consideration in the bill of sale is concerned, surely it would be a harsh rule that would force the parties in a tax case of this nature to stand upon the formal "one dollar and other valuable consideration." Consideration in fact has an important bearing upon the amount of tax.

We are left on the facts here presented with an isolated transaction or "casual sale" not subject to the use tax.

The entry will be

Appeal sustained.

Remanded for entry of judgment in accordance with this opinion.

EVELYN A. BICKFORD
vs.
CHARLES BERRY

ROLAND H. BICKFORD
vs.
CHARLES BERRY

(See Page 132)

Waldo. Opinion, January 22, 1964.

Appeals. Negligence. Evidence. Pre Trial.

The mere happening of an accident does not imply negligence.

It is the responsibility of counsel to furnish a record sufficiently complete in order that the issues may be thoroughly and properly reviewed on appeal.

Stipulations and statements of counsel at pretrial conference are binding with respect to facts admitted or agreed or defenses waived.

The pre-trial order is important in considering whether or not the directed verdicts are erroneous.

ON APPEAL.

In this negligence case, plaintiff appeals the granting of motion for directed verdict. Held, that question of whether defendant was negligent was for the jury. Appeals granted.

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

Wendell R. Atherton, for Plaintiff.

Rudman and Rudman,
by *Paul L. Rudman,* for Defendant.

TAPLEY, J. On appeal. Evelyn A. Bickford and Roland H. Bickford seek damages from defendant, Charles Berry, as the result of an automobile accident. The actions sound in negligence and were tried jointly. At the conclusion of plaintiffs' evidence counsel for the defendant moved for directed verdicts in favor of the defendant. These motions were granted by the presiding justice and from the granting of the motions the plaintiffs appealed. The presiding justice granted the motions for the reason that the plaintiffs failed to produce affirmative evidence that would in any manner establish negligence on the part of the defendant.

Roland H. Bickford and Evelyn A. Bickford are husband and wife. Mr. Bickford picked up his wife at her place of employment in Brewer, on the afternoon of October 15, 1961, and then proceeded with her as a passenger to their home in Winterport, Maine.

The testimony in plaintiffs' case recites that Mr. Bickford was operating his car along U. S. Route 1-A in a southerly direction; that when he was approximately 300 feet from the driveway to his home he turned on his directional light, indicating a left turn. When 50 feet from the driveway he,

then being on his right side of the road, started turning to the left into his driveway. At a point where the car was headed into the driveway it was struck by one operated by the defendant. At the time of the collision approximately 2½ feet of the Bickford automobile was on the traveled portion of the highway. The rear left tail light of the Bickford car was struck. Mr. Bickford testified that the weather was inclement; that there was a precipitation of rain and snow and that he was unable to observe what was behind him because the rear window of his automobile was covered with snow.

It is well established in this State that the mere happening of an accident does not imply negligence. *Millett* v. *Maine Central Railroad Co.*, 128 Me. 314; *Adams* v. *Richardson*, 134 Me. 109.

> "- - - - the presence of an automobile on the wrong side of the highway is a prima facie proof of negligence."
> *Gist* v. *Allentown Wholesale Distributors, Inc.*, 158 A. (2nd) 777, 779 (Pa.)

The pre-trial order becomes important in considering as to whether or not the directed verdicts for the defendant were erroneous.

> "Stipulations made at a pre-trial conference are binding upon the parties. A party need not offer any evidence to prove a matter so stipulated, nor will evidence in contradiction of it be admitted." *Maine Civil Practice - Field and McKusick - Commentary* 16.2.

> "Stipulations and statements of counsel at a pre-trial conference are binding with respect to facts admitted or agreed or defenses waived."
> *Federal Practice and Procedures - Barron and Holtzoff* — Vol. 1A, Sec. 473, Page 844.

The contention of the defendant, as stated by him in the pre-trial order, recites that he came over the crest of the

hill; that plaintiff's car was stopped in the highway and that the plaintiff had given no warning of his position in the highway. This contention has the force of testimony, either for or against the defendant, depending upon the view a jury may take of the factual aspects of the case.

Because of the contents of the pre-trial order as to defendant's version of the accident, the circumstances of the instant case are distinguishable from those cases which hold that the mere happening of an accident does not imply negligence. This is not a case where defendant obtains directed verdicts without submission of evidence on his part but, rather, one in which the contents of the pre-trial order provide defendant's version of the happening and should be considered in the determination of the directed verdicts.

The record discloses the activities of the plaintiff in operating his automobile and, in addition thereto, that his car was struck in the rear, which was protruding 2½ feet on the defendant's left side of the traveled portion of the way. According to the contention of the defendant, as expressed in the pre-trial order which, as we have said, has the force of testimony, he agreed that he struck the rear end of plaintiff's car but says that he was not negligent because when he came over the crest of the hill plaintiff's car was stopped on the highway and the plaintiff had not given the defendant any warning of his position on the highway.

The circumstances attending the accident, as stated by the respective parties, are diametrically opposed. On the one hand, the jury could determine, according to the plaintiffs' contention, that the defendant negligently drove over to his, the defendant's, left hand side of the road and struck the plaintiff's car as it was entering the driveway or they, on the other hand, could find that as the defendant came over the crest of the hill he was faced with a situation of the plaintiff's automobile being stopped on the highway with no warning as to its position. It could be inferred

from defendant's contention that as he came over the hill, the plaintiff's vehicle was in such position in the highway as to cause the collision to be unavoidable on the part of the defendant.

We are of the opinion that the plaintiff's testimony and the substance of the pre-trial order make this a case for jury consideration.

The court has been handicapped to a great extent because of the failure of the plaintiffs to present a copy of the "chalk" as an exhibit. Much of the testimony made reference to the "chalk" and it also would have clarified the use of the pictures that were admitted as exhibits.

This court has on previous occasions admonished the bar for presenting incomplete records for the purposes of appellate review. It is the responsibility of counsel to furnish a record sufficiently complete in order that the issues may be thoroughly and properly reviewed.

Appeals granted.

MYRTLE HAYES
vs.
BERNARD E. BUSHEY

York. Opinion, January 27, 1964.

Trespass. Liability. M. R. C. P. Rule 56 (c).
Tort. Negligence.

The intention to enter the land of another is an essential element of trespass; absence of such an intention or such negligence as will substitute therefore will destroy liability.

One may intend to enter upon the land of another under the reasonable misapprehension that his entry is lawful; such a mistake does not avoid his liability for trespass.

Involuntary or accidental entry upon the land of another is not a trespass.

There is a distinction between the intention to do a wrongful act or commit a trespass and the intention to do the act which results in or constitutes the intrusion.

ON APPEAL.

Trespass action by dwelling owner against truck owner operator for injuries resulting to owner's dwelling and its contents when truck collided with dwelling. Defendant appeals entry of summary judgment on issue of liability. Appeal sustained, and case remanded for proceedings in accordance with opinion.

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

Joseph E. Harvey, for Plaintiff.

Verrill, Dana, Walker, Philbrick and Whitehouse,
by *John A. Mitchell* and *John W. Philbrick,*
for Defendant.

WEBBER, J. The plaintiff brought a complaint for trespass. In the first three paragraphs thereof she alleged the date of the event, her claim of ownership and possession of certain real estate and a description of a building located thereon and certain chattels contained therein. In the fourth paragraph she alleged the defendant's trespass in these terms:

> "4. On said day, Defendant, without right or permission, unlawfully entered on her said land with a large semi-trailer truck and with great force and violence, drove said truck automobile head on and into the Plaintiff's building, aforementioned, knocking the building off its foundation, and totally destroying the same, as well as all of Plaintiff's personal belongings located in said building."

The complaint terminated with a demand for judgment.

The defendant seasonably answered, admitting plaintiff's ownership and possession and further admitting that his truck driven by him left the highway and entered plaintiff's land without permission, colliding with and damaging plaintiff's building. The defendant, however, specifically denied that the entry was unlawful or without right and alleged that "said entry was unintentional and without fault or negligence on his part but was due to the fault and negligence of the driver of a motor vehicle which was being driven in the opposite direction from that in which he was driving and which was turned into and across the lane in which the defendant was lawfully driving said semi-trailer truck on his own right-hand lane of said highway in the exercise of due care, striking the left side of the tractor of said semi-trailer truck and causing said tractor and trailer to leave the highway and enter upon the land of the plaintiff and to collide with the plaintiff's said building."

The plaintiff seasonably filed her motion for summary judgment on the issue of liability, which motion was granted

by the justice below, leaving for jury determination only the issue of damages. Defendant's appeal raises the issue as to whether the denial of an intentional and voluntary intrusion and the further denial of negligence on the part of the defendant present genuine issues as to any material facts within the meaning of M. R. C. P., Rule 56 (c).

Our court has never before been called upon to decide whether liability will be imposed for an unintended and involuntary intrusion upon land of another. The rule stated in the Restatement of the Law of Torts, Vol. 1 contains the following pertinent provisions:

Page 359, Sec. 158:

"One who intentionally and without * * * privilege

(a) enters land in possession of another or any part thereof or causes a thing * * * so to do * * *

is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests. * * *

Comment (e) Tort liability is never imposed upon one who has neither done an act nor failed to perform a duty. Therefore, one whose presence on the land is not caused by any act of his own or by a failure on his part to perform a duty is not a trespasser thereon. * * * "

Page 390, Sec. 165:

"One who recklessly or negligently, or as a result of an extra hazardous activity, enters land in the possession of another or causes a thing * * * so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing * * * upon the land causes harm to the land * * *."

Page 394, Sec. 166:

"Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-

> negligent entry on land in the possession of another or causing a thing * * * to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm * * * .
>
> Illustration 2. A, while driving his automobile along the street in the exercise of due care, is suddenly overcome by a paralytic stroke, which he had no reason to anticipate. He loses control of the automobile and falls across the steering wheel thereby turning the car so that it runs upon and damages B's lawn. A is not liable to B."

It is necessary to keep in mind the distinction between the intention to do *a wrongful act or commit a trespass* and the intention to do *the* act which results in or constitutes the intrusion. One may intend to enter upon the land of another but under the reasonable misapprehension that his entry is lawful. Such a mistake does not avoid his liability for trespass. It is only the intention *to enter* the land of another that is an essential element of trespass and the absence of such an intention or such negligence as will substitute therefor will destroy liability. This distinction is clearly set forth in Harper and James, The Law of Torts, Vol. 1, Page 12, *et seq.*, Sec. 1.4.

In *Puchlopek* v. *Portsmouth Power Co.* (1926), 82 N. H. 440, 136 A. 259, there was some evidence that decedent child had slipped accidentally in such a manner that his arm had passed through a picket fence surrounding defendant's property and come in contact with a live wire inside the fence. We are in accord with that portion of the opinion which deals with the element of trespass. At page 260 of 136 A. the court said: "Such an involuntary intrusion could not be regarded as a trespass. * * * , the essential element of force, expressed in the phrase *vi et armis*, is lacking in such an entrance on another's premises. If the decedent slipped and fell towards the fence, it was a case of force *exerted by accident on him* and not of force exerted *by him.*" (Emphasis ours.)

The New Hampshire court has reaffirmed the principle that an involuntary or accidental entry upon the land of another is not a trespass. *White* v. *Suncook Mills* (1940), 91 N. H. 92, 13 A. (2nd) 729; *Paine* v. *Hampton Beach Improvement Co.* (1953), 98 N. H. 359, 100 A. (2nd) 906.

In *Edgarton* v. *H. P. Welch Co.* (1947), 321 Mass. 603, 74 N. E. (2nd) 674, the plaintiff's intestate was riding on a truck driven by another. The truck left the highway and damaged power lines of defendant Power Company. Plaintiff's intestate was electrocuted. The defendant was charged with negligence. The Power Company asserted that plaintiff's intestate was a trespasser. The court held that an unintended intrusion upon land in possession of another did not constitute trespass.

In *Phillips* v. *Sun Oil Co.* (1954), 307 N. Y. 328, 121 N. E. (2nd) 249, gasoline from defendant's pumps seeped through the soil into plaintiff's well causing pollution. Plaintiff charged separate counts of nuisance, negligence and trespass. Plaintiff withdrew his charges of nuisance and negligence and at the close of his evidence the court dismissed his count in trespass for failure of proof. Sustaining the action below, the Court of Appeals held that proof of trespass had failed since the intrusion must be the result of either an intended act or of negligence.

We are satisfied upon a review of the authorities that reason and logic lend support to what appears to be the modern trend of the law as above set forth. We conclude that in the instant case issues of fact are presented upon the pleadings as to whether or not the defendant intentionally drove his truck upon the plaintiff's property. If, as the answer states, the defendant can demonstrate that he was proceeding in the exercise of due care with no intention other than to operate his vehicle upon the public highway, but was forced upon the plaintiff's land by the wrongful act of a third party, no trespass would be shown. Under these

circumstances a summary judgment on the issue of liability should not have been ordered.

The plaintiff suggests that the defendant should in any event be held responsible for conducting an extra-hazardous activity. We neither intimate nor suggest what our holding might be in a case involving what might properly be deemed to be an extra-hazardous activity. It is enough to say that the mere operation of a semi-trailer truck along a public highway does not fall into that category.

The plaintiff has not specifically charged the defendant with negligence in her complaint. The defendant, recognizing that the claimant need not specify every theory upon which relief might be granted, has specifically asserted his own due care. The defendant is entitled to know before trial whether or not he is charged with negligence and this by an appropriate pleading. As was stated in *O'Donnell* v. *Elgin, J. & E. Ry. Co.* (1949), 338 U. S. 384, 70 S. Ct. 200, 205, 206:

> "We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking We think the unfortunately prolonged course of this litigation is in no small part due to the failure to heed the admonition well stated by the Court of Appeals of the Seventh Circuit in a similar case: 'Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection.' Vigor v. Chesapeake & Ohio R. Co., 1939, 101 F. 2d 865, 869. Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts.
>
> "But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separa-

> tion of the two kinds of actions be observed and impressed. The trial court in this case submitted the whole indiscriminately as a negligence case. This is hardly to be regarded as reversible error, for both counsel pleaded and tried the case as such and their requests were stated entirely in terms of the law of negligence. But the scrambling of the claims in this case illustrates how much evidence may be admitted, submitted and considered on negligence issues that, under our repeated holdings, would be immaterial in case of violation of the Safety Appliance Acts."

In *Wall* v. *Brim* (1943), 138 F. (2nd) 478, where the complaint was for negligence and the case was fully tried on that issue but the evidence would not support a verdict based on the negligence theory, the court remanded for amendment of the pleadings and a new trial on the issue of trespass under Rule 15(b).

In the instant case an opportunity should be afforded to the plaintiff before trial to amend the complaint by adding an additional count in negligence if the plaintiff desires to pursue this theory. Moore's Federal Practice, Vol. 2, page 1717 contains the following:

> "True, the courts will go very far in finding a basis on which to sustain a pleading as against a motion to dismiss for failure to state a claim, but good practice demands that the pleader state his claim with simplicity and clarity in the first instance, rather than set out a jumble of unrelated facts and hope that the court will work out his case for him. Further, if the pleading is to give *'fair notice' of the claim,* it will normally have to be bottomed upon some theory supporting recovery.
>
> "The courts have recognized these considerations in a line of cases supporting the proposition that the pleadings should *indicate the theory or theories on which the pleader relies."* (Emphasis ours.)

See also Field & McKusick, Maine Civil Practice, page 151, Sec. 10.2.

If in the instant case no such amendment is offered it can readily be determined and ordered at pretrial that no issue as to negligence remains in the case.

It may be noted that upon the issue of the intention and voluntariness of the act alleged to constitute a trespass, the plaintiff who shows his own possessory right and the act of intrusion by the defendant makes out a prima facie case as to liability. The burden of going forward with evidence to show the absence of intention and voluntariness then shifts to the defendant. The burden of proof as to all the essential elements of trespass, however, rests throughout upon the plaintiff.

The entry will be

Appeal sustained. Case remanded to the Superior Court for further proceedings in accordance with this opinion.

THACHER HOTEL, INC.
vs.
MARDELLE S. ECONOMOS

York. Opinion, February 4, 1964.

Contracts. License. Intoxicating Beverages. Public Policy.

In the absence of oral testimony, the rule that findings of fact stand unless clearly erroneous is not applicable.

To invalidate a contract on the ground of public policy the "impropriety of a transaction" must be clearly established.

A contract in furtherance of obtaining hotel liquor license unlawfully is against public policy.

Whether hotel owner had failed to disclose any interest in establishment in making its application for liquor license was matter for determination of State Liquor Commission and not of court in collateral proceeding involving legality of contracts relating to operation of dining rooms in hotel.

Public policy against aiding party to illegal contract is designed not to protect other party from apparently improvident bargain but to deter others from entering into like legal contracts.

ON APPEAL.

This is an action on a "management contract" between plaintiff corporation and the defendant relating to the operation of dining rooms in the plaintiff hotel. Defense holds that contract is illegal in the light of the liquor licensing statute and plaintiff may not recover. Appeal denied.

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

Waterhouse, Spencer and Carrol, for Plaintiff.

J. Armand Gendron, for Defendant.

WILLIAMSON, C. J. On appeal. This is an action on a "management contract" between the plaintiff corporation and the defendant relating to the operation of dining rooms in the plaintiff's hotel. The defense is that the contract was illegal in light of the liquor licensing statute, and hence the plaintiff may not recover thereon.

The case was heard in the Superior Court upon an agreed statement of facts. The defendant admits (assuming the legality of the contract) the claims of the plaintiff for minimum payments and expenses incurred for sales, social security, state and federal unemployment and withholding taxes for which judgment was entered for $1267.77 with interest and costs.

In the absence of oral testimony, the rule that findings of fact below stand unless clearly erroneous is not applicable. We are free to find the ultimate facts from the agreed primary facts without giving weight to findings inherent in the decision of the sitting justice. *Allen* v. *Kent,* 153 Me. 275, 136 A. (2nd) 540. The rule is not altered by the Maine Rules of Civil Procedure. See Rule 52; Field & McKusick Maine Civil Practice, §§ 52.7 and 52.8.

For the period in question in 1958, and indeed from the commencement of the "management contract" in 1955, the plaintiff held and exercised a hotel license as a bona fide hotel for the sale of liquor for consumption on the premises. The pertinent provisions of R. S., c. 61, entitled "Laws Relating to Liquor" are:

> "**Sec. 1. Definitions.** 'Hotel' shall mean any reputable place operated by responsible persons of good reputation, where the public, for a consideration, obtains sleeping accommodations and meals under one roof and which has a public dining room or rooms operated by the same management open and serving food during the morning, afternoon and evening, and a kitchen, apart from the public

dining room or rooms, in which food is regularly prepared for the public on the same premises."

"**Sec. 42. Licenses for consumption sale.** Licenses for the sale of spirituous and vinous liquor to be consumed on the premises where sold may be issued to clubs and to bona fide hotels . . ."

The argument of the defendant in substance is: (1) that the plaintiff under the "management contract" with the defendant did not have "a public dining room or rooms *operated by the same management*" (emphasis supplied); (2) that the plaintiff, for this reason alone, was not a bona fide hotel and so was not entitled to a liquor license; (3) that the "management contract" thus dealt with an unlawful enterprise, and (4) that public policy denies recovery thereon.

The key words in the controversy are "operated by the same management." The decision turns upon the meaning of these words in the statute, and their application to the "management contract" as we construe its terms.

Before discussing the facts and the contract in detail we may eliminate certain questions from consideration.

First — As we shall see, there is nothing whatsoever inherently wrongful or unlawful about the "management contract." If it were not for the applicability of the liquor law, liability of the defendant would not be questioned. In such case it would be immaterial whether management of the dining room was in the plaintiff corporation or the defendant.

Second — The "management contract" was unquestionably entered into with the operation of dining rooms to meet the requirement of the liquor laws in the minds of the parties. In short, the contract was in furtherance of the operation of the hotel with a liquor license.

Third — If the contract was in furtherance of an unlawful purpose, that is, to obtain a liquor license by subterfuge with management of the dining rooms *not* in the plaintiff,

it would be an illegal contract on which plaintiff could not recover.

The following cases in which no recovery was allowed illustrate the principle: *Brown* v. *Tuttle,* 80 Me. 162, 13 A. 583 (for services or money furnished in furtherance and for continuance of living together unlawfully as husband and wife) ; *Morris* v. *Telegraph Co.,* 94 Me. 423, 47 A. 926 (on failure to deliver a telegram sent in furtherance of a gambling contract) ; *Jolovitz* v. *Redington & Co., Inc.,* 148 Me. 23, 88 A. (2nd) 589 (contract involving chance) ; *Stacy* v. *Brothers* (Conn.), 107 A. 613 (by purchaser of saloon under contract to operate unlawfully under seller's license) ; *Turner* v. *Schmidt Brewing Co.* (Mich.), 270 N. W. 750 (under contract with brewery to remodel retailer's beer gardens when statute prohibited aid by wholesaler to retailer). See also cases in which without the required license there can be no recovery for services. *Randall* v. *Tuell,* 89 Me. 443, 36 A. 910 (innkeeper) ; *Black* v. *Mutual Life Asso.,* 95 Me. 35, 49 A. 51 (insurance agent) ; *Harding* v. *Hagar,* 60 Me. 340 (freight). See also 5 Williston, Contracts § 1766 (rev. ed.) ; 6A Corbin, Contracts § 1518, p. 750. Compare *Tillock* v. *Webb,* 56 Me. 100 (Sunday contract).

A contract in furtherance of obtaining a hotel liquor license unlawfully is plainly against our public policy. That such a contract may not be in direct contravention of a statute does not lessen the force of the public policy against its enforcement.

Fourth — "The law leaves the parties to an illegal contract 'where it finds them.' " *Jolovitz* v. *Redington & Co., Inc., supra,* p. 29. The public policy, expressed in law, is designed not to protect the defendant as here from an apparently improvident bargain, but to deter others from entering into like illegal contracts.

We are not concerned with our conception of fairness between the parties. The defendant does not deny that she

owes the plaintiff what it claims under the contract. She does no more than say that the power of the State is not available to the plaintiff to establish its claim and to enforce judgment thereon.

Fifth — To invalidate a contract on the ground of public policy, the "impropriety of a transaction," to use Professor Williston's words, must be clearly established. 5 Williston, *supra,* § 1629A. Our court in *Bell* v. *Packard,* 69 Me. 105, in which the issue was whether Maine or Massachusetts law controlled, said, at p. 111: " . . . no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law . . . "

> "In general and unless restrained by valid statutes, competent persons have the utmost liberty of making contracts. Agreements voluntarily made between such persons are to be held sacred and enforced by the courts, and are not to be lightly set aside on the ground of public policy or because as events have turned it may be unfortunate for one party." *Crimmins & Peirce Co.* v. *Kidder Peabody Accept. Corp.,* 282 Mass. 367, 185 N. E. 383, 388, 88 A. L. R. 1122, and annot. 1131.

See also 12 Am. Jur. *Contracts* § 251, 17 C. J. S. *Contracts* § 211 (d).

We summarize the contract, headed "management contract," between Thacher Hotel, Inc., the plaintiff corporation, called the "Owner," and the defendant, called the "Food Manager," as follows:

> "1. The Owner shall employ the Food Manager for the term of five (5) years from [January 3, 1955] until the close of business on the Saturday following [January 3, 1960], as manager of the Coffee Shoppe and Dining-Cocktail Room located in the premises of the Owner known as Thacher Hotel. . . .

"2. The Food Manager shall well and faithfully serve the employer in such capacity, and shall at all times devote her whole time, attention, and energies to the management and improvement of said business, and shall perform all such services, acts and things as the Owner shall from time to time direct as hereinafter set forth:

"(a) The Food Manager will have exclusive direction and responsibility of purchasing, storage, preparation and service of all food within the Thacher Hotel, specifically set forth as the kitchen, Coffee Shoppe, Dining-Cocktail Room, and in the rooms of the Hotel whenever such is required by guests of the Hotel."

(b) Limits the use of the Dining-Cocktail Room for parties and banquets.

"(c) The service of beer, wines and liquors will be made by the waiters or waitresses, and such sales of beer, wines and liquors shall be accurately recorded on a separate check from the food check, and such separate checks shall be identified as Cocktail Bar checks, and payment of such Cocktail Bar checks shall be made after each serving in a manner prescribed by the Owner, and shall not constitute in any manner a part of food income."

(d) Owner is responsible for charges by hotel guests.

"(e) The Food Manager will have the exclusive responsibility for the food operation without undue interference by the Owner, except in such cases specifically referred to herein. However, at times mutually agreeable, the Food Manager and the Owner or the Owner's representatives shall discuss and consider matters which may be of mutual interest in maintaining efficient and profitable operation.

"(f) The food operation shall be conducted under the name and style of 'Thacher Hotel Coffee Shoppe.'"

(g) All receipts from the food operation shall be deposited in the bank in the name of "Thacher Hotel Coffee Shoppe." "All accounts receivable and payable shall be in the name of 'Thacher Hotel Coffee Shoppe,' and all expenditures to be made by check, except such items normally paid from petty cash, in which case a proper set-up of accounting shall be prescribed. All funds in said account shall be under the direction and the exclusive responsibility of the Food Manager, and all checks for withdrawal from said account shall be signed by the Food Manager, or by such persons designated by her."

(h), (i), (j), and (k) relate to maintenance of accurate accounts by Food Manager, food income to include juke box and tobacco sales, responsibility of Food Manager for care and maintenance of equipment, and privilege of replacing and installing new equipment to be paid from food income and to remain Owner's property.

"(l) The Coffee Shoppe shall be kept open at least six (6) days per week prepared for service of meals at the usual mealtimes, morning, noon and evening."

3. The Food Manager is required to deposit $1,000 in escrow and certain amounts weekly. In the event of the death of the Food Manager, the owner agrees after payment of outstanding obligations to release the balance of the escrow deposit.

4. The Food Manager guarantees payment to the owner of certain percentages of weekly receipts with minimum guarantee for the period in question in 1958 of $85 a week.

5. and 6. Workmen's Compensation, Public Liability and fire insurance, and all taxes and licenses pertaining to the food operation shall be paid therefrom "in conjunction with the Hotel as prescribed by the Owner."

"7. The Food Manager shall have the authority and responsibility to operate the food business without interference from the Owner. It is understood, however, that the Food Manager will conduct the operation in a high grade and orderly manner, and will not permit questionable conduct or entertainment on the premises; that the Food Manager will pay all food and other expenditures of said operation from the income thereof and within a time consistent with good business practices, and not through negligence impair the good credit of the Owner."

8. In event of fire weekly payments suspended while food operation impossible.

9. and 10. Gas, electricity and fuel paid from food operation; inventory at commencement of contract at costs to be paid by Food Manager to Owner.

"11. After the payment of all accounts for food, wages, taxes, insurance and weekly payments to Owner, and other expenses chargeable to the food operation, the Food Manager shall receive as her compensation the entire net profit from said food operation.

"12. It is understood by the Owner and the Food Manager, that wherever the word 'food' or 'food operation' is used herein, beer, wines and liquor are specifically excluded therefrom and that the Food Manager has no connection therewith or responsibility therefor.

"13. A control of income and expense of the food operation shall be maintained in such a manner prescribed by the Owner, as will insure proper conduct of the business in respect to income and payment of financial obligations when due.

"14. The Food Manager shall be responsible for the premises where food is served, sleeping rooms excepted, and shall maintain the premises clean and neat, including the Dining-Cocktail Room, at all times.

> "15. If at any time during the term of this agreement, any of the stores in the so-called Hotel Thacher Block shall become vacant, the Owner hereby agrees with the Food Manager that it will not lease, demise or let any such store or stores to any parties who shall engage in the business of serving food to the public, but this provision shall not apply to the continued operation of the store in said Block now engaged in the retail sale of ice cream, candy and popcorn."

From our study of the contract we are satisfied that within the meaning of Sec. 1 of the statute the plaintiff, that is to say "the same management," operated the dining rooms in the Thacher Hotel and was a "hotel" for licensing purposes.

In so construing the contract, we give effect to the intentions of the parties, which surely were to enter into an arrangement permissible under the licensing laws. The defendant has failed at the least to establish clearly any impropriety compelling the invalidation of the contract on grounds of public policy.

There are in the contract certain provisions often found in employment contracts and others often found in lessee or independent contractor transactions. Taken as a whole, having in mind the purpose of the contract we conclude that the plaintiff retained effective management of the dining rooms. Webster's New International Dictionary (second edition) defines "management" as "The collective body of those who manage or direct any enterprise or interest; the board of managers." The defendant in her capacity as "food manager" was not unlike a department or store manager, or the manager of a baseball club. Her power and authority, unquestionably broad, do not deny an employer-employee relationship with the plaintiff.

It is significant that the dining rooms were conducted in the name of and as an integral part of the plaintiff's hotel,

and that the plaintiff recognized its full and complete responsibility for their operation. The present action was brought in part to recover for taxes paid on goods purchased and employees' wages arising from the "food operation."

The provisions for compensation by which the plaintiff received a percentage of gross income with a minimum guarantee and the defendant received the balance, and bore the losses, if any, do not compel the conclusion that the defendant was not under the direction, control or management of the plaintiff. The minimum guarantee and loss provisions would no doubt more likely arise in a lease or independent contractor situation. It does not follow, however, that if the parties *otherwise intend,* we may not give effect to their contract. We must not lose sight of the provisions for employment of the defendant with the careful restrictions in the use of the "food income," and the full and complete responsibility of the plaintiff for the operation of the hotel in its several departments.

The Thacher Hotel, that is the plaintiff corporation, met without challenge on this record the strict requirement that it is a "reputable place operated by responsible persons of good reputation." It chose to give broad authority to a "food manager." It did not, however, give up or transfer, or lose its "management" of the dining rooms and thereby fail to qualify for the license so obviously a vital part of the business enterprise.

The plaintiff did not inform the Commission of the contract with the defendant in making its application for a hotel license. The defendant urges that it therefore "failed to disclose the complete and entire ownership or any interest in the establishment." R. S., c. 61, § 28. Whether the plaintiff failed in this respect is a matter for the determination of the State Liquor Commission and not of the courts in a collateral proceeding.

We do not attempt to establish or to indicate the precise meaning of "operated by the same management" in Sec. 1 of the statute. We limit our opinion to the facts before us. Public policy does not here require that the defendant escape responsibility for carrying out the terms of her contract.

The entry will be

Appeal denied.

COMMERCIAL LEASING, INC.

vs.

ERNEST H. JOHNSON, STATE TAX ASSESSOR

Cumberland. Opinion, February 7, 1964.

"Use Tax." Licenses. Constitutional Law. Due Process.

The burden of proving that a transaction is not taxable is upon the person charged with tax liability.

An owner of leased vehicles, responsible for repairs thereon, in choosing to have repairs made in this jurisdiction exercised within this state a right or power incident to the ownership of property; this is not extended to apply to parts used in the repair of such vehicles outside of this jurisdiction.

The mere power over a resident does not permit a state to exact from him a property tax on his tangible property permanently located outside jurisdiction of the taxing state.

Neither sales nor use tax was authorized on parts which were ordered from New Hampshire by mail or telephone and were actually delivered at buyer's place of business in New Hampshire by means of seller's vehicle operated by seller's employee.

Assessment of use tax on leased trucks and trailers which came to rest in Maine for convenience or business profit of lessor that is for purpose of having repairs made by lessor in accordance with terms of lease, did not violate commerce clause or due process clause of Fourteenth Amendment.

ON REPORT.

This sales and use tax case is on report to determine whether or not assessments levied violate the Fourteenth Amendment and if the provisions of the Use Tax Statute authorize assessment of a Use Tax upon the parts and materials purchased by Appellant upon the facts disclosed in this case. Tax abated in part. Case remanded to the Superior Court to determine the amount of taxes, interest, and penalties assessed on the tractors and trailers and to enter judgment thereon in accordance with this opinion.

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

Robert F. Preti, for Appellant.

Ralph W. Farris,
John W. Benoit, Asst. Attys. Gen., for Appellee.

SIDDALL, J. On report. Commercial Leasing, Inc., hereinafter called the Appellant, is a Maine corporation, organized in 1950, engaged in the business of leasing automotive equipment. It has an office in Portland where certain records are kept, and employs two persons in this state, its president and its treasurer. During the audit period from January 1, 1955, through November 30, 1960, it was duly qualified and authorized as a foreign corporation to do business in New Hampshire. During that period it purchased tractors and trailers without the State of Maine, which were delivered direct to the Appellant in New Hampshire. The Appellant also purchased certain parts and materials from various suppliers, a portion from Merrill Transport Company and other Maine companies and the remainder from suppliers outside the borders of the State of Maine. Paul E. Merrill of Portland, Maine, owns and operates as a sole

proprietorship Merrill Transport Company, and is engaged in the business of hauling petroleum products. He is also the president of the appellant corporation and owner of all its capital stock. The Appellant and Merrill Transport Company have places of business at the same address in Portland.

The State Tax Assessor, hereinafter called the Appellee, assessed a use tax with interest and penalties on these tractors, trailers, parts, and materials in the sum of $21,634.14.

The issues in this case are summarized as follows:

1. Do the provisions of the Use Tax Statute authorize the assessment of a Use Tax on the tractors and trailers or on the parts and materials purchased by the Appellant, upon the facts disclosed in this case?

2. If the answer is in the affirmative in either instance, does the assessment violate the due process or commerce clauses of the 14th Amendment to the Constitution of the United States?

The pertinent statutory provisions are as follows:

> "A tax is imposed on the storage, use or other consumption in this State of tangible personal property, purchased at retail sale on and after July 1, 1957, at the rate of 3% of the sales price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the assessor, showing that the seller has collected the sales or use tax, in which case the seller shall be liable for it."
>
> R. S., 1954, Chap. 17, Sec. 4, as amended.

It is noted that prior to July 1, 1957, the tax rate was 2% of the sales price of the taxable article.

R. S., Chap. 17, Sec. 2 definitions:

> " 'In this state' or 'in the state' means within the exterior limits of the state of Maine and includes

all territory within these limits owned by or ceded to the United States of America."

" 'Storage' or 'use' does not include keeping or retention or the exercise of power over tangible personal property brought into this state for the purpose of subsequently transporting it outside the state."

" '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."

We discuss first the tax assessed on the tractors and trailers. These tractors and trailers were purchased outside of this state for delivery to the plaintiff in New Hampshire. Five of the trailers were registered in the State of Maine after delivery in New Hampshire. These trailers were leased to Merrill Transport Company and were used in hauling jet fuel between points in New Hampshire and Brunswick, Maine, for a period of about three weeks, and were then leased to C. H. Sprague and Son Co., hereafter called Sprague, a Massachusetts corporation dealing in industrial coal and fuel oil and having a place of business in New Hampshire. In view of the decision reached it is unnecessary to consider the effect of this lease and registration upon the taxability of these vehicles. The remaining vehicles, after having been received in New Hampshire, were immediately leased by the Appellant to Sprague. A separate lease of each vehicle was prepared by the Appellant, executed by it, apparently in the State of Maine, and forwarded to Massachusetts to be signed by Sprague. One copy of the lease was retained at Appellant's Portland office, one copy was retained in Sprague's office, and one copy was placed with the equipment.

Under the terms of the leases the Appellant-lessor was obligated to maintain the vehicles and have them available for service seven days a week. Appellant was responsible

for normal wear and tear repairs. About 90% of the repairs were made by the Appellant in New Hampshire, and about 10% were made in the State of Maine by the Appellant through Merrill Transport Company. There was also evidence from the President of Merrill Transport Company, indicating that the Appellant was obliged to furnish fuel for the vehicles, a portion of which was furnished by Merrill Transport Company in the State of Maine and billed to the Appellant. The president also testified that it was the obligation of the Appellant to have service available for the equipment regardless of whether it was in Maine, New Hampshire, Vermont, or elsewhere. Appellee claims that these acts performed in this state in fulfillment of the Appellant's obligation under the terms of the leases constitute a taxable use of the property in this state.

On this issue the case appears to be one of novel impression. No case in which the facts are the same or similar has been called to our attention.

In *Trimount Co.* v. *Johnson,* 152 Me. 109, a nonresident lessor leased a certain coin-operated machine to a resident lessee. It was stipulated that the lessor had done nothing with respect to the leased property within the State of Maine either before or since the making of the lease. Our court concluded that the petitioner had not exercised in this state any right or power over the property within the statutory definition of "use."

In *South Shoe Machine Co., Inc.* v. *Johnson,* 159 Me. 74, 76, a nonresident corporation leased shoe machinery to resident lessees to be used by them in their business in this state. In denying the right to assess a use tax on the machines the court said:

> "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 *Automatic Canteen Company of America* v. *Johnson,* 159 Me. 189, the plaintiff was a nonresident lessor of personal property leased to and used in this state by a Maine lessee. The majority opinion held that certain acts of employees of the lessor performed in the State of Maine constituted an exercise of power over the leased property incidental to ownership, and held the use tax to be lawfully assessed.

California has been less liberal to the taxpayer than our decisions allow. The case of *Union Oil Co. of California* v. *State Board of Equalization,* reported in 368 P. (2nd) 496 involved an extra-state sale and lease-back of certain property. The court held that when the leased personal property physically entered the State of California the owner (lessor) exerted a right of ownership through the instrumentality of the lease and thereby used the property in that state, and that the taxing authority at the location (California) where the owner exercises such ownership may properly find that such use constitutes a taxable use.

The Appellant argues that the instant case is not distinguishable from *Hambro, Inc.* v. *Johnson,* reported in 158 Me. 180. In that case this court decided that the mere receipt of rentals in Maine, under a lease executed in New Hampshire of personal property never physically present in the state, did not constitute the exercise of a right or power in this state over the tangible property itself within the definition of the word "use." In the instant case leased vehicles were, from time to time, physically present within this jurisdiction to be repaired by the Appellant-lessor through Merrill Transport Company. The record shows that some seventeen thousand dollars' worth of parts were purchased from Merrill Transport Company by the Appellant and put on vehicles, presumably the vehicles taxed, by Merrill Transport Company. It is noted that a sales tax was paid on these items and was not included in the assess-

ment. This information serves to emphasize what is obvious from the entire record that the repairs made in this jurisdiction were extensive transactions. We are satisfied that the Appellant as owner-lessor of the vehicles, responsible for such repairs, in choosing to have them made in this jurisdiction, exercised within the territorial limits of this state a right or power incident to the ownership of property. The burden of proving that a transaction is not taxable is upon the person charged with tax liability. R. S., 1954, Chap. 17, Sec. 9. The record contains no evidence indicating that repairs were not made in this state upon any vehicle upon which the use tax was assessed. We therefore conclude that the tax upon all of the vehicles was properly assessed, subject to a consideration of the constitutional questions raised by the Appellant.

We now discuss the question of the taxability of the parts. The evidence shows that some of them were purchased from Merrill Transport Company and other Maine dealers, and the remainder from suppliers outside of the State of Maine. The Appellee claims that the parts purchased from Maine dealers were sales in the State of Maine, and the payment of a sales tax thereon not having been shown by the Appellant a use tax was payable by the purchaser under the provisions of R. S., 1954, Chap. 17, Sec. 4. On the other hand the Appellant claims that title to these parts passed in New Hampshire, and they were not subject to a use tax in this state.

Our Uniform Sales Act contains the following provisions: R. S., 1954, Chap. 185, Sec. 18.

> "I. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> II. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of

the contract, the conduct of the parties, usages of trade and the circumstances of the case."

Sec. 19. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

"The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. * * * * Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties. Under the terms of the Uniform Sales Act, which is in force in Pennsylvania as well as in Maine, certain rules are laid down for ascertaining such intention."

Wallworth v. *Cummings,* 135 Me. 267, 269.

We first discuss the use tax assessed on the parts purchased from Merrill Transport Company. The Appellee does not challenge the corporate entity of the Appellant. He does claim, however, that the transaction between Merrill Transport Company and the Appellant should be carefully scrutinized. The Appellant concedes that the burden is on it to show that it factually does not come within the purview of the Use Tax Statute. Upon the record in this case where did title to these parts pass?

Appellant's president testified that it employed two mechanics in New Hampshire at the time of the audit, and also had the partial services of a third person, David Bell, who was a Sprague employee who handled some detail work

for the Appellant. The nature of the detail work was not disclosed, but David Bell testified that he was employed by Sprague and that he had authority to order parts on behalf of the Appellant for the repair and maintenance of vehicles in New Hampshire. On direct examination he was asked the question, "Have you had occasion to order parts on behalf of Commercial Leasing, Inc. to be delivered in Newington, New Hampshire?" He answered, "I have." He was interrogated in regard to his dealings with Merrill Transport, and it appears that he received from a mechanic a list of parts needed in the repair of Appellant's vehicles, and after approving the list he sent it along to the purchasing agent for Merrill Transport Company. On occasions the transaction was made by telephone. The parts were delivered to the Appellant in New Hampshire by vehicles of Merrill Transport Company. Glenn S. Libby, an employee of Merrill Transport Company, who handled the orders received from Mr. Bell, testified that the orders were processed in his employer's stock room and then loaded on his employer's truck and delivered in New Hampshire. The truck was driven by an employee of Merrill Transport Company with instructions to go to Newington, N. H., unload the parts and return. He also testified that no orders for parts to be delivered in New Hampshire came from Portland.

The testimony of these witnesses clearly indicates that these parts were ordered from New Hampshire by mail or telephone; and that they were actually delivered at Appellant's place of business in New Hampshire by means of seller's vehicle operated by his employee. David Bell testified that he had authority to order parts for use in the repair and maintenance of the vehicles in New Hampshire. His authority in this respect could come only from the Appellant. The record contains no refutation of his testimony in this regard. Applying the pertinent rules for ascertaining the intention of the parties to the facts in this case we

are satisfied upon the record that the parties intended that title to the parts was not to pass until they were delivered in New Hampshire. Under these circumstances a sales tax against the seller was not authorized because the property was purchased in this state without the payment of a sales tax has no application.

The testimony with reference to the parts purchased from Maine companies other than Merrill Transport Company is far from clear. It is our interpretation of this testimony that the parts were ordered through Maine companies and that they came by carrier from outside of Maine and New Hampshire. Under these circumstances there could be no use tax assessed against the Appellant for these parts. The same conclusion is reached in regard to the parts purchased from sellers outside the State of Maine and delivered in New Hampshire. These parts were never physically present in this jurisdiction in their original state. They were present here after having replaced some part of a vehicle upon which we have concluded a use tax may be assessed. We have already determined, subject to constitutional questions, that the owner of leased vehicles, responsible for repairs thereon, in choosing to have such repairs made in this jurisdiction exercised within this state a right or power incident to the ownership of property. We do not extend that principle to apply to parts used in the repair of such vehicles outside of this jurisdiction.

The Appellant argues that the imposition of the use tax violates the provisions of the commerce clause and was a denial of due process because the tax was on tangible personal property which was located outside the borders of this state.

In *Hunnewell Trucking, Inc.* v. *Johnson,* 157 Me. 338, a use tax was imposed on personal property owned by the taxpayer. In that case the taxpayer purchased outside the State of Maine and brought into this state certain materials

and supplies for use upon its motor trucks in its business in interstate commerce. These materials and supplies were placed in the taxpayer's terminal in Maine for the exclusive purpose of being affixed to the motor trucks and used in the normal course of taxpayer's business. Our court there held that there was a break in the interstate transit purely for the convenience or business profit of the taxpayer, and that the immunity from taxation by the commerce clause of the United States Constitution had been lost.

The court quoted from 171 A. L. R. 284, the general rule in cases where immunity from the imposition of taxes is lost by reason of a break in transit, as follows:

> "It is universally agreed that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the states through which it passes. Where, however, the interstate transit is broken or interrupted in a particular state, the question arises whether the property may thereupon be subjected to local taxation therein. In this situation the principle has been adopted by the Supreme Court of the United States and adhered to by the lower Federal courts and the courts of the various states that if the break in the interstate journey was caused by the exigencies or conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the continuity of the transit remains unimpaired, and the immunity of the goods from state or local taxation is consequently unaffected; but if the interruption in the journey occurred for purposes connected with the business convenience or profit of the taxpayer, or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation."

In substantiation of its position the court cited the following cases: *Henneford, et al.* v. *Silas Mason Co., Inc., et*

al., 300 U. S. 577; *Nashville, Chattanooga St. Louis Railway* v. *Wallace,* 288 U. S. 249; *Southern Pacific Company* v. *Gallagher,* 306 U. S. 167, and *Pacific Telephone and Telegraph Co.* v. *Gallagher,* 306 U. S. 182.

In the instant case the leased trucks and trailers came to rest in this state for the convenience or business profit of the Appellant, i.e., for the purpose of having repairs made by the lessor-owner in accordance with its obligations under the terms of the leases. They thereby ceased to be a part of interstate commerce and became subject to the assessment of a use tax.

The Appellant calls our attention to the case of *Greenough* v. *Tax Assessors of City of Newport,* 331 U. S. 486. In that case the court was concerned with the right of the state to levy a personal property tax on intangible personal property. The difference between the taxation of tangible and intangible personal property was discussed, and the court stated that the mere power over a resident does not permit a state to exact from him a property tax on his tangible property *permanently* located outside the jurisdiction of the taxing state.

The instant case differs from *Greenough* in that the tax assessed was for the privilege of using property in this state.

> "In so far as use taxes are imposed with respect to an attribute of property ownership exercised within the state, they are not open to the objection that they deny due process of law by reason of extra-territorial operation, even as applied to the use of supplies by a foreign corporation upon their appropriation within the state by the corporation's general office to the use of the whole intrastate, interstate, and foreign railroad system maintained by it, ..."
>
> 47 Am. Jur., Sales and Use Taxes, Sec. 48.

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass or property within the state of destination. * * * This is so, indeed, though they are still in the original packages. * * * For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. * * *
>
> The privilege of use is only one attribute, among many, of the bundle of privileges that make up property of ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."
>
> *Henneford* v. *Silas Mason Co., supra.*

We therefore find that the use tax assessed on the tractors and trailers was not in violation of the commerce or due process clause of the Fourteenth Amendment to the Federal Constitution.

Appellee is entitled to judgment for the tax assessed on the tractors and trailers with interest and penalties thereon. The tax on the parts must be abated.

The tax assessment sets forth a total tax of $18,453.07, interest in the sum of $3,111.07, and penalties in the amount of $70.00. No breakdown is made of the various items making up the tax, interest, and penalties. Other evidence in the case fails to give us sufficient information to determine the amount of the judgment. The case is therefore remanded to the Superior Court to determine the amount of taxes, interest, and penalties assessed on the trailers and tractors and to enter judgment for the Appellee for the amount found due.

The entry will be

Tax abated in part. Case remanded to the Superior Court to determine the amount of taxes, interest, and penalties assessed on the tractors and trailers and to enter judgment thereon in accordance with this opinion.

SCHOOL ADMINISTRATIVE DISTRICT NO. 17

vs.

ROBERT S. ORRE, ET AL.

Oxford. Opinion, February 10, 1964.

"Eminent Domain." Municipal Officers. Public Laws. Legislative Intent.

"An administrative unit shall include all municipal or quasi-municipal corporations responsible for operating public schools."

The legislature views the School Administrative District as an "administrative unit" which is a "quasi-municipal corporation" and it follows that the School Directors may be properly considered to be its "municipal officers" for the purpose of performing those duties which rationally and logically should and must be performed by the School Directors.

The denial of authority to sell, without more, by the owner of the designated lots constitutes a refusal to sell the same to the plaintiff within the meaning of R. S., Chap. 41, Sec. 15, as amended.

ON REPORT.

This case is a proceeding for declaratory judgment interpreting school condemnation statute. Held, that it was the duty and responsibility of the school directors of the district as "municipal officers" within the relevant statute, to lay

out the proposed schoolhouse lot and playgrounds and appraise damages for the taking thereof. Order in accordance with opinion.

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

Robert T. Smith, for Plaintiff.

John A. Platz,
Thomas E. Day, Jr., for Defendant.

WEBBER, J. On report. This complaint seeks a declaratory judgment in effect interpreting the provisions of R. S., Chap. 41, Sec. 15 as amended. The facts are not in dispute. The School Directors of the plaintiff School Administrative District No. 17 legally designated a parcel of land for school purposes. The land is located partly in Norway and partly in Paris and is owned by a corporation not a party here. On April 30, 1963 the plaintiff inquired from the owner of the land by letter addressed to its president whether the corporation would sell the land to the plaintiff and requested that a price be set. By letter of May 21, 1963 the president of the owner corporation replied that the Board of Trustees at a meeting held on May 19, 1963 had concluded that the Board was without authority to act upon plaintiff's request. No communication was received from the owner thereafter. For the purposes of the instant case, the owner not being a party and not having been heard, it must be considered that the owner has declined to sell the property to the plaintiff. The plaintiff has requested that the defendants in their capacity as municipal officers of the two towns in which the property lies proceed to take the property by eminent domain. The defendants assert that under the provisions of the pertinent statutes the School Directors of plaintiff School Administrative District are exclusively vested with

the authority and charged with the responsibility for such taking.

We turn to the language and intent of R. S., Chap. 41, Sec. 15 as amended, this being the controlling statute. Prior to the passage of the Sinclair Act so-called enacted as P. L., 1957, Chap. 364, the section read as follows:

> "**Sec. 15. Schoolhouse lots by condemnation; damages; reversion to owner.** When a location for the erection or removal of a schoolhouse and requisite buildings has been legally designated by vote of the town at any town meeting called for that purpose, and the owner thereof refuses to sell, or, in the opinion of the municipal officers, asks an unreasonable price for it, or resides without the state and has no authorized agent or attorney therein, they may lay out a schoolhouse lot and playgrounds, not exceeding 25 acres for any 1 project, and appraise the damages as is provided for laying out town ways, and on payment or tender of such damages, or if such owner does not reside in the state, upon depositing such damages in the treasury of such town for his use, the town designating it may take such lot to be held and used for the purposes aforesaid; and when such schoolhouse lot has ceased to be used by the town for school purposes for 2 successive years, said lot reverts to the owner, his heirs or assigns, on demand by him or them in writing made to the municipal officers of the town, subject to the right of the town to enter upon said lot and remove said schoolhouse at any time within 6 months after said demand. Any town or city may take real estate for the enlargement or extension of any location designated for the erection or removal of a schoolhouse and requisite buildings and playgrounds, as herein provided; and all schoolhouse lots and playgrounds that require fencing shall be fenced by the town or city."

The impact of the amendments made by P. L., 1957, Chap. 364, Sec. 5 may best be illustrated by italicizing the addi-

tions to the original text and by enclosing deleted words and phrases in parentheses, with the following result:

> "**Sec. 15. Schoolhouse lots by condemnation; damages; reversion to owner.** When a location for the erection or removal of a schoolhouse and requisite buildings has been legally designated by vote of the town at any town meeting called for that purpose *or by the school directors of a school administrative district,* and the owner thereof refuses to sell, or, in the opinion of the municipal officers, asks an unreasonable price for it, or resides without the State and has no authorized agent or attorney therein, they may lay out a schoolhouse lot and playgrounds, not exceeding 25 acres for any one project, and appraise the damages as is provided for laying out town ways, and on payment or tender of such damages, or if such owner does not reside in the State, upon depositing such damages in the treasury of such town for his use, the (town) *administrative unit* designating it may take such lot to be held and used for the purposes aforesaid. (; and when) *When* such schoolhouse lot has ceased to be used (by the town) for school purposes for two successive years, said lot reverts to the owner, his heirs or assigns, on demand by him or them in writing made to the municipal officers of the town *or school directors of the school administrative district,* subject to the right of the town *or school directors* to enter upon said lot and remove said schoolhouse at any time within 6 months after said demand. Any (town or city) *administrative unit* may take real estate for the enlargement or extension of any location designated for the erection or removal of a schoolhouse and requisite buildings and playgrounds. (as herein provided; and all) *All* schoolhouse lots and playgrounds that require fencing shall be fenced by the town, (or) city *or administrative district.*"

Sec. 15 as thus amended must be viewed as part of a legislative plan and pattern which is revealed upon an examina-

tion of all of the provisions of P. L., 1957, Chap. 364. Therein provision was made for the creation of School Administrative Districts which would include more than one town, these Districts to be supervised by School Directors. For the most part functions ordinarily performed either by the selectmen or school committees of towns were in the case of School Administrative Districts placed in the hands of the School Directors. The language of a particular section of the statutes should now be construed in such a manner as to implement the manifest intention of the Legislature and conform to the new pattern.

Sec. 15 as amended provides in express terms that the location for the erection of a schoolhouse and requisite buildings is to be legally designated by action of the School Directors in the case of a School Administrative District and when the owner thereof refuses to sell, they are to lay out the location and appraise the damages. Our attention is called to the language: "or, in the opinion of the municipal officers, (the owner) asks an unreasonable price for it," which covers an alternative situation not involved in the instant case. The words "municipal officers" as therein used now include the School Directors in an appropriate case. Such a construction stems from and is consistent with the virtually identical definitions of "administrative units" as found in R. S., Chap. 41, Sec. 28 as amended by P. L., 1957, Chap. 364, Sec. 11 and in R. S, Chap. 41, Sec. 236 as amended by P. L., 1957, Chap 364, Sec. 96, as follows: "An administrative unit as referred to in this chapter shall include all municipal *or quasi-municipal corporations* responsible for operating public schools." (Emphasis ours.) It may also be noted that P. L., 1957, Chap. 443, Sec. 1 enacting a new Sec. 237E of R. S., Chap. 41 parenthetically discloses the intention of the Legislature with respect to the use of the term "administrative unit" by stating in part: "The several administrative units (cities, towns, plantations and School Administrative Districts) shall be"

etc. The Legislature views the School Administrative District as an "administrative unit" which is a "quasi-municipal corporation" and it follows that the School Directors may be properly considered to be its "municipal officers" for the purpose of performing those duties which rationally and logically should and must be performed by the School Directors. Sec. 15 as amended is still in need of clarifying amendment, especially with respect to the "depositing (of) such damages in the treasury of such town" (not involved in the instant case), but the section as amended, thus construed, nevertheless presents a reasonable and workable method of procedure in the case of School Administrative Districts and fully accords with the overall legislative pattern disclosed by the many amendments and new provisions contained in P. L., 1957, Chap. 364.

Moreover, the foregoing construction accords with a reasonable interpretation of R. S., Chap. 41, Sec. 16 as amended which provides for appeal from the action taken by School Directors under Sec. 15 as above set forth. Sec. 16 was entirely repealed by P. L., 1957, Chap. 342 and a new section substituted, as follows:

> "**Sec. 16. Appeal.** If the owner is aggrieved at the location of the lot or the damages awarded by the municipal officers, he may apply to the county commissioners within 6 months from the determination of such location and award of damages. The county commissioners of the county wherein such property or land is located shall constitute a Board of Appraisers which shall on such application meet and ascertain and determine what the location of the lot shall be, changing said location if they deem it proper, and determine the value of the property or land to be taken, make a correct return of their doings, signed by them, accompanied by an accurate plan of the land and state in their return the name of the person to whom damages are allowed, and the amount allowed. The county commissioners shall give reasonable notice to in-

terested parties of the time and place of their meeting and afford interested parties an opportunity to be heard. Their return shall be filed with the clerk of the county commissioners and remain in the custody of their clerk for inspection, and notice thereof given to the interested parties. If the damages are increased or the location changed, such town shall pay the damages and costs; otherwise the costs shall be paid by the applicant. Any interested party aggrieved by their determination of location or damages may appeal from their determination to the Superior Court of the county at the next regular term of said court following the date of filing of their return with their said clerk. If no such appeal is made, the proceedings shall be closed, and become effectual; all claims for damages not allowed by them be forever barred; and all damages allowed by them be final. If an appeal be taken at the time and in the manner provided herein, the court shall determine the location, changing said location if it deems it proper, and the damages by a committee of reference if the parties so agree, or by a verdict of its jury, and shall render judgment for the location and the damages recovered, and judgment for costs in favor of the party entitled thereto. The appellant shall file notice of his appeal with the county commissioners within the time above limited, and at the first term of court shall file a complaint setting forth substantially the facts, upon which the case shall be tried like other cases. The party prevailing recovers costs to be allowed and taxed by the court, except that they shall not be recovered by the party claiming damages or change of location, but by the other party if on such appeal by either party, said claimant fails to recover a greater sum as damages than was allowed to him by the county commissioners or fails to have the location changed. The committee of reference shall be allowed a reasonable compensation for their services, to be fixed by the court upon the presentation of their report and paid from the county treasury upon the certificate of the clerk

of courts. From the action of the court or on exceptions, or from any judgment after a jury trial, an appeal may be taken by any party to the Supreme Judicial Court.

"Upon final determination of the location of said lot the clerk of the town, clerk of the county commissioners or clerk of Superior Court, whichever one has custody of the records of the final hearing tribunal, shall cause a description of the lot and a plan thereof to be recorded in the registry of deeds for the county or registry district where the same is located."

By P. L., 1957, Chap. 443, Secs. 4 and 5, the words "administrative unit" were substituted for the word "town" in the 16th line and the 41st line of the published text of said section, and by P. L., 1959, Chap. 317, Secs. 13, 14 and 15 changes were made to bring the statute into harmony with the Maine Rules of Civil Procedure. Here again the words "municipal officers" as used in the 2nd line of the published text of the section as now amended must now be taken to mean and include the School Directors in any case where under the provisions of Sec. 15 the taking has been by a School Administrative District. Thus construed the provisions of Secs. 15 and 16 as amended are in harmony and provide an orderly method of procedure in cases involving the location of school properties by School Administrative Districts.

As applied to the instant case judgment should be entered declaring it to be the duty and responsibility of the School Directors of plaintiff District to lay out the proposed schoolhouse lot and playgrounds and appraise the damages for the taking thereof subject to the right of appeal as provided in R. S., Chap. 41, Sec. 16 as amended; and further declaring that the denial of authority to sell, without more, by the owner of the designated lots constitutes a refusal to sell the same to the plaintiff within the meaning of R. S., Chap. 41, Sec. 15 as amended.

So ordered.

GENERAL MOTORS ACCEPTANCE CORP.

vs.

LOUIS ANACONE

Androscoggin. February 12, 1964.

Automobiles. Trover. Evidence. Contracts. Trust. Conversion. Usage. Juries.

Affixing a signature to an instrument by a rubber stamp is sufficient to fulfill the requirement of a written endorsement if the stamp is affixed with the intent of using it as an endorsement, and with authority.

The finding of a jury is not to be disturbed if there be credible evidence to support it.

A statute enacted after a judicial construction is presumed to take that construction.

The gist of conversion is the invasion of a party's possession or right to possession at the time of the alleged conversion.

The plaintiff must show that he had a general, or a special property in the goods, and the right to their possession at the time of the alleged conversion.

If the holder acquired possession rightfully, a demand by the person entitled to possession and a refusal by the holder to surrender is necessary before the withholding becomes a conversion, but if the taking by the holder was wrongful, that taking is a conversion without demand. Where the circumstances show that a demand would be useless, a demand is not necessary.

If plaintiff's property is a "security interest," it is a special property; if property consists of title, it is a general property.

Where trust receipt gives trustee liberty of sale and trustee sells to a buyer in ordinary course of trade, the buyer takes free of the entruster's security interest in the goods sold.

Knowledge that a dealer has automobiles upon floor plan is not sufficient to expose a purchaser, otherwise a "buyer" under the terms

of the uniform trust receipts act, to the entruster's security interest; that knowledge which will deprive a buyer of protection against entruster's security interest must be actual.

A person's status as a contemporary automobile dealer does not prevent his being a "buyer" under the uniform trust receipts act.

Absent entruster's demand for possession of entrusted automobiles held by trustee's transferee subject to claim of entruster under trust receipt, there was no conversion by transferee.

Rule of damages applicable to complaint in trover for conversion is value of goods at time of conversion, even though plaintiff may be accountable therefor to some third party.

ON APPEAL.

This case is on appeal from denial of defendant's motions for directed verdict, for entry of judgment notwithstanding verdict and for a new trial. Appeal sustained, judgment reopened and new trial ordered, unless plaintiff should remit part of verdict.

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

Frank W. Linnell,
G. Curtis Webber, for Plaintiff.

Milton G. Wheeler,
William E. McKinley, for Defendant.

MARDEN, J. Complaint in trover for conversion, and here on appeal from the denial of defendant's motion for a directed verdict, from denial of defendant's motion for entry of judgment notwithstanding the verdict, from denial of motion for new trial and from final judgment entered on verdict for plaintiff.

On the motion for judgment notwithstanding the verdict based upon seven points (which points will be identified in the opinion as N.O.V. 1 through 7), defendant challenged the sufficiency of the evidence in general and specifically its sufficiency as bearing upon certain legal issues which will be later discussed.

In the motion for a new trial based also upon seven points (which will be identified in the opinion as N.T. 1 through 7), errors in the admission of evidence, in ruling one plaintiff's witness as hostile and allowing cross-examination by plaintiff's counsel, error of the trial court in declining defendant's request for certain charges of law, error in court instruction to the jury, and excessive damages were argued. Points N.T. 3 and 7 (cross-examination of plaintiff's witness as hostile and excessive damages) were abandoned on appeal and the remaining twelve points (N.O.V. and N.T.) are embodied in the nine points of appeal. Discussion of the issues now briefed will appear as the points are reached in the opinion.

The controversy stems from the contractual relationship existing among General Motors Corporation, hereinafter termed GMC; General Motors Acceptance Corporation, plaintiff, hereinafter termed GMAC; Twin Town Chevrolet, Inc., a General Motors automobile dealer, hereinafter termed Twin Town; and the factual and legal relationship between GMAC and the defendant, Louis Anacone.

The contractual relations above referred to are based upon documents having to do with the sale of automobiles by GMC through Twin Town to the open market, which documents broadly stated involve so-called "Trust Receipts," as defined and controlled by the Uniform Trust Receipts Act

(Chapter 189, R. S., 1954, as amended), hereinafter termed the Act.*

The operation which these documents reflect was as follows:

When Twin Town ordered motor vehicles from GMC, a list of such cars identified by their serial numbers and other code letters and numbers identifying model, color and accessories, were, by machine records operation, recorded upon a document which embodied not only the invoice covering the order, but a bill of sale[1] of those cars from GMC to GMAC, a trust receipt[2], a promissory note payable on demand in the amount of the invoice, with the terms and conditions of

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* See generally Uniform Laws Annotated 9C and Supplement, Uniform Trust Receipts Act; Heindl, Trust Receipt Financing, 2 Mercer-Beasley Law Review 1 (1933); Trust Receipt Financing under the UTRA 26 Chicago-Kent Law Review 197 (1948); The Ohio UTRA 19 Ohio State Law Review 680 (1958); Trust Receipts 12 Temple Law Quarterly 189, 200 (1938); and Handbook of the National Conference * * * Uniform State Laws * * * for 1933, Uniform Trust Receipts Act.

[1] "BILL OF SALE Know all men by these presents that the undersigned for valuable consideration does hereby grant, sell, transfer and deliver unto the General Motors Acceptance Corporation (Grantee) the motor vehicles described above: to have and to hold all and singular the said goods and Chattels to said grantee, its successors and assigns. The undersigned covenants with said grantee that the undersigned is the lawful owner of said Chattels; that they are free from all encumbrances: that the undersigned has a good right to sell the same; that the undersigned will warrant and defend same against the lawful claims and demands of all persons, witness the hand and seal of the undersigned on the 'date of execution' specified above."

OLDSMOBILE DIVISION, General Motors Corporation

By _____ Accountant

[2] "TRUST RECEIPT TO GENERAL MOTORS ACCEPTANCE CORPORATION (hereinafter referred to as GMAC): The undersigned (debtor), hereinafter referred to as the dealer, hereby acknowledges that the above-described property has been shipped by the manufacturer thereof for delivery to and on the order of the dealer, subject to transfer of title thereto by the manufacturer to GMAC, under the GMAC Wholesale Plan. The dealer further acknowledges that GMAC has a security interest, in said property and agrees that the dealer's possession thereof shall be on the terms and conditions

the trust receipt[3] appearing either on the face of the document or its reverse side.

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set forth on the reverse side and herein incorporated by reference thereto. *Executed on the 'date of execution' specified above.*"
TWIN TOWN CHEVROLET COMPANY INC
(Dealer's Name)

By _____
(Attorney in Fact)

[3] "TERMS AND CONDITIONS REFERRED TO IN TRUST RECEIPT

"1. Title to said property shall remain in GMAC as security retained for and until the dealer's payment in cash of the amount payable under and according to his (its, their) promissory note of same date and identification number.

"2. The dealer's possession of said property shall be for the purpose of storing and exhibiting same for retail sale in the regular course of business. The dealer shall keep said property brand new and subject to inspection and, except as may be necessary to remove or transport same from freight depot to the dealer's place of business, the dealer shall not use or operate same, for demonstration or otherwise, without express permission, and shall not in any event use said property illegally, improperly or for hire.

"3. Said property shall be at the dealer's sole risk of any loss or damage of or to same, or to persons or other property, during removal or transportation of said property from freight depot to the dealer's place of business or at any other time during possession hereunder.

"4. The dealer agrees to keep said property free of all taxes, liens and encumbrances, and any sum of money that may be paid by GMAC in release or discharge thereof shall be paid to GMAC on demand as an additional part of the obligation secured hereunder. The dealer shall not mortgage, pledge or loan said property, and shall not transfer or otherwise dispose of same except as next hereinafter more particularly provided.

"5. The dealer may sell said property at retail in the ordinary course of business; provided, however, that any and all proceeds thereof shall be fully, faithfully and promptly accounted for by the dealer to the extent of the obligation hereby secured.

"6. GMAC's security interest in said property hereunder shall attach, to the full extent provided or permitted by law, to the proceeds, in whatever form, of any retail sale thereof by the dealer until such proceeds are accounted for as aforesaid, and to the proceeds of any other disposition of said property or any part thereof by the dealer.

"7. In the event of the dealer's default in payment under and according to said promissory note, or in the due performance of or compliance with any of the terms and conditions hereof, or in the event of a proceeding in bankruptcy, insolvency or receivership instituted

The cars were shipped by GMC to Twin Town. GMC executed the bill of sale transferring title to the cars to GMAC. By previous arrangement with Twin Town, GMAC paid GMC the invoiced charges, contemplating, again part of a prior arrangement, that Twin Town would execute the trust receipt and the promissory note payable to GMAC.

To expedite this merchandising these documents were never delivered to Twin Town for execution by Twin Town of the trust receipt and promissory note. Twin Town had previously given written powers of attorney[4] to named

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by or against the dealer or the dealer's property, or in the event that GMAC deems itself insecure or said property or any part thereof in danger of misuse, loss, seizure or confiscation, GMAC may take immediate possession of said property, without demand of further notice and without legal process; for this purpose and in furtherance thereof, the dealer shall, if GMAC so requests, assemble said property and make it available to GMAC at a reasonably convenient place designated by it, and GMAC shall have the right, and the dealer does hereby authorize and empower GMAC, to enter upon the premises wherever said property may be and remove same.

"In the event of repossession of said property, then, (1) if the rights and remedies applicable to repossession hereunder are governed by the provisions concerning rights and remedies under Article 9 of, and relating to Secured Transactions under, the Uniform Commercial Code as a result of enactment thereof, GMAC shall have such rights and remedies as are thereunder provided and permitted; otherwise, (2) GMAC may, at its election, either (a) sell said property upon notice, at public or private sale, for the account of the dealer, or (b) declare this transaction and the dealer's obligation under the aforesaid promissory note to be terminated and cancelled, and retain any sums of money that may have been paid by the dealer hereunder.

"8. Any provisions hereof prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remaining provisions hereof."

[4] Omitting formal portions the powers of attorney authorized the attorney in fact:

"Upon receipt, from time to time, of Orders for motor vehicles ordered by it under the General Motors Acceptance Corporation Wholesale Plan, to effect delivery to it of motor vehicles thereunder by executing *(herewith also authorizing the signature of said attorney for such purpose to be in the form of an imprinted or otherwise reproduced facsimile signature of said attorney)*, acknowledging and delivering General Motors Acceptance Corporation trust receipts and notes covering and for the number of motor vehicles indicated by said Orders." (Emphasis added.)

employees of GMAC, in the GMAC offices through which these documents were processed, to execute the trust receipts and the promissory notes on behalf of Twin Town.

In some instances, conventional procedure was adopted by the trust receipts and promissory notes being physically executed by Twin Town.

> This merchandising practice represents the "conventional," "orthodox" or "true" tri-partite trust receipt transaction, 53 Am. Jur., Trust Receipts § 2, both at common law and under the Act. *Keating* v. *Universal Underwriters Insurance Co.*, 320 P. (2nd) 351, 354 [1-3] (Mont. 1958).

> In the terms of the trade such practice is known as "floor planning" or "flooring" motor vehicles.

Under these documents GMAC became an "Entruster" and Twin Town became a "Trustee" within the terms of the Act.

The sufficiency of the execution of these trust receipts on behalf of Twin Town by its attorneys in fact is attacked by defendant (N.O.V. 5).

Upon occasions when Twin Town, as trustee, did not have the model of, or equipment on, a car which a potential purchaser desired, Twin Town would procure the desired car from other sources and by executing an "Exchange Agreement"[5], in which GMAC released its security interest in the original car and accepted security interest in the car

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These powers were executed by Twin Town, the signature of which was supported by acknowledgment before a Notary Public and certificate that the act of the officer of Twin Town in executing the power was in conformity with resolution of its Board of Directors endorsed on the same form were the signatures of the attorneys in fact purportedly in their own hands or by stamped facsimile.

[5] "EXCHANGE AGREEMENT (To be used only where Substituted Motor Vehicle is owned outright or is being financed by other than GMAC)

acquired by Twin Town from other sources, would purportedly substitute the "security" of the second car for that of the original car. As to the "substituted" cars involved in the present controversy, defendant urges (N.O.V. 7) that by such substitution, GMAC acquired no security interest, under the Act.

TO GENERAL MOTORS ACCEPTANCE CORPORATION (hereinafter referred to as GMAC):"

Trust Receipt Identification No. _____

New _____ (Hereinafter
(Year) (Make-Model) (Identification No.)

referred to as Original Motor Vehicle)

New _____ (Hereinafter
(Year) (Make-Model) (Identification No.)

referred to as Substituted Motor Vehicle)

Obtained from _____
(Dealer)

"In consideration of the sub-joined consent by GMAC to the undersigned's exchange of the above-described Original motor vehicle for the motor vehicle described and identified above as the Substituted motor vehicle and the release by GMAC of its rights and security interest in said Original motor vehicle under the undersigned's trust receipt bearing the identification number designated above, the undersigned acknowledges that said Substituted motor vehicle is hereby substituted in place of said Original motor vehicle under the aforesaid trust receipt, and that said Substituted motor vehicle is and shall be subject to GMAC's rights and security interest under the terms, provisions and conditions of said trust receipt, with the same force and effect as if the aforesaid trust receipt, as and when originally executed, described and covered said Substituted motor vehicle.

"The undersigned warrants that said Substituted motor vehicle is free from any encumbrance whatever other than GMAC's security interest therein and will save GMAC harmless from the lawful claims and demands of any and all persons with respect thereto."

Executed this ____ day of _____ 19____ at _____
(City) (State)

_____
(Dealer's signature)

By_____
(If Corp. or Partnership) (Title)

"GENERAL MOTORS ACCEPTANCE CORPORATION hereby consents to the exchange of the above-described Original motor vehicle for the motor vehicle described and identified above as the Substituted motor vehicle, and in furtherance thereof, releases its rights and security interest in said Original motor vehicle under the terms,

During the period that Twin Town was in operation beginning in May 1955 and ending on or about August 5, 1960 Twin Town through its Manager, Mr. Kilgore, and in 1960, through Mr. Kilgore as President, Treasurer and Manager, had done business with the defendant as a contemporary motor vehicle dealer in new and used cars. The acquaintance of the men antedated the creation of Twin Town, and both had had substantial experience in the automotive sales field.

In 1960, terminating about August 6, the periodic inspections by GMAC of Twin Town's operation to confirm presence on the floor of the vehicles which GMAC had "entrusted," found Twin Town "out of trust" viz., "short" as to numbers of cars ranging from nine in February to thirty-nine on July 25th. In each of these instances Twin Town had raised the money necessary to satisfy GMAC's security claims. Upon the next audit, August 6, 1960, Twin Town was found to be sixty-one cars short, was unable to pay GMAC off, whereupon GMAC took possession of all entrusted cars and "trade-ins" on entrusted cars then to be found. Bankruptcy proceedings on Twin Town followed.

During the latter portion of Twin Town's operations, July 25 to August 6, 1960, during which period Twin Town was admittedly in bad financial condition, Twin Town and defendant engaged in a substantial number of transactions with each other involving the alleged sales and deliveries of cars by Twin Town to Anacone for "cash" (checks), transfers by Twin Town to Anacone of multiple units on a whole-

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provisions and conditions of the trust receipt bearing the above-designated identification number."

Executed this _____ day of_____ 19____ at _____
(City) (State)

GENERAL MOTORS ACCEPTANCE CORPORATION

By_____
(Title)

(PREPARE IN DUPLICATE, SEND BOTH COPIES TO GMAC)

sale basis and implied delivery of cars by Twin Town to Anacone to be applied on or in satisfaction of pre-existing debts, fictitious sales in that Anacone would pay for Twin Town cars, but leave them in Twin Town's possession for sale, receiving a "bonus" for this service, and pledges of cars to Anacone.

As to fifteen motor vehicles which Twin Town allegedly transferred to Anacone between July 25 and August 6, 1960 plaintiff complains (of eighteen cars listed in the complaint, three were withdrawn by stipulation during trial) that the transfers by Twin Town to Anacone were in violation of the trust receipts and under circumstances which made Anacone a converter. Anacone admits receiving thirteen of these cars, but under circumstances which did not constitute a conversion, and denies receiving the remaining two.

EXECUTION OF TRUST RECEIPTS BY ATTORNEYS-IN-FACT

The first attack on plaintiff's position with which we shall deal is point N.O.V. 5, in which is questioned the validity of the trust receipts which were executed on behalf of Twin Town by attorneys in fact. Separate powers of attorney over the period March 27, 1958 to July 28, 1960 had been given Geraldine E. Kavanaugh of Framingham, Massachusetts, E. C. Downie of North Tarrytown, New York, and J. A. Grenzicki of Detroit, Michigan. These attorneys in fact were employees of GMAC in the respective offices in which sales of motor vehicles from GMC to Twin Town were processed and each attorney in fact held powers from many dealers, — Grenzicki for approximately 3,000 dealers, Mrs. Kavanaugh for "some 300" dealers in parts of the Atlantic coast region, and E. C. Downie, now Mrs. Edith Byrne, from 750 to 900 dealers along the Atlantic coast. In the offices of Mr. Grenzicki and Mrs. Kavanaugh their facsimile signature was affixed from a plate and as part of a machine process; in Mrs. Byrne's office, her signature was

affixed by the use of a rubber stamp facsimile in the possession of a fellow employee. From 1,000 to 2,500 transactions each day were processed in the offices involved. In no case did the attorney in fact personally apply the plate or stamp bearing the facsimile signature. The affixation was an automatic administrative act.

As to this point, our Act requires only that the writing designating the goods concerned be signed by the trustee (Act, § 2, I. c. 1), "but these subsections do not prescribe any particular form of signature. The trust receipts * * * but constitute private agreements between the entruster and the trustee. There is nothing in these subsections or in the act as a whole to reveal an intent to change the common law of contracts as to what may be a binding form of signature on the part of a corporation." Dictum in *General Motors Acceptance Corp.* v. *Haley*, 109 N. E. (2nd) 143, 147 [4-6] (Massachusetts Act, 1952).

It has long been held under the negotiable instruments law that affixing a signature to such an instrument by a rubber stamp is sufficient to fulfill the requirement of a written endorsement, if the stamp is affixed with the intent of using it as an endorsement, and with authority. *American Union Trust Co.* v. *Never Break Range Co.*, 190 S. W. 1045, 1047 [1], 1049 [4] (Mo. 1916).

In *Eastern Acceptance Corporation* v. *Camden Trust Company*, 163 A. (2nd) 134, 138 [5] (N. J. UTRA, 1960), a case in which the signature of the trustee by an attorney in fact was questioned, together with criticism of the attorneys in fact being employees of the entruster, such signatures were held valid. The case does not reveal whether such signatures were facsimile, but such reproductions were contemplated in the present case. See that portion of the power, underlined in the footnote, wherein the signature of the attorney in fact is authorized in the form of "an imprinted or otherwise reproduced facsimile signature."

The particular phase of the execution of the trust receipts and notes by attorneys in fact for Twin Town involves what defendant contends is an unauthorized delegation of authority by the attorney in fact whereby a fellow employee actually affixed the signature of the attorney in fact, in two cases by operation of billing machinery and one by the use of a rubber stamp.

The questioned authority of this practice was submitted to the jury under instructions as to usage in the industry and the principles of delegated agency and objection to the instruction as to applicability of "usage" is point N.T. 6. For the jury to properly consider business usage significant in connection with the power of attorney granted by Twin Town it was necessary to show that Twin Town was sufficiently aware of the usage as to justify a presumption that Twin Town had knowledge of it and to have executed the power of attorney with reference to it. See 20 Am. Jur., Evidence § 333, 55 Am. Jur., Usages and Customs § 35, and *Dulac* v. *Dumbarton Woolen Mills, et al.*, 120 Me. 31, 37, 112 A. 710. We can find nothing in the record to support a conclusion that Twin Town had any knowledge of the intra office practice of GMAC in the processing of the documents involved. The tri-partite arrangement among the GMC, GMAC and Twin Town was aimed primarily at the distribution of cars in the most expeditious manner possible. The primary purpose of the powers of attorney, whereby the trust receipts and promissory notes could be executed as early as possible in each transaction, was to speed the delivery of the cars to Twin Town. The attorneys in fact had no way of knowing whether the cars listed on the invoice conformed to Twin Town's order and there was no judgment or discretion involved in the affixing of Twin Town's signature to those instruments. The printing on the documents, which are exhibits, would indicate that when they reached the attorneys in fact the full name of Twin Town,

its address and code number had already been printed on the document by the machine processes and the execution of the trust receipt and note on behalf of Twin Town was accomplished by the ministerial act of adding the name of the attorney in fact. Upon the facts in this case, the delegation of this act by the attorney in fact to a fellow employee cannot be premised upon usage.

Because these acts were only ministerial they were acts which might properly be delegated, will be regarded as the act of the agent and binding on the principal. 3 Am. Jur. (2nd) Agency § 150, and Restatement of Agency (2nd) § 78.

The execution of the trust receipts and promissory notes by delegation of the ministerial acts to fellow employees of the attorney in fact, under the circumstances of this case, was valid.

The execution of other trust receipts arose out of (a) purchase by Twin Town of cars from another dealer, which dealer transferred to GMAC and on which Twin Town itself executed a trust receipt and note, and (b) a transfer by Twin Town to GMAC of a car owned by Twin Town, possession retained by Twin Town, and a trust receipt executed (Bipartite trust receipt). These transactions as valid trust receipts, are recognized by the Act and are not challenged by the defendant.

Substituted Security

The second attack on plaintiff's standing under the trust receipts has to do with the status of those automobiles which purportedly were substituted under the trust receipt for those originally listed, is made under point N.O.V. 7, involves three cars, and is based upon defendant's contention that the trust receipts act contemplates no such substitution.

Apart from the trust receipts act the purported substitutions consisted briefly of a contract between Twin Town and GMAC that in consideration of GMAC's releasing its security interest in a car originally invoiced and "trust receipted," Twin Town would give GMAC security interest in another car, the substituted car, and was accomplished by a written exchange agreement[5] signed by Twin Town and GMAC which incorporated by reference the particular trust receipt affected. Such a contract is not unconventional and its effect can be challenged successfully only if it is prohibited by the Act.

ACT

Sec. 2.[6]

"I. A trust receipt transaction within the meaning of this chapter is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subsection III, whereby

* * * * * * * * * *

"C. The entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in goods * * * in possession of a trustee, and the possession of which is retained by the trustee; provided that * * * the giving of new value * * *

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[5] See page 59.

[6] "Sec. 2. What constitutes trust receipt transaction and trust receipt. —

I. A trust receipt transaction within the meaning of this chapter is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subsection III, whereby

A. The entruster or any third person delivers to the trustee goods, documents or instruments in which the entruster

1. prior to the transaction has, or for new value
2. by the transaction acquires or
3. as the result thereof is to acquire promptly, a security interest; or

B. The entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in instruments or documents which are actually exhibited to such entruster, or to his agent in that behalf, at a place of business of either

"1. be against the signing and delivery by the trustee of a writing designating the goods, * * * and reciting that a security interest therein * * * has passed to * * * the entruster, * * * ."

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entruster or agent, but possession of which is retained by the trustee; or

C. The entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in goods or documents in possession of a trustee, and the possession of which is retained by the trustee;

provided that the delivery under paragraph A or the giving of new value under paragraph B or paragraph C either

1. be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or

2. be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing.

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

If the trustee's rights in the goods, documents or instruments are subject to a prior trust receipt transaction, or to a prior equitable pledge, section 9 and section 3, respectively, of this chapter, determine the priorities.

II. A writing such as is described in subparagraph I of paragraph B of subsection I, signed by the trustee, and given in or pursuant to such a transaction, is designated in this chapter as a 'trust receipt.' No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

III. * * * "

It is to be noted that subsection II refers to subparagraph I of paragraph B of subsection I. There is no subparagraph I of paragraph B of subsection I and it appears that "subparagraph I" should be "subparagraph 1." Assuming this typographical correction the Maine Act has no such subparagraph. This situation is occasioned by the fact that paragraph C was inserted in the Maine Act between paragraph B and the clause following paragraph B in the uniform trust receipts act as it appears in Uniform Laws Annotated 9C, without revising subsection II to conform to the change. Subparagraph 1 of paragraph B of subsection I of the uniform act as given in Uniform Laws Annotated 9C necessarily becomes subparagraph 1 of paragraph C of subsection I of the Maine Act.

"New value" is defined in Section 1 of the Act[7] as including the release of a valid and existing security interest. The release by GMAC of its security interest in the original car is "new value" and is recognized consideration under the Act for the transfer by the trustee to it of security interest in the substituted goods in trustee's possession.

ACT

Sec. 2.

"II. A writing such as is described in subparagraph I * * *, signed by the trustee, and given in or pursuant to such a transaction, is designated in this chapter as a 'trust receipt.'[6] * * *."

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[7] **Sec. 1. Definitions.**—In this chapter, unless the context or subject matter otherwise requires:

" 'Buyer in the ordinary course of trade' means a person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee's liberty of sale, including one who takes by conditional sale or under a preexisting mercantile contract with the trustee to buy the goods delivered, or like goods, for cash or on credit. 'Buyer in the ordinary course of trade' does not include a pledgee, or mortgagee, a lienor or a transferee in bulk.

" * * *

" 'New value' includes new advances or loans made, or new obligation incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under section 10; but 'new value' shall not be construed to include extensions or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations.

" * * *

" 'Transferee in bulk' means a mortgagee or a pledgee or a buyer of the trustee's business substantially as a whole.

" * * *

" 'Value' means any consideration sufficient to support a simple contract. An antecedent or preexisting claim, whether for money or not, and whether against the transferor or against another person, constitutes value where goods, documents or instruments are taken either in satisfaction thereof or as security therefor."

The section 10 referred to under "new value" above, has to do with the entruster's right to proceeds and is not here pertinent.

"In the ordinary course of trade" as used in the Act and "in the regular course of business" as used in Paragraph 2 of the terms in the trust receipt (footnote 3, page 57) are considered synonymous.

Under our Act the "exchange agreement" is a trust receipt, and GMAC acquired security interest in the substituted cars therein listed.

In re Yost, et al., 107 F. Supp. 432 (D. C. Md. 1952) is cited as being critical of the "substitution" idea as applied to trust receipts and it is the only case which has come to our attention in which that phase of trust receipt transaction is discussed. In *Yost*, however, the argued substitution was not supported by any writing and the court said under [2] on Page 436:

> "Where substitutions of different articles are made he should have obtained a new trust receipt designating the substituted article."

The pronoun "he" refers to the entruster. In the instant case we have both the writing and provisions in our Act, Section 2, validating the substituted security transaction.

ESTOPPEL

N.O.V. 4 urges that GMAC's conduct, — either in continuing to finance floor-planned cars for Twin Town, after repeated defaults of the trust receipt terms, thereby permitting sales abuses of which it now complains, or remaining silent with knowledge that Twin Town was disposing of cars at wholesale prices, estops it, as a matter of law, from asserting its present claims against Anacone.

It is not clear whether Anacone bases estoppel (a) upon GMAC's broad conduct of keeping Twin Town in business or, (b) more narrowly, upon GMAC's knowledge that Twin Town was selling cars at wholesale prices in violation of paragraph 2 of the Trust Receipt.[3]

The record supports no finding that Anacone, whose burden of proof it was, proved under (a) acts of GMAC con-

[6] See page 66.
[3] See page 57.

stituting an estoppel, *Denison* v. *Dawes,* 121 Me. 402, 409, 117 A. 314; *Aetna Casualty & Surety Co.* v. *Eastern Trust & Banking Co.,* 156 Me. 87, 97, 161 A. (2nd) 843.

If the jury determined, as it was competent to do by inference, by virtue of transfer of some cars to Anacone at a price approximating the amount of GMAC's security interest, that such transfers were at "wholesale" prices, and that GMAC was aware of such incident, no estoppel evolves, for such purchases by Anacone did not deprive him of protection as a "buyer" and he was not prejudiced.

The remaining issues arise out of the applicability of the terms of the documents, which we have now determined to be valid trust receipts, our Act, and the conventional issues raised at trial having to do with sufficiency of evidence upon which to premise the verdict returned.

PROMPT ACCOUNTING

Broadly speaking the "floor plan" under which Twin Town had possession of the entrusted vehicles permitted Twin Town to sell the cars at "retail in the ordinary course of business; provided, however, that any and all proceeds thereof shall be * * * promptly accounted for by the dealer to the extent of the obligation * * * secured" (¶ 5, Trust Receipt) [3].

According to the record, "prompt accounting" by Twin Town required it to remit to GMAC during business hours of the day Twin Town sold the car, sufficient money to satisfy GMAC's claim. In the event that the proceeds of a particular sale were insufficient to pay off GMAC's security interest, Twin Town was required to add funds from other sources sufficient to cancel GMAC's security interest. Other provisions of the trust receipt covering circumstances where Twin Town sold a vehicle which the purchaser had to "finance" are not here involved. In the event of Twin

[3] See page 57.

Town's default in payment or non-compliance with any of the terms of the trust receipt, GMAC was entitled to immediate possession (¶ 7, Trust Receipt) [3].

RECORDATION

The "statement of trust receipt financing" executed by GMAC and Twin Town (Act, § 13), the seasonable filing of which with the Secretary of State affected the rights of purchases from Twin Town is not here involved, as filing requirements were met.

"BUYER" UNDER THE ACT

The provisions of the Act which are centers of controversy and put in issue by N.O.V. 2 and N.T. 4, are those defining a "buyer in the ordinary course of trade" [7] and "new value" [7] as applied to such buyer. GMAC contends that, as to the cars in controversy, Anacone was not a "buyer" within the terms of the Act and, therefore, did not acquire the cars free of GMAC's security interest; — that he did not give new value; that he did not act in good faith and without actual knowledge of limitations on Twin Town's liberty of sale; that in some instances he did not take delivery of the vehicle whereby the purported sales were fictitious, — and hence not a sale under the Act (Sec. 1) and that in some instances he was a pledgee, — specifically excluding him as a "buyer" under the Act (Sec. 1) [7].

> While there is implication that Anacone was not a "buyer" because of his being a "transferee in bulk" it must be observed that the definition of "transferee in bulk" given in Section 1 [7] obviates this implication, for there is nothing in the record to justify a finding that Anacone bought Twin Town's business "substantially as a whole."

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[3] See page 57.

[7] See page 68.

> It is to be noted also that where Twin Town, under the terms of the trust receipt, had liberty of sale and sells to a "buyer in the ordinary course of trade,"[7] such buyer takes free of the entruster's security interest in the goods so sold and no limitation placed by GMAC on the liberty of sale granted Twin Town affects a "buyer in the ordinary course of trade, unless the limitation is actually known to the latter." Act, Section 9, II A.[8]

In analyzing defendant's position as a buyer who acted "in good faith and without actual knowledge of any limitation on the trustee's liberty of sale" it is urged that because of Anacone's long experience in the automobile sales field and the frequency with which he dealt with Twin Town, he must have known that Twin Town was "floor planning" its cars, and was limited to retail sales and that purchase of automobiles from Twin Town with that knowledge rendered him not a "buyer" under the Act.

> Knowledge that a dealer has cars upon floor plan is not sufficient to expose a purchaser otherwise a "buyer" under the terms of the Act to the entruster's security interest. *Commercial Credit Co.* v. *Barney Motor Co.*

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[7] See page 68.

[8] "Sec. 9. * * *

II. Where a purchaser from the trustee is not protected under subsection I hereof, the following rules shall govern:

A. Sales by trustee in the ordinary course of trade.

1. Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, * * * such buyer takes free of the entruster's security interest in the goods so sold and no filing shall constitute notice of the entruster's security interest to such a buyer.

2. No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter."

Subsection I referred to above has to do with purchasers of negotiable documents or instruments.

et al., 76 P. (2nd) 1181, 1183 [3] (Cal. UTRA, 1938); *People's Finance & Thrift Co. of Visalia* v. *Bowman*, 137 P. (2nd) 729, 733 [14] (Cal. D. C. of Appeals, UTRA, 1943). That knowledge which will deprive a buyer of protection against the entruster's security interest must be actual and as applied to the car in question, *Commercial Credit Corp.* v. *General Contract Corp.*, 79 So. (2nd) 257, 260 [1] (Miss. UTRA, 1955); *Premium Commercial Corporation* v. *Kasprzycki*, 29 A. (2nd) 610, 613 [4] (Conn. UTRA, 1942); *General Credit Corporation* v. *The First National Bank of Cody*, 283 P. (2nd) 1009, 1014 [3] (Wyo. UTRA, 1955); *Refrigeration Discount Corp.* v. *Catino*, 112 N. E. (2nd) 790, 794 [7, 8] (Mass. UTRA, 1953), and which applies equally to the "retail" limitation.

The record does not support a jury finding, if such were made, that Anacone acquired any of the cars in controversy with the actual knowledge required by the Act. Such a finding, if made, would have to result from speculation arising out of the relationship of the parties.

Anacone's status as a contemporary automobile dealer did not prevent his being a "buyer" under the Act. *Colonial Finance Co., Inc.* v. *DeBenigno*, 7 A. (2nd) 841, 842 (Conn. UTRA, 1939); *General Finance Corporation* v. *Krause Motor Sales*, 23 N. E. (2nd) 781, 783 [2] (Ill. UTRA, 1939).

The testing of the transactions between Twin Town and Anacone with relation to Anacone's giving "new value," participating in fictitious sales and becoming a pledgee is commented upon later.

ADMISSION OF EVIDENCE

Points N.T. 1 and N.T. 2 charge the trial court with error in admitting, over defense objection, Twin Town documents (ledger cards) under N.T. 1 and (series of checks given by Twin Town to Anacone) under N.T. 2. The

purpose of such evidence was to establish the financial relationship existing between Twin Town and Anacone during the year 1960, ending with the financial collapse of Twin Town in early September of that year. The last ledger entries are dated August 5, 1960. At face value these exhibits, with qualifying testimony, purported to show that at various times during that period Twin Town owed Anacone thousands of dollars which was paid only by Twin Town's delivering automobiles to Anacone and that such deliveries were transfers denying Anacone the status of a "buyer" and that Anacone, therefore, acquired subject to GMAC's security claim.

The trustworthiness of the ledger cards and the checks for acceptance at face value is highly questionable. The dealings between Twin Town and Anacone were handled almost exclusively by Mr. Kilgore, Twin Town's checks were issued by Mr. Kilgore, and the knowledge of Twin Town's bookkeeper, Mr. Joseph, as to the trades between Kilgore and Anacone came only from information furnished him by Mr. Kilgore and not infrequently supplied at a time subsequent to the transaction involved. Conversely, Mr. Kilgore's knowledge of the conclusions suggested by Twin Town bookkeeping was circumscribed for the same reason.

Numerous entries by Mr. Joseph on the Anacone account was occasioned by a check payable to Anacone coming across his desk without explanation and, minus explanation, Mr. Joseph entered the check as a credit to the Anacone account. A series of such entries resulted, at one stage, in the accumulation of a very substantial credit in Twin Town's favor. Messrs. Kilgore and Anacone exchanged checks, the Anacone checks being good and the Twin Town checks unsupported by sufficient funds. The extent to which these transactions were reported to Mr. Joseph is unclear. The admission of these checks and these ledger cards required the jury to conclude that Twin Town and Anacone were engaged in irregular financial dealings, out

of which plaintiff urged the jury to conclude that fifteen cars, which allegedly were transferred from Twin Town to Anacone, were so tainted by the practices referred to as to oblige the jury to find that Anacone was entitled to no protection under the Act. The admission of these exhibits cannot be said to have been improper, but whether or not the practices reflected by this evidence were identified with the cars in dispute, is another question. It was the plaintiff's burden to show that each car in controversy was traced to a transaction which would give Anacone no protection under the Act. In this it has failed. The record identifies no car for which recovery is sought as being subject of a fictitious sale or pledge.

The chart, a part of this opinion, lists the cars for which plaintiff seeks recovery, each car identified by the last four digits of its serial number. The conventional transaction between Twin Town and a purchaser was evidenced by the execution of a buyer's order, which order identified the car, expressed the terms of the sale and was signed by the purchaser. If the transaction were a "cash" sale, an invoice would be made by Twin Town identifying the car, listing equipment, accessories, and the amount received on delivery. In a sale to Anacone, Mr. Anacone prepared a sheet identifying the car, usually by a serial number and showing the price paid. On the chart we have listed with relation to each controversial car, the date of the buyer's order, the date of the invoice, the evidence of payment, the date which Mr. Anacone's records show as the date of the transaction, Mr. Anacone's position as to whether he received the car, the amount of the security interest claimed by GMAC, the sale price, where the record reveals it, and entry, if any, in Twin Town's cash journal. In each column is also indicated the plaintiff or defendant exhibit number of the document referred to, and during trial the documents which counsel had concluded were identified with the particular car in question were stapled together. In the column labeled

"comment" are remarks supported by the record, sometimes clarifying previous entries and in three instances indicating the status of the car more obscure. To illustrate this, in the first line of the chart as applied to a 1958 Chevrolet, Serial No. 0019 (Car No. 1), the record requires a finding that the buyer's order for that car was dated July 26, 1960, is defendant's exhibit 5; that the invoice date was August 5, 1960, and number 3341 and is defendant's exhibit 5; that the evidence of payment for the car was a check in the amount of $6,862, dated July 26, 1960, which check is both plaintiff's exhibit 9, and defendant's exhibit 5; the fourth document is the sheet from Mr. Anacone's record indicating that he received the car in question on July 26, 1960 and is defendant's exhibit 5; that GMAC's interest was $700; that sale price was $950 and that $6,862, was entered on Twin Town's cash journal for July 26, 1960.

The chart indicates that the 1960 Oldsmobile 0554 (Car No. 2) was part of the same transaction, but that Mr. Anacone denies receipt of the 1960 Oldsmobile. As to these two cars the record shows that they were two of four cars, that the check for $6,862 represents the total price for the four cars, but that only the 1958 Chevrolet and the 1960 Oldsmobile were under plaintiff's trust receipt. The jury was charged with determining as to fifteen such cars, whether Mr. Anacone did or did not (a) receive the fifteen cars, and (b) if he received them, did he do so under circumstances depriving him of the protection afforded a "buyer" under the Act?

The record indicates that this case was tried for five days and that the jury deliberated approximately seven hours, less the time required to leave the courthouse for an evening meal. There are 114 exhibits. The finding of a jury is not to be disturbed if there be credible evidence to support it, but we are obliged to here record that the jury findings in this case, based upon perhaps six hours of deliber-

ations must have been governed by the atmosphere of the case generated by the lengthy trial and the extremely confusing and highly irregular financial transactions alleged between Mr. Kilgore of Twin Town and the defendant, which understandably, but invalidly, resulted in the jury's conclusion that nearly all of the cars were acquired by him so tainted with those alleged practices that the identity of the practices were attached to each car. It is an example of faulty *post hoc* reasoning.

NEW VALUE AND PROOF OF DELIVERY

The definition of "new value" in Section 1 of the Act[7] is not all inclusive. "It goes no farther than to specify that certain things shall be and other things shall not be regarded as within that term. It does not, for example, state that cash actually paid in full satisfaction of the price of an article constitutes such value" *DeBenigno, supra,* at page 844 [2] but it cannot logically be contended that cash or its equivalent is not "new value" within the requirements of the Act.

Painstaking study of the record and the exhibits leads us to conclude that the jury was justified in finding, as to delivery of the two cars which Anacone denied receiving, and the "new value" aspect of the transaction involving the thirteen cars which Anacone admitted receiving, as follows:

As to the four cars indicated by the asterisks, there is positive evidence by Mr. Kilgore which would justify a finding that those four vehicles, together with two others not under trust receipt, were transferred to Mr. Anacone in satisfaction of pre-existing debt (bad checks) in no way identified with these four cars (cf. *DeBenigno*), were not for "new value" and that Mr. Anacone was not a "buyer" under the Act. Mr. Anacone received these four cars subject to GMAC's security interest, and resolves point N.T. 5.

[7] See page 68.

DeBenigno, supra, and *Commercial Discount Co.* v. *Mehne,* 108 P. (2nd) 735 (D. C. of Appeal, Cal. UTRA, 1940) are leading cases on a definition of "new value" as applied to a credit on the books of the dealer in favor of a purchaser. Our Maine Act was adopted in 1955 and under the principles that a statute enacted after a judicial construction is presumed to take that construction, *Hutchins* v. *Libby,* 149 Me. 371, 379, 103 A. (2nd) 117, and to a lesser degree is presumed to take the construction given by a foreign court, 50 Am. Jur., Statutes § 323, and the significance of a construction applied to one of the uniform laws, create a precedent which cannot be ignored. However, we do not accept the definition of "new value" as applying to a pre-existing debt beyond the limited facts of the Connecticut case. *DeBenigno's* construction of "new value" is criticized in 53 HLR 335 (1939). *Mehne* recognizes a more valid protection to the purchaser by considering him a buyer under a pre-existing mercantile contract as allowed in the Act, § 1.[7]

Cars No. 2 and No. 13 were vehicles the receipt of which Anacone denied. The only evidence of delivery as to car No. 13 is testimonial reference to its appearing on invoice #3346, which invoice is not an exhibit. The burden of establishing delivery of this car has not been satisfied. Car No. 2 was one of four cars purportedly covered by a July 26th transaction, only two of which were under trust receipts. While car No. 1 appears on the buyer's order, the invoice, the sheet from Mr. Anacone's records and the check given to cover the four cars is in a total of the sum of the four sales prices, car No. 2 appears only on plaintiff's invoice. The 1960 Oldsmobile appearing on the buyer's order and on Mr. Anacone's record is not identified as a "Hol. Sed." but is identified as a station wagon with a different serial number. Additionally the invoice lists three cars, the

[7] See page 68.

third being a 1959 Ford with serial number unknown, while the buyer's order and the Anacone record lists a 1958 Mercury. These inconsistencies cast doubt upon the accuracy of the invoice which was dated ten days after the buyer's order and check, and prepared by Twin Town, inferentially from Mr. Kilgore's memory, ten days after the transaction evidenced by the buyer's order, check, and the Anacone record.

Premising proof of delivery of car No. 2 upon these facts can be only speculation. The record discloses that the jury sought instructions as to the two cars which Anacone denied receiving and were properly advised that they would have to resolve this point upon the evidence before them. The fact that the total amount of the verdict was within a few cents of the total of the security value claimed by plaintiff on the remaining thirteen cars, suggests very strongly that the jury concluded that delivery of cars No. 2 and No. 13 to Anacone had not been established, with which conclusion, if we interpret the verdict correctly, we agree. If we interpret the verdict incorrectly, we find no adequate evidence that Anacone received cars No. 2 and No. 13. See *Bridgham* v. *Hinds,* 120 Me. 444, 446, 115 A. 197. Point N.O.V. 6 is here covered.

Documentary evidence supporting the transactions on car No. 3, and car No. 12, must be read together. The four associated documents support consistently the transfer to Anacone of a 1960 Oldsmobile. The only document which carries a serial number is the invoice on car No. 3 which identified the car as a "Hol. Sed." with serial number ending in 3638. Anacone's record identified the car as a "60 Olds 4 Dr 98 White." Additionally Anacone's record carries a notation that this car was sold to Twin Town on July 29, 1960, the day following the purported sale by Twin Town to Anacone. If this be so, Anacone's responsibility for car No. 3 arising out of the July 28th deal terminated

on July 29th when it could be found that the car was returned to Twin Town. This conclusion becomes valid when the documents supporting the transaction on car No. 12 are studied. The Anacone record identified it as a "98 4 Dr HT White" with serial number 3638 but the invoice identifies it as a station wagon serial number 6253. The weight of documentary evidence on this transaction leads one to a valid conclusion that the invoice is in error and that in fact Mr. Anacone reacquired the Oldsmobile 3638 on August 3, 1960.

> The evidence justified the finding that Anacone purported to acquire this car on July 28th for $3,150, retransferred it to Twin Town the next day and acquired it on August 3, 1960 for $3,000 which was less than the security interest held by GMAC, but at a time when Twin Town was struggling for financial survival.

In the light of the conclusion reached above, invoice number 3340 does not by itself establish delivery of this car to Anacone, but documentary support of his admission that he received the car can be found in his record dealing also with car No. 1, which group of exhibits we have discussed previously in another connection, wherein it was pointed out that the only document in that group which was offered to show delivery of car No. 2 was the invoice, but on the buyer's order, and on the Anacone record supported by a check representing the total purchase price of four cars, is a 60 Oldsmobile station wagon, the serial number of which is given on the Anacone record as 6253. The only conclusion supported by the evidence is that cars No. 3 and No. 12 were so acquired.

> It is significant to note, also, that with the exception of car No. 3, which has just been discussed, and the four cars delivered to Anacone in satisfaction of outstanding bad checks, all of the cars involved were transferred to Anacone at a price never less than the

outstanding security interest. If this fact establishes by fair inference that the transfers were for wholesale prices, although no evidence so characterizes them, and while such sales, — if wholesale, were violations of the trust receipts as between Twin Town and GMAC, such sales would not prevent Anacone being a "buyer" under the Act (Sec. 1).[7]

As to car No. 14 we find nothing in the record to describe the transaction through which the car reached Mr. Anacone. According to Mr. Kilgore's testimony, this vehicle, with fourteen others, appeared on invoice number 3346 dated August 5, which invoice is not an exhibit. The total of the invoice was $23,513.48 and this amount was charged to Mr. Anacone, increasing by that amount the balance in Twin Town's favor according to the ledger entries, the infirmities of which have been discussed, ante. Because of the weakness in communication between Mr. Kilgore and Mr. Joseph, the true account between Twin Town and Anacone could not have been reflected in the ledger, in the light of Anacone's firm denial that any such debit balance ever stood against him, and Mr. Kilgore's testimony that when, on August 5th Twin Town was found to be "out of trust" on sixty-one cars and it had transferred fifteen cars to Anacone, the account between Twin Town and Anacone became substantially balanced. On that date the ledger shows over $39,000 due Twin Town from Anacone. It was a proper inference that car No. 14 reached Anacone, with others, toward satisfaction of a debt not identified with car No. 14 (see comment on *DeBenigno, supra*), which circumstance deprived Anacone of protection as a "buyer" and he received car No. 14 subject to GMAC's security interest.

Cars No. 7 and No. 8 appear in the series of documents reflecting a sale on August 3 with payment on August 4 by a check for $4,900, the price for the two cars is given as $5,048.11 and the difference between the invoice price and

[7] See page 68.

the check of $148.11 is explained by Mr. Anacone that he claimed a rebate in that amount on a car previously purchased that was "scratched up a little." We find that on the Anacone record dealing with car No. 4 on a July 29 purchase, a notation against the 1960 Oldsmobile 2472 that the price there listed was "–148.00." The explanation is logical and supported by the Anacone records which the jury could accept as trustworthy as the Twin Town record.

With the explanation just given as to the August 3rd transaction on cars No. 7 and No. 8, those cars together with cars No. 1, No. 3, No. 4, No. 5, No. 6, and No. 12 represent transactions which were not established as other than "cash" in the sense that the checks were dated on the date of the buyer's order, were in amounts identical to the sale prices shown on the documents, the checks were honored upon deposit, were shown on the Anacone record as being received on the day indicated by the check and the buyer's order, and were sales for new value. As to these cars the evidence fails to show that Mr. Anacone was anyone but a "buyer" under the Act, and entitled to take these vehicles free of GMAC's security interest. A finding that Mr. Anacone was answerable to GMAC on these vehicles is not justified by the record.

We have determined that cars No. 9, No. 10, No. 11, No. 14, and No. 15 reached Mr. Anacone subject to GMAC's claim. These conclusions cover points N.O.V. 1 and 2 as applied to the Act.

CONVERSION

To this point we have discussed the legal status of the parties under the trust receipts and the Act, and we arrive at the final point N.O.V. 3, which challenges the jury's conclusion that Anacone converted property of GMAC.

The gist of conversion is the invasion of a party's possession or right to possession at the time of the alleged conversion.

The plaintiff must show that he had a general, or a special property in the goods, and the right to their possession at the time of the alleged conversion. *Carey* v. *Cyr and Denico,* 150 Me. 405, 406, 113 A. (2nd) 614; *Sanborn* v. *Matthews,* 141 Me. 213, 217, 41 A. (2nd) 704.

If the holder acquired possession rightfully, a demand by the person entitled to possession and a refusal by the holder to surrender is necessary before the withholding becomes a conversion, but if the taking by the holder was wrongful, that taking is a conversion without demand. Where the circumstances show that a demand would be useless, a demand is not necessary. 53 Am. Jur., Trover and Conversion § 88, *Sanborn, supra,* at 217; *Dean* v. *Cushman,* 95 Me. 454, 456, 50 A. 85; *Hagar* v. *Randall,* 62 Me. 439, 441.

Unquestionably GMAC had a general, or special property in the cars under the trust receipts, Act, Sec. 1 definition of "Security Interest." If plaintiff's property consists of title, it is a general property. If plaintiff's property is a "security interest" it is a special property. See *Kasprzycki, supra.* We are not here concerned with a distinction. GMAC did not have possession, it had been delivered to Twin Town for purposes of sale. Only upon the default in certain conditions set forth in the trust receipts did GMAC thereafter become entitled to possession,[3] Act, Sec. 6 I.[9] One such condition was that Twin Town upon sale should "faithfully and promptly" pay off GMAC's claim, to wit remit during business hours of the day of sale the proceeds to GMAC. Only upon default by Twin Town of this

[3] See page 57.

[9] "**Sec. 6.** * * *

I. The entruster shall be entitled as against the trustee to possession of the goods, documents or instruments on default, and as may be otherwise specified in the trust receipt.

II. An entruster entitled to possession under the terms of the trust receipt or of subsection I may take such possession without legal process, whenever that is possible without breach of the peace."

* * * * * * *

term, material here, did GMAC's right to possession arise. Until such default occurred, the sale by Twin Town was valid, delivery of possession of the car to the purchaser was authorized and possession by the purchaser was rightful, whether or not he were a "buyer."

Upon default by Twin Town, and the accrual of GMAC's right to possession, the rightful possession of a purchaser not a "buyer" could be transferred into a conversion only after demand by GMAC and refusal by the holder-purchaser to surrender. No demand was made by GMAC on Anacone nor was evidence given to establish a demand useless.

The rights of plaintiff in trover stand, therefore, upon a tortious taking by Anacone.

As a "buyer," Anacone acquired Twin Town cars free of GMAC's security interest, whether or not Twin Town seasonably paid off GMAC, Act, Sec. 9.[8] Were a purchaser, not a "buyer," to acquire cars from Twin Town and Twin Town paid off GMAC, there would be no security interest to be imposed upon the vehicle involved. As to cars which Anacone acquired not as a "buyer" (in satisfaction of antecedent debt) and on which Twin Town violated its trust receipt by non-payment, these were held by Anacone subject to GMAC's claim, but absent demand for possession by GMAC, and refusal by Anacone, Anacone's liability to GMAC was under an implied contract, as a debtor.

The legal status of these parties is peculiar to their factual relationship. Cases dealing with trover and conversion under the conventional mortgagor-mortgagee, conditional vendor-vendee, pledge and bailment relationships do not control. The significant distinction is the "liberty of sale" granted the trustee.

[8] See page 72.

In answer to point N.O.V. 3 upon the theory of conversion, upon which the complaint was founded, the defendant is entitled to judgment *non obstante veredicto.*

In trial, however, GMAC claimed damages which would normally be identified with a complaint under an implied contract to wit, an implied promise to pay the security interest of GMAC.

The rule of damages applicable to a complaint in trover for conversion is the value of the goods at the time of conversion *Brown* v. *Haynes,* 52 Me. 578, 583; *Sanborn, supra,* and *Bartlett* v. *Newton,* 148 Me. 279, 287, 92 A. (2nd) 611, even though the plaintiff may be accountable therefor to some third party, *Bradley Land and Lumber Company* v. *Eastern Manufacturing Company,* 104 Me. 203, 206, 71 A. 710. All evidence on damages in the present case was confined to the plaintiff's security interest, which would be plaintiff's measure of damage in trover only were it accountable to the defendant for any remaining interest in the property, *Bradley Land and Lumber Company, supra,* which here it was not.

Inasmuch as the case was tried partly in trover and partly in implied contract, without objection, we conclude that a new trial is more properly ordered. Rule 50 (b) M. R. C. P.

It is fair to assume that a retrial would be lengthy, expensive and pose no simpler jury question upon the complicated and confusing transactions between these parties than herein existed.

As indicated, the jury would have been justified in finding under the terms of the trust receipts and the Act that Mr. Anacone took five cars subject to the security interest of GMAC totaling $11,904.69. If the plaintiff cares to accept judgment against Mr. Anacone in that amount with

interest from date of the complaint, it may do so, provided, however, that execution issuing upon such judgment will not be in a capias form.

Appeal sustained, judgment reopened and new trial ordered, unless plaintiff shall within 30 days from filing of mandate remit such amount of the verdict as exceeds $11,904.69, and accept straight execution therefor.

Vehicle	Buyer's order date	Invoice date	Evidence of payment	Anacone record	Anacone testimony or stipulation	GMAC's Security Interest	Sale Price	Cash Journal	Comment
1. 58 Chev. 0019	7/26/60 D Ex #5	8/5/60 #3341 D Ex #5	Check 7/26/60 $6862.00 P Ex #9—D Ex #5	7/26/60 D Ex #5	Receipt admitted	$700.00	$950.00	$6862 entered 7/26/60	Covers four cars, these two under Trust Receipt. Check represents payment for four cars. Car #0019 on all exhibits but car #0554 only on invoice.
2. 60 Olds. 0554	" "	" "	" "	" "	*Receipt denied*	$3271.98	$3262.00		
3. 60 Olds. 3638	7/28/60 D Ex #7	8/5/60 #3351 D Ex #7	Check 7/28/60 $3150.00 P Ex #6—D Ex #7	7/28/60 D Ex #7	Receipt admitted	$3313.20	$3150.00 and on 8/3/60 $3000.00	$3150 entered 7/28/60	Anacone exhibit states sold to Twin Town on 7/29. Invoice not consistent on Olds. Ser. No. See *** below and opinion.
4. 60 Olds. 2472	7/29/60 D Ex #1	7/29/60 #3290 D Ex #1	Check 7/29/60 $5486.00 P & D Ex #1	7/29/60 D Ex #1	" "	$3215.46 originally but $842.86 at trial	$3223.00	$5486 entered 7/29/60	Transaction involved two cars, totaling check listed. Only #2472 under Trust Receipt. Carries notation of $148.00 refund due **.
5. 60 Chev. 0718	8/1/60 D Ex #2	8/1/60 #3312 D Ex #2	Check 8/1/60 $5042.00 P & D Ex #2	8/1/60 D Ex #2	" "	$2482.99	$2483.00	$9042 entered from Anacone 8/1/60	Check represents payment for both cars.
6. 60 Chev. 0137	" "	" "	" "	" "	" "	$2492.58	$2559.00		
7. 60 Chev. 3283	8/3/60 D Ex #4	8/3/60 #3322 D Ex #4	Check 8/4/60 $4900.00 P & D Ex #4	8/4/60 D Ex #4	" "	$2272.22	$2272.22		Car prices total $5048.11 less $148.00 rebate to adjust on previous transaction. **
8. 60 Olds. 7663	" "	" "	" "	" "	" "	$2765.89	$2765.89		
9. 60 Chev.* 1893	Undated D Ex #6	8/5/60 #3338 P Ex #5	Invoice marked "Paid—KHK"		" "	$2521.51	$2490.96		Total invoice $7660.68. Kenneth H. Kilgore was the Manager and later President, Manager and Treasurer of Twin Town.
10. 60 Chev.* 0373	" "	" "	" "		" "	$2348.17	$2448.26		
11. 60 Chev.* 4244	" "	" "	" "		" "	$2637.17	$2721.46		
12. 60 Olds. 6253	8/3/60 D Ex #3	8/5/60 #3340 D Ex #3	Check 8/4/60 $4200.00 P Ex #3	8/3/60 D Ex #3	" "	$3211.65	$3262.00		Transaction involved two cars totaling check listed. Only #6253 under Trust Receipt. Anacone record not consistent. See *** above, and opinion.
13. 60 Chev. 1365					*Receipt denied*	$2420.38			Invoice given as #3346 in testimony. No exhibit.
14. 60 Chev. 4416					Receipt admitted	$1910.82			
15. 60 Chev.* 0640					" "	$2487.02			Invoice given as #3339 in testimony. No exhibit.

* These four cars (plus two others not here involved) delivered to Anacone to cover bad checks outstanding.

STATE OF MAINE
vs.
OSCAR HODGKINS

York. Opinion, February 12, 1964.

Intoxication. Automobile. O. M. V. I.

Complaint charging that defendant at specified time on public way operated automobile, he "being then and there under the influence of intoxicating liquor" sufficiently charged defendant with driving while under influence of intoxicating liquor.

"Then and there under influence of intoxicating liquor" refers to the time and place of the operation of the motor vehicle by the respondent and to no other time or place.

ON EXCEPTIONS.

This case is before us on exceptions to the denial of the respondent's motion in arrest of judgment. Appeal denied.

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

Lloyd P. LaFountain, County Atty., for State.

Basil A. Latty, for Defendant.

WILLIAMSON, C. J. This case is before us on exceptions to the denial of the respondent's motion in arrest of judgment. The respondent was tried and found guilty in the Superior Court on a complaint reading as follows:

> ". . . on oath complains that Oscar Hodgkins of Hollis, Maine heretofore, to wit, on the twenty-ninth day of August in the year of our Lord one thousand nine hundred and sixty-two at Hollis, in the said County, on River Road, so-called, a public way in said Town of Hollis, did then and there operate a certain motor vehicle, to wit, an automo-

bile, he, the said Oscar Hodgkins, being then and there under the influence of intoxicating liquor, against the peace of the State and contrary to the form of the statute in such case made and provided."

The pertinent part of the statute reads:

"Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, upon conviction, shall be punished. . . " R. S., c. 22, § 150.

The respondent contends that the complaint is bad in "That the complaint does not allege that while Respondent was driving a car on a public highway that he was at the same time under the influence of intoxicating liquor, or in other words, that he was under the influence of intoxicating liquor while he was driving a motor vehicle."

In our view "then and there under the influence of intoxicating liquor" refer to the time and place of the operation of the motor vehicle by the respondent and to no other time or place. There is no risk whatsoever that any other meaning will be given to the complaint. The point was settled in *State* v. *Hurley,* 71 Me. 354. See also *State* v. *Michaud,* 150 Me. 479, 493, 114 A. (2nd) 352; *State* v. *Dumais,* 137 Me. 95, 99, 15 A. (2nd) 289; *State* v. *Buckwald,* 117 Me. 344, 104 A. 520; *State* v. *Mahoney,* 115 Me. 251, 256, 98 A. 750.

The entry will be

Exceptions overruled.

PHILIP W. LAWRENCE
vs.
MARY H. CUNNINGHAM (FOOTER)

Sagadahoc. Opinion, February 27, 1964

Contracts.

If after repairs, other portions of the chimney, not made the responsibility of the plaintiff by contracts, were in such condition as to prevent the chimney from being fully functional, the plaintiff could not be held accountable for the deficiency.

An award for substantial performance is proper when court finds no lack of good faith on part of plaintiff.

ON APPEAL.

Defendant appeals decision of presiding justice finding that plaintiff had substantially performed contract. Appeal denied.

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

Charles T. Small, for Plaintiff.

John P. Carey, for Defendant.

WEBBER, J. The plaintiff contractor alleges full performance of a written agreement and demands the contract price from defendant owner. The defendant asserts that the plaintiff has not performed the contract and did not enter into the agreement or undertake performance in good faith. The defendant by counter claim seeks recovery of the sums advanced by her under the contract, setting forth that the services rendered and materials furnished by the plaintiff are without value.

The matter was heard and decided below by a single justice, jury waived. He was aided by a view. He found that

the plaintiff had substantially performed the contract according to its terms, but made allowance to the defendant for additional and corrective work required in the sum of $343.25 against a total contract price of $3,000. His findings accurately cited *Water Co.* v. *Village Corporation,* 102 Me. 323, 66 A. 714, in support of the rendition of a properly reduced judgment in a "substantial performance" case. See also *Rockland Poultry Co.* v. *Anderson,* 148 Me. 211, 216, 91 A. (2nd) 478, 480. He gave the defendant proper credit for payment of $600 on account. Defendant appeals.

The situation is somewhat unusual in two respects. The parties were bargaining for the repair of an old and dilapidated house which had been condemned by municipal authorities. Recognizing that the value of the premises was such that the cost of a first class job would be prohibitive, the parties by contract fixed the standard of workmanship to be required. Although nearly all of the work done by the plaintiff is the subject of complaint, the parties agree that their disagreement over the contract requirements pertaining to the repair of chimneys presents the most serious monetary issue between them.

We quote the following excerpts from the contract:

> "2. It is agreed that there are to be *no major structural changes* in the building . . . (exceptions stated—not pertinent), but it is especially understood that there will be *no alterations* of other existing doors and windows, walls, floors, or roof *or chimney* with the exception of the removal of half of the so-called ell on the west side of the building. * * *
>
> "5. The Repairer is to 'top' the chimney on the ell and 'cap' the other two chimneys with the understanding that 'capping' means to start at the top and work down and replace as much brick as is necessary to make the chimney functional and structural and sound sound (sic), whereas 'top-

> ping' means to remove the entire chimney, at least one foot below the wood structure of the roof. * * *
>
> "12. It is understood and agreed between the parties that these premises were condemned by the City of Bath, that the present condition is dilapidated and that the premises could not possibly be restored change its shape (sic) without the expenditure of many times the contract price and that consequently the Owner is not to exact of the Repairer a standard of workmanship out of proportion to the fact that it is the purpose of this contract to make the premises *useable,* but not to make premises correspond to the workmanship that would be in the average new or repaired state." (Emphasis ours.)

It may be noted that during negotiations looking to a possible settlement of the dispute the plaintiff undertook to do some corrective work in the premises but was prevented by the defendant.

In his findings the justice below summarized the result in these terms: "It cannot be gainsaid that the result of plaintiff's efforts left a dwelling which the defendant, counsel nor the court would choose to occupy." The court construed the word "useable" as intended by the parties in their agreement to mean:

> "1. Acceptable to the Bath 'Code.' It is not clear whether the Code referred to is Building Code or Fire Code, but it is some Code wherein minimal requirements of housing for occupancy are established.
>
> "2. Acceptable for occupancy by persons who could be attracted to the premises, in the light of the structural attributes and living facilities which it offers, both with regard to the work done by plaintiff and with regard to those structural features of the premises with which plaintiff had nothing to do."

We think that this meaning assigned to the word "useable" as employed by the parties accords with the purpose and intent of the entire contract as construed in the light of the surrounding evidence. The findings further stated:

> "At best this property would attract only tenants either of very modest means or those seeking shelter under rather urgent necessity. It can be classed only as 'cheap' rental property. From available tenants the most of the items of work of which defendant complains would in our opinion draw no criticism."

In summation the justice below concluded that, except for certain items as to which he gave credit in reduction of the judgment, the defendant received the quality of workmanship for which she specifically bargained.

With particular reference to the chimney work the court rejected the contention of the defendant that she was entitled to three fully functioning chimneys even though such construction would have required the ripping out and rebuilding of walls and partitions and the complete rebuilding of the chimneys from the ground up. The court quite properly held that the plaintiff's obligation was expressly limited by contract, but that the *portion* of the chimney for which the plaintiff undertook responsibility must in its repaired state meet code standards. In short, if after such repair, *other portions* of the chimney, not made the responsibility of the plaintiff by contract, were in such condition as to prevent the chimney from being fully functional, the plaintiff could not be held accountable for the deficiency. We have emphasized above certain words and phrases employed in the contract which lend support to the interpretation of the justice below.

Although, as above noted, there were some variances from and deficiencies in contract performance for which credit was given in the assessment of damages, the court expressly

found no lack of good faith on the part of the plaintiff. Under these circumstances an award for "substantial performance" was proper. *Thurston* v. *Nutter*, 125 Me. 411, 418, 134 A. 506, 509.

There being no manifest error in the interpretation of the contract or the application of governing principles of law, the issues remaining are factual. The evidence was conflicting. The justice below saw and heard the witnesses and had the benefit of a view. We see no indication that his findings were clearly erroneous.

Appeal denied.

TERESA M. MACLEAN

vs.

ERVILLE A. JACK

Cumberland. Opinion, March 6, 1964.

Discretion. Verdicts. Evidence. Jury. M. R. C. P.

Whether a case be reported to the Law Court under Rule 72 (c) is entirely within the discretion of the presiding justice.

In cases in which the trial court on its own initiative orders a new trial it shall in the order, specify the grounds therefor.

The granting or refusing to grant a new trial on motion addressed to the trial court rested wholly within the discretion of the presiding justice, and his decision was final and not subject to review.

An order granting or denying a motion for a new trial on the ground of excessive or inadequate damages is reviewable after judgment and may be reversed in the event that a clear and manifest abuse of discretion on the part of the trial judge is shown.

A verdict should not be ordered for the defendant by the trial court when taking the most favorable view of the evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds.

A verdict is properly directed when a contrary verdict could not be sustained, and the evidence and inference therefrom are to be taken in the light most favorable to the party against whom the verdict was directed.

It is the duty of the court in the case of excessive damages to set aside the verdict if the jury disregards the evidence or acts from passion or prejudice or if the jury acted from improper influence or makes some mistake of fact or law.

When it appears that the jury has dischargd their duty with fidelity and have reached a reasonable approximation of the damages, the court will not interfere in the verdict.

ON APPEAL.

This case was tried in the Superior Court twice and is on appeal by both the plaintiff and defendant. Plaintiff appeals upon the inadequacy of damages, from the granting of defendant's motion for a new trial, and from the denial of her motion to report the case to the Law Court under Rule 72 (c) M.R.C.P.

The defendant appeals from the final judgment and the denial of his motion to set aside verdict and judgment and for judgment *n.o.v.*

Both appeals denied.

Julian G. Hubbard,
John Marshall, for Plaintiff.

Lawrence P. Mahoney, for Defendant.

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

SIDDALL, J. This case has been tried twice in the Superior Court. At the conclusion of the evidence in the first case the defendant made a motion for a directed verdict which was denied by the presiding justice. The jury returned a verdict for the plaintiff in the sum of $9,000.00. The defendant seasonably filed a motion for judgment *n.o.v.*, or, in the alternative a motion for a new trial. The motion for a new trial was granted. The plaintiff thereafter filed a motion that the presiding justice set forth in the record his reasons for allowing the motion for a new trial. The record does not show that this motion was acted upon. The plaintiff also filed a motion that the court report the case to the Law Court under Rule 72 (c) M.R.C.P. This motion was denied.

The second trial resulted in a verdict for the plaintiff in the sum of $4,000.00. The defendant at the close of the testimony in that case filed a motion for a directed verdict which was denied. The defendant then seasonably filed a motion *n.o.v.*, or, in the alternative a motion for a new trial, both of which were denied. The defendant appealed from the final judgment and from the order denying defendant's motion to have the verdict and judgment set aside and for judgment *n.o.v.* and assigned points of appeal summarized as follows: (1) that the evidence was insufficient to warrant a verdict for the plaintiff; (2) that the evidence offered by the plaintiff was contrary to the undisputed physical facts, and establishes her contributory negligence as a matter of law; (3) that the undisputed physical facts corroborate the testimony of the defendant as to the manner in which the accident occurred. Another point of appeal raised by the defendant was abandoned on argument.

After judgment in the second case the plaintiff seasonably appealed therefrom on the following grounds: (1)

that the damages in the second trial were grossly inadequate; (2) that the presiding justice in the first trial erred in granting defendant's motion for a new trial; (3) that the presiding justice at the first trial erred in denying plaintiff's motion to report the case to the Law Court under Rule 72 (c) M.R.C.P.; (4) that the presiding justice at the first trial failed to act upon the motion filed by the plaintiff requesting that the court set forth its reason for granting a new trial.

Plaintiff does not argue grounds three and four. However, we discuss them briefly. The order of the court granting a new trial was an interlocutory order, and whether a case be reported to the Law Court under Rule 72 (c) is entirely within the discretion of the presiding justice.

The rules provide that in those cases in which the trial court on his own initiative orders a new trial he shall in the order specify the grounds therefor. The record discloses that defendant's motion for a new trial was granted on February 6, 1962. On February 20, 1962, the motion requesting the court to set forth his reason for granting a new trial was filed. The record fails to show that this motion was ever brought forward for hearing or adjudication. The plaintiff takes nothing from her points of appeal 3 or 4.

The plaintiff contends that the presiding justice erred in granting defendant's motion for a new trial. The defendant claims that the order granting the plaintiff's motion is not an appealable order.

Under the provisions of R. S., 1954, Chap. 113, Sec. 60 (now repealed), under which Rule 17 of the so-called old rules was based, the losing party might seek a new trial from the trial judge or go directly to the Law Court on a report of the whole case. Furthermore, an unsuccessful resort to the trial court did not preclude another motion addressed to the Law Court. The rule specifically provided

that no exceptions lay to the decision of the presiding justice, and no appeal therefrom was permissible. Our court has held that the granting or refusing to grant a new trial on motion addressed to the trial court rested wholly within the discretion of the presiding justice, and that his decision was final and not subject to review. See *Nevico* v. *Greeley,* 155 Me. 104; *Bodwell-Leighton Co.* v. *Coffin & Wimple,* 144 Me. 367.

Rule 59 M.R.C.P. is substantially the same as Federal Rule 59. This rule requires that all motions for a new trial be addressed to the trial judge. New trials may be granted for any of the reasons for which new trials have heretofore been granted.

With the elimination of Rule 17 and the provisions therein that no appeal from the decision of the presiding justice in civil cases is permissible, we must consider anew whether the granting of a new trial under the circumstances of this case is subject to appeal or review.

Defendant's motion for a new trial in the first case alleged grounds therefor summarized as follows: (1) That the court erred in charging the jury that the defendant because of the yellow light facing him as he entered an intersection was required to use "extreme caution" in entering the intersection; (2) that the court erred in instructing the jury that they were competent to find an arthritic condition, when the evidence offered by plaintiff's expert witness was that there had been no aggravation of the arthritic condition arising out of the accident; (3) excessive damages.

> "An order granting a new trial is usually not appealable, since such an order is purely interlocutory and is not such a final judgment as the statute makes appealable." * * *
>
> A distinction must be observed, however, between appealability and reviewability. An order grant-

> ing a new trial is not appealable, but it is certainly reviewable. On appeal from the final judgment following the second trial, the appellant may claim error in the grant of a second trial, and if the appellate court agrees, it will reinstate the verdict reached at the first trial."
>
> Federal Practice and Procedure, Barron and Holtzoff, Sec. 1302.1, p. 346.

See also Field and McKusick, Maine Civil Practice, Sec. 59.4, p. 481.

One of the grounds set forth in defendant's motion for a new trial is that damages awarded in the first trial were excessive.

It was long settled in federal courts that the granting or denial of a motion for a new trial, including a motion on the ground of excessive or inadequate damages, was not open to review for error of fact. *Fairmount Glass Works* v. *Cub Fork Coal Company,* 287 U. S. 474, 77 L.Ed. 439; *Scott* v. *Baltimore & O. R. Co.* (3rd Cir.) 151 F. (2nd) 61, 65; *Francis v. Southern Pac. Co.* (10th Cir.) 162 F. (2nd) 813.

There have been recent decisions which indicate that there is an exception to this rule when there has been an abuse of discretion on the part of the trial judge in the *denial* of a motion for a new trial based upon excessive or inadequate damages. *Dagnello* v. *Long Island Railroad Company* (2nd Cir.) 289 F. (2nd) 797 (1962), in which Mr. Justice Medina makes an exhaustive review of federal decisions on this issue. See also the following cases: *Bankers Life & Casualty Company* v. *Kirtley* (8th Cir.) 307 F. (2nd) 418, 423 (1962); *Price* v. *H. B. Green Transportation, Inc.* (7th Cir.) 287 F. (2nd) 363, 365 (1961); *Baldwin, et al.* v. *Warwick* (9th Cir.) 213 F. (2nd) 485, 486 (1954); *Trowbridge* v. *Abrasive Co. of Philadelphia* (3rd Cir.) 190 F. (2nd) 825, 830 (1951); *Sebring Trucking Co.* v. *White* (6th Cir.) 187 F. (2nd) 486 (1951); *Gleghorn* v. *Koontz* (5th Cir.) 178 F. (2nd) 133, 136 (1949).

No case has been called to our attention, and we have discovered none, in which the appellate court has reviewed an order *granting* a motion for a new trial based on excessive or inadequate damages. However, we can discern no difference in principle between the exercise of review on the *denial* of a motion basd upon that ground, and the exercise of review on the *granting* of such a motion.

We conclude that an order granting or denying a motion for new trial on the ground of excessive or inadequate damages is reviewable after judgment and may be reversed in the event that a clear and manifest abuse of discretion on the part of the trial judge is shown.

A careful examination of the evidence taken at the first trial satisfies us that the damages assessed were clearly excessive. Medical bills were $182.00 and damage to her automobile was stipulated at $978.00. The plaintiff was employed on a commission basis with an average weekly income of $50.00 per week. She remained home after the accident for a period of eight weeks, during which time she did some work by means of the telephone. At the most, her damages arising from loss of wages amounted to $400.00. The damages assessed were $9,000.00. After deducting therefrom the special damages listed above, approximately $7,440.00 is left which the jury must have assessed for pain and suffering present and future. The plaintiff was about 70 years of age at the time of the accident on December 21, 1959. Trial was had on April 25, 1962. Without discussing the evidence in detail it appears that the plaintiff at the time of the accident was rendered unconscious briefly. Medical testimony of two doctors was offered by the plaintiff. The plaintiff apparently suffered damage to the soft tissue in the region of the cervical spine. Her complaints were due to this damage. She was given physiotherapy treatments. There was some limitation of the motion of the neck. She testified that she suffers constant pain up and down her

back but does not have much pain when she drives her car. The intensity of the pain was not shown. There is medical testimony to the effect that she probably will suffer pain permanently as a result of her injuries.

We note that the court charged the jury that if they found that there was an arthritic condition which was aggravated by the accident, it became a proper matter for consideration. No proof was offered of an aggravation of an arthritic condition. After verdict, and upon reflection, the presiding justice might have felt that his instructions in this respect had misled the jury and had affected the size of the verdict.

In any event we are unable to find any abuse of discretion on the part of the presiding justice in ordering a new trial on defendant's motion.

The defendant, at the conclusion of the trial of the second case, made a motion for a directed verdict on the grounds that the plaintiff had failed to prove negligence on the part of the defendant and that the plaintiff had established contributory negligence on her part as a matter of law. The defendant after verdict seasonably filed a motion *n.o.v.* Under Rule 50 (b) M.R.C.P. the trial court may order a final judgment contrary to the verdict if the direction for a verdict was erronously denied. Defendant's motion was denied by the presiding justice.

A verdict should not be ordered for the defendant by the trial court when taking the most favorable view of the evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds. *Archer* v. *Aetna Casualty Co.,* 143 Me. 64, 68; *Howe* v. *Houde,* 137 Me. 119; *Wellington* v. *Corinna,* 104 Me. 252. Expressed conversely, a verdict is properly directed when a contrary verdict could not be sustained, and the evidence and inferences therefrom are to be taken in the

light most favorable to the party against whom the verdict was directed. *Cantillon* v. *Walker, et al.*, 146 Me. 160, 161, and cases cited.

The question before us on this motion of defendant is whether the evidence taken in the light most favorable to the plaintiff with all reasonable inferences therefrom would have warranted a finding by the jury that the defendant was guilty of negligence which was the proximate cause of plaintiff's damages and that the plaintiff was free from contributory negligence.

The accident happened at the intersection of St. John Street and Congress Street in the city of Portland. The plaintiff was on St. John Street travelling north and the defendant on Congress Street travelling west. The plaintiff was faced with a stop sign and a flashing red light. The defendant was faced with a flashing yellow light. The accident occurred within the intersection.

A careful review of the evidence satisfies us that the evidence was such that a jury would have been warranted in finding that the accident was caused by the negligence of the defendant and that the plaintiff was free from contributory negligence. Submission of the case to the jury was required. The case was a typical jury case, and the jury returned a verdict for the plaintiff. It was justified in so doing. The court properly denied defendant's motion for a directed verdict, and his subsequent motion for a judgment *n.o.v.*

The plaintiff in her points of appeal claims that the damages assessed by the jury in the second trial were inadequate. It is the duty of the court, in the case of excessive damages, to set aside the verdict if the jury disregards the evidence or acts from passion or prejudice. *Chizmar* v. *Ellis*, 150 Me. 125; *Johnson, et al.* v. *Kreuzer*, 147 Me. 211. Or if the jury acted from improper influence, or makes some

mistake of fact or law. *Pearson* v. *Hanna,* 145 Me. 379, 381. Court will not interfere with verdict though it seems somewhat large, if it be within the bounds of reason. *Davis* v. *Tobin,* 131 Me. 426, 434. The same considerations apply to verdicts where inadequacy of damages are claimed. *Cosgrove* v. *Fogg, et al.,* 152 Me. 464.

The testimony in the second trial relating to damages was substantially the same as that given in the first trial. There was, however, medical testimony that during the year that elapsed between the two trials the limitation of movement of the neck had increased. The plaintiff testified that due to her injuries her income had decreased considerably. The jury saw the various witnesses and heard their testimony in relation to plaintiff's damages. It was for the jury to consider whether any decrease in plaintiff's income was due to her injuries or from a natural letdown in work which comes to some people at her age of life. When it appears that the jury have discharged their duty with fidelity, and have reached a reasonable approximation of the damages, the court will not interfere in the verdict. *Davis* v. *Tobin, supra.* We do not believe the verdict in this case was so inadequate as to warrant interference by this court.

The entry will be

Plaintiff's appeal denied.

Defendant's appeal denied.

STATE OF MAINE
vs.
JULIEN TALBOT

Somerset. Opinion, March 11, 1964.

Demurrer. Forgery. Indictments. Fraud.

Insufficiency of indictment for absence of allegation that instrument allegedly uttered was falsely altered or forged could be reached by demurrer.

Sufficiency of allegation in indictment must be tested upon presumption that respondent is innocent and has no knowledge of facts charged against him.

Indictment must have that degree of certainty and precision which will fully inform respondent of special character of charge against which he is called upon to defend and which will enable court to determine whether facts alleged are sufficient in law to constitute offense so that record may stand as protection against further jeopardy.

Acts of "making" and "altering" are not the same; act of forging, separate from its legal significance, is to make or imitate falsely, to produce or devise, or to fabricate; act of altering is changing something already made, produced or fabricated.

Person charged with forgery is entitled to know whether his conduct is that of making or altering.

Altering as such of an instrument is not necessarily a violation of the law, but act of altering may be done in good faith, may be done to correct an error or to conform instrument to truth.

Unless indictment necessarily charged respondent with violation of statute it was insufficient.

Use of machine copying reproductive processes to produce copy of instrument for use as part of forgery indictment was approved.

Affixation of impleaded instrument to charge sheet in manner to reduce detachment to a minimum will be valid.

Offenses of forging and uttering forged instrument are distinct.

Failure to allege manner in which forgery was assertedly committed is not fatal since means adopted are not material to indictment.

ON EXCEPTIONS.

This case is on exceptions to the overruling of a demurrer to an indictment charging the defendant with fraud. Exceptions sustained. Demurrer sustained. Indictment quashed.

Clinton B. Townsend, County Attorney, for State.

William D. Hathaway, for Defendant.

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

MARDEN, J. On exceptions to the overruling of a demurrer to an indictment, the original of which is, by agreement, before us.

The charging portion of the indictment is composed as follows:

> "The jurors for the state aforesaid, upon their oath present, that Julien Talbot * * * with intent to defraud, feloniously did utter and publish as true to one Ernest J. Quint, Sr., a certain altered and forged written instrument purporting to be a contract, a verbatim copy of which is appended to this indictment, he, the said Julien Talbot then and there well knowing the same to be altered and forged, against the peace of the State and contrary to the statute in such case made and provided",

at which point were stapled two photostatically reproduced sheets representing the instrument alleged to have been altered and forged, following which appeared "A true bill, signed Harold V. Tewksbury, Foreman and signed Clinton B. Townsend, County Attorney." A portion of the instrument as reproduced is of questionable legibility, to some eyes totally unreadable and to others readable upon careful study.

This instrument is in the form of a contract between American Modernizing Co. therein referred to as the "Contractor" and Ernest James Quint, Sr., referred to as "Owner," the gist of which is that the owner employs the contractor to make certain home improvements therein set forth for a job cost with a provision that "this contract shall not be binding upon the 'Contractor' until accepted by the 'contractor' " with a space at the end of the instrument reading "Accepted: American Modernizing Co. _____ Contractor." Although this acceptance clause is unsigned, the document does not limit "acceptance" to the signing of the prepared clause. Respondent's demurrer to this indictment was overruled and now in support of his exceptions urges that:

(1) That the indictment is insufficient because of the absence of an allegation that the instrument allegedly uttered was "falsely" altered and forged.

(2) That the physical composition of the indictment consisting of (a) the use of a photostatic copy of the reference instrument and (b) its affixation to the sheet bearing the charge renders the indictment invalid, and (c) in any event the charge must be legible, in absence of which the indictment is insufficient.

(3) That, in this case, extrinsic facts must be pleaded representing how the instrument could prejudice the rights of another, and

(4) That the pleading must set forth both the alteration charged and its materiality.

DEMURRER

The insufficiency which the respondent alleges may be reached by demurrer. " * * * (A) demurrer puts the legality of the whole of the proceedings in issue, as far as they judicially appear; for the court is bound to examine

the whole record, to see whether they are warranted in giving judgment upon it; * * * *." Bishop on Criminal Procedure 3rd Ed. § 741, *State* v. *Mahoney,* 115 Me. 251, 252, 98 A. 750 and *State* v. *Dunn,* 136 Me. 299, 301, 8 A. (2nd) 594. Demurrant contends "that the indictment is bad for not stating the requirements in a legal way" *State* v. *Kerr,* 117 Me. 254, 258, 103 A. 585.

SUFFICIENCY OF ALLEGATION

The sufficiency of allegation must be tested upon a presumption that respondent is innocent and has no knowledge of the facts charged against him, *State* v. *Farnham,* 119 Me. 541, 544, 112 A. 258, and must have that degree of certainty and precision which (a) will fully inform him of the special character of the charge against which he is called upon to defend, and (b) will enable the court to determine whether the facts alleged are sufficient in law to constitute an offense so that the record may stand as a protection against further jeopardy. *Kerr, supra,* at 257.

The respondent is accused of feloniously uttering and publishing "a certain altered and forged written instrument" in violation of Section 1 of Chapter 133, R. S., which provides "whoever, with intent to defraud, falsely makes, alters, forges or counterfeits any * * * written instrument of another, or purporting to be such, by which any pecuniary demand or obligation * * * is or purports to be created, * * * shall be punished * * * *."

Forgery as a crime, and by our statutory definition, includes the acts of falsely making and falsely altering with intent to defraud. The *acts* of making and altering are not the same. The act of forging, to forge, separate from its legal significance, is "to make or imitate falsely; to produce or devise, to fabricate," Webster's New International Dictionary 2nd Ed.; "to fashion, make, produce," Webster's Third New International Dictionary; "to make in the

likeness of something else," "to counterfeit"; *State* v. *McKenzie,* 42 Me. 392, 394; *DeRose* v. *The People,* 171 P. 359, 360 [1, 2] (Colo. 1918); *Carter* v. *State,* 116 S. W. (2nd) 371, 376 [6, 7] (Texas 1938); *Marteney* v. *United States,* 216 F. (2nd) 760, 763 [4] (Ct. of Appeals Tenth Cir. 1954). The act of altering, to alter, is the changing of something already made, produced, or fabricated. As Webster's Third New International Dictionary puts it "to cause to become different in some particular characteristic without changing into something else."

A person charged with the offense of forgery is entitled to know whether his conduct, which the law criticizes, is that of making or altering. Altering, as such, of an instrument is not necessarily a violation of law. An act of altering may be made in good faith, may be made to correct an error, or to conform the instrument to the truth. This is recognized in 23 Am. Jur., Forgery, § 16 *et seq.* and in *State* v. *Sotak,* 131 S. E. 706, 708 [2] (W. Va. 1926); *People* v. *Reichert,* 191 N. E. 220 (Ill. 1934) and Annot. 93 A. L. R. 864. The nature of the altering to bring it within the definition of forgery must be false altering, *State* v. *Flye,* 26 Me. 312, 320, also Whitehouse and Hill, Directions and Forms for Criminal Procedure for the State of Maine, p. 103, and the word "falsely" in the reference statute must be read as modifying "alters." The felonious utterance with intent to defraud of an altered instrument may be some offense, but it is not forgery. Unless the indictment necessarily charges the respondent with the violation of the statute, the indictment is insufficient. *State* v. *Maine State Fair Association,* 148 Me. 486, 490, 96 A. (2nd) 229. Upon this point an exception is sustained.

Having determined that the charge as expressed in the indictment is insufficient we do not have to reach the other points raised, but the practical importance of considering the use of currently available methods of reproducing

printed material, the applicability of such methods to criminal pleadings and, if use of such reproductive process is found to be valid, how the reproduced copy may be safely incorporated without offending long established principles of criminal pleading, and the necessity of pleading extrinsic facts in the present case as it may affect future criminal pleading, prompts us to explore these areas.

REPRODUCTION

It was said in *State* v. *Bonney,* 34 Me. 383 that in an indictment for forgery, the instrument alleged to be forged should be set forth in the indictment "according to its tenor." By this mode "an exact copy" is intended (p. 384) and traditionally the instruments involved have been "copied" into the indictment. The realities of attempting to thus reproduce a variety of instruments, first by hand copying and later by the typewriter, have excused the writer from "copying," in the case of a bank bill or note, "its vignettes, mottoes and devices." Wharton's Criminal Law, 12th Ed., §939. This in itself illustrates that the "exact copy" contemplated by the law, has been practically impossible. It is fair to say that the same exception would apply to documents with advertising symbols or characters not material to the charge. *State* v. *Flye,* 26 Me. 312, 317. In cases of an allegedly forged signature, even though the signature as appearing on a typewritten copy has never informed the accused of the handwriting against which he might have to defend, an indictment in this form has never been deemed insufficient.

In these respects the present availability of machine copying methods, when properly applied, can reproduce a more exact copy than has ever been heretofore available. It must follow that the use of such reproductive processes are acceptable.

The trustworthiness of such reproduction has been recognized in Maine since 1935 in what are now Sections 144-146,

inclusive, of Chapter 113, R. S., and the Uniform Photographic Copies of Business and Public Records as Evidence Act adopted by 1961, in some instances with modifications, by the federal system and thirty-three states.

INCORPORATION

The manner in which a reproduced instrument may be safely made a part of the indictment poses another problem. We cannot say arbitrarily that the affixation to the paper on which the charge is written is invalid, for in lengthy indictments it has long been a custom to bind several sheets together as one instrument and in that sense the sheets have been affixed to one another. The basis of concern is that by improper affixation, the reproduced instrument or a portion may become detached from the indictment and lost before the case is recorded, and leave the respondent exposed to double jeopardy by subsequently being unable to show that he has been once jeopardized. With this risk in mind, we can say only that an affixation of the impleaded instrument to the charge sheet in a manner to reduce its detachment to a minimum would be by us considered valid. In the instant case the reproduced instrument was attached to the charge sheet immediately following the charge and before the certification by the signature of the foreman of the grand jury, and the signature of the county attorney. The law requires that the instrument be *within* the indictment, and we have long incorporated in legal documents separate papers "to which reference is hereby made" or as "attached hereto and made a part hereof." 42 C. J. S. "Incorporation" Page 544; in Equity Pleading, Whitehouse Equity Practice, § 201; 17A C. J. S., Contracts, § 299; 12 Am. Jur., Contracts, § 245; 26 C. J. S., Deeds, § 101, Wills, *Newton* v. *Seaman's Friend Society,* 130 Mass. 91, and in a criminal indictment *Whitfield* v. *State,* 256 P. 68 [1, 2] (Okla. 1927).

If the subject instrument is verbally incorporated, by appropriate language, and proposed to be physically incorporated, it should be attached to the charge sheet at the point of proposed incorporation and thereafter followed by the remainder of the charge and the requisite certification and signatures.

To fully inform the respondent of the charge which he is called upon to defend requires a legible charge sheet. An illegible charge sheet is exposed to abatement.

PLEADING EXTRINSIC FACTS

Demurrant urges also that inasmuch as the instrument purported to be a contract between the "owner" and "contractor" was, by its terms, not binding upon "contractor" until accepted by the contractor and the space for such acceptance was not executed, there was no contract, that no one was or could be prejudiced by any terms of the instrument, false or otherwise, and, therefore, the offense of forgery was not pleaded; that to found a charge of forgery upon the reference instrument required the declaration of other facts to reveal how someone's rights could be or were prejudiced, and if falsely altering be the basis of the charge, that the genuine instrument should be pleaded together with the alleged alteration.

These contentions have limited applicability. The charge is not based upon an act of forging or falsely altering, but knowingly uttering (offering as good, Wharton's Criminal Law, 12th Ed., § 910) a forged instrument with intent to defraud. The elements are (a) a forged or falsely altered instrument within a category covered by the statute, (b) known by the utterer to be forged or falsely altered, and (c) utterance of the same with intent to defraud, 23 Am. Jur., Forgery, § 5; *Clark* v. *State*, 114 So. (2nd) 197, 200 [2] (Fla. 1959) on a statute materially the same as ours.

The extent to which the contentions recited above are appropriately examined in the present case goes only to the question of whether the document here allegedly forged or falsely altered is an instrument falling within our statute, whereon a charge of uttering may be founded. Is it a written instrument of another or purporting to be such by which any pecuniary obligation is or purports to be created? The terms of the instrument do not require that acceptance by the Modernizing Company be entered in the space provided on the document. The Modernizing Company may have accepted the proposed contract orally or by other writing, in which event pecuniary obligations are created on the part of the contracting parties. If proof discloses no acceptance by the Modernizing Company, we are left with the question of whether this instrument is one, or purports to be one, by which any pecuniary obligation "purports" to be created. In such event the document may validly be considered an offer on the part of the person represented by the other signatory to the paper to become bound to the terms of the contract which the paper represents, which offer would remain in effect until terminated by revocation, death, rejection or by lapse of time. Such offer until terminated purports (intends, is designed, means, if genuine) to create a contract and establish a pecuniary obligation. The reference instrument is within the meaning of our statute and an instrument upon which a charge of uttering may be based.

To constitute the offense of uttering, it is in no case requisite to show that the accused had been implicated in the (act of) forgery. Wharton, *supra,* § 919; *Levy* v. *State,* 170 A. (2nd) 216, 218 [2-6] (Md. 1961) certiorari denied 82 S. Ct. 113.

The offenses of forging and uttering a forged instrument are distinct. *State* v. *Blodgett,* 121 N. W. 685, 688 (Iowa 1909); *Commonwealth* v. *Miller,* 115 S. W. 234, 236 (Ky.

1909). The fact that the indictment does not allege, in detail, the manner of forgery is not fatal, for the means adopted to produce the instrument are not material. *Hazen* v. *Mayo*, 90 So. (2nd) 123, 124 [1, 2] (Fla. 1956). Criticisms 3 and 4 in support of respondent's exceptions, except as discussed above, have no application.

Exceptions sustained

Demurrer sustained.

Indictment quashed.

ROLAND J. CAMIRE
vs.
COMMERCIAL INSURANCE CO.

Androscoggin. Opinion, March 16, 1964.

Negligence. Insurance. Torts. Automobiles.

Insured's conduct was fraudulent where insured before and during trial of tort action against insured designedly dishonored his relation of candor and cooperation with the insurer.

Absence of timely notice of accident to the insurer is a defense affirmative in nature.

An insured, despite culpability, is entitled to seasonable notice of disclaimer.

ON APPEAL.

This is an appeal from the decision and order for judgment of a justice in a trial without jury. Appeal sustained: judgment vacated: cause remanded to Superior Court for further consideration in accordance with this opinion.

Grover G. Alexander, for Plaintiff.

Frederick G. Taintor, for Defendant.

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

SULLIVAN, J. The plaintiff appeals from the decision and order for judgment of a justice in a trial without jury.

Plaintiff had recovered a final judgment against Jerome A. Dostie for bodily injuries negligently inflicted upon the former by the latter. That judgment remained partially unsatisfied and plaintiff commenced this action against the defendant, insurer of Dostie when those injuries had been perpetrated, to have the insurance money applied to the satisfaction of the judgment against Dostie. R. S., c. 60, § 302 and § 303 as amended.

Plaintiff in his suit against Jerome A. Dostie had asserted and a jury had found that plaintiff had been a passenger in an automobile operated upon the public highway by Francis Dostie, brother of Jerome, and that plaintiff had been injured as a consequence of the car in which he was riding having been forced off the highway and upset as a proximate result of the negligent operation of another motor vehicle simultaneously driven on the same public way by Jerome A. Dostie, defendant's assured.

Subsequent to the road mishap the insured, Jerome A. Dostie, signed a report to this defendant, his insurer, informing defendant that when the car in which the plaintiff was riding left the highway and became wrecked the automobile controlled by Jerome A. Dostie was away from the public highway, was at rest in the yard of a garage and was "nowheres near road." Until subjected to cross examination at the tort trial Jerome Dostie by reiteration re-

mained constant in his stated representation to the Defendant. In the presence of the jury throughout direct and redirect questioning Jerome Dostie staunchly asserted that his car had not been a factor in the accident but had remained stationary and sequestered from the public way.

Plaintiff was injured on April 9, 1960. On February 12, 1961 Jerome Dostie advised his insurer, this defendant, as follows:

> "On April 9, 1960, my brother and I had been having trouble with our cars. My car is my own, but my brother's is owned by my father, Albert J. Dostie. We were taking the cars to Maine Hydraulic Jack Company, on Route 4, Auburn. He was supposed to meet me there. I arrived first and pulled into the Company's driveway. My uncle, Larry Foisy, manager of the company, directed me to move my car, which I did.
>
> "I was sitting in my car talking to my uncle who was standing in the driveway. Suddenly, we saw the car driven by my brother run off the left side of the road and turn over. My uncle and I ran over across the street to see if anyone was hurt ----"

At the jury trial in the action of this plaintiff versus Jerome Dostie, in September, 1961, Jerome Dostie testifying in his own behalf under direct examination and again to redirect questioning confirmed the narration quoted above. But upon cross examination Jerome Dostie answered in significant part as follows:

(Conversation of Jerome Dostie with this plaintiff at the scene of and a few minutes after the accident)

> "Q. Did you make any comment to Roland (plaintiff) about, 'Roland, please don't tell them I backed out into the road?'
>
> A. Not that I can remember.

Q. Not that you can remember.

A. No.

Q. But you might have said it.

A. I might have."

(During visit of Jerome Dostie with plaintiff at hospital)

"Q. Did you hear Mrs. Camire's (wife of plaintiff) testimony? I assume when you visited, that in her presence at the hospital, you did ask Roland (plaintiff) not to tell the officer (State Police Officer) that you had backed the car out into the driveway?

A. Yes.

Q. All right. Did (sic) you again — did (sic) you acknowledge making that remark right now?

A. Yes.

Q. All right. Now, Jerome, have you at any time, and your answer is very important, have you at any time ever told the story to anyone else apart from Roland and Mrs. Camire, that the accident happened because you backed into the highway and Francis was coming too fast?

A. No, I have not.

Q. You have not. And you want to leave it with this Court and jury, and them (sic) and women, you have never told anyone that story.

A. Not to my knowledge.

Q. What do you mean, not to your knowledge? Have you or have you not?

A. Not that I can remember.

Q. Well, do you think you might have told it and forgotten it?

A. No."

At the jury trial against Jerome Dostie the plaintiff maintained and presented evidence to prove that Jerome Dostie on April 9, 1960 had backed his car out of the garage driveway and onto the public highway and had thereby forced the automobile operated by his brother Francis off the highway to the injury of the plaintiff. Prior to that trial this defendant had known of such contentions of the plaintiff as to Jerome's negligent actions. Plaintiff's explanation of the causes and effects constituting the casualty was elicited in brief at the pretrial conference and indicated in the pretrial order.

The casualty policy issued by the defendant and insuring Jerome Dostie contains these stated conditions:

> "The insured shall co-operate with the Company and upon the Company's request, attend hearings and trials and assist in making settlement, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance - - - - - -"
>
> "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy."
>
> "In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable" - - - - - - - -

During the jury trial Francis Dostie, brother of Jerome, testified that Jerome's car was not upon the highway at the

time of the accident and did not contribute to the mishap. Jerome told defense counsel supplied to him by the defendant here that his, Jerome's insistence upon his nonparticipation in the accident was correct and could in no way be shaken. He denied the objective truth of plaintiff's testimony that his, Jerome's car was upon the highway or was a cause of the unfortunate and injurious incident. Jerome continuously spoke assurance that he had never discussed the casualty with the plaintiff.

Defendant in the case at bar urges *inter alia* the defense of fraud practiced against it by its assured, Jerome Dostie, before and during the jury trial.

After the cross examination of Jerome Dostie hereinbefore quoted defense counsel furnished to him by this defendant for the jury trial continued his professional participation in that cause to the moment of the returned verdict and thereafter through the post trial procedure of pursuing to a ruling both a motion for a judgment *n.o.v.* and a motion for a new trial. Defense counsel was successful in achieving a remittitur of $4,000 from the verdict on October 19, 1961. On October 23, 1961 defense counsel withdrew from the case and advised plaintiff's counsel that the defendant repudiated all obligation to indemnify Jerome Dostie against plaintiff's awarded judgment.

Plaintiff here contends that defendant has demonstrated no vitiating fraud, no lack of cooperation upon the part of Jerome Dostie with his insurer and that even were the facts not so the persistence of defense counsel without reservation in functioning at the jury trial subsequent to the cross examination of Jerome Dostie and even unto an exhaustion of post verdict motions is imputable to this defendant as a waiver by it of its right to disavow liability to indemnify Jerome Dostie.

The case at bar was instituted under the provisions of R. S., c. 60, § 302 and § 303 amended.

"**Sec. 302.** The liability of every company which insures any person - - - - against accidental loss or damage on account of personal injury or death or on account of accidental damage to property shall become absolute whenever such loss or damage, for which the insured is responsible, occurs; and the rendition of a final judgment against the insured for such loss or damage shall not be a condition precedent to the right or obligation of the insuring company to make payment on account of such loss or damage."

"**Sec. 303 amended.** Whenever any person, - - - - recovers a final judgment against any other person, - - - - - for any loss or damage specified in section 302, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action in his own name, against the insuring company to reach and apply said insurance money, provided when the right of action accrued, the judgment debtor was insured against said liability and that before the recovery of said judgment the insuring company had had notice of such accident, injury or damage. The insuring company shall have the right to invoke the defenses described in this section in said proceedings. None of the provisions of this paragraph and section 302 shall apply:

I. - - - When the automobile, motor vehicle or truck is being operated by any person contrary to law as to age or by any person under the age of 16 years where no statute restricts the age; or

II. - - - When such automobile, motor vehicle or truck is being used in any race or speed contest; or

III. - - - When such automobile, motor vehicle or truck is being used for towing or propelling a trailer unless such privilege is indorsed on the policy or such trailer is also insured by the company; or

> **IV.** - - - In the case of any liability assumed by the insured for others; or
>
> **V.** - - - In the case of any liability under any workmen's compensation agreement, plan, or law; or
>
> **VI.** - - - **Fraud or collusion.** When there is fraud or collusion between the judgment creditor and the insured." - - - - - - - - -

The statutory texts quoted were enacted quite verbatim by our Legislature as P. L., 1927, c. 146. The 1927 Legislative Record yields no commentary as to the prior law, mischief or objective remedy occasioning the legislation. The statutes after their enactment normally constituted a part of each contract made thereafter in Maine and providing casualty insurance liability or indemnity such as that featured in this case. *Sullivan* v. *Insurance Co.,* 131 Me. 228, 230; *Lorando* v. *Gethro,* 228 Mass. 181, 187; Williston on Contracts, 3rd ed., § 615.

Historically, our statutes here considered were successive in time to Statute 1914, c. 464, §§ 1 and 2 of the Massachusetts laws, extant as Anno. Laws of Mass., c. 175, §§ 112, 113. By 1917 the Massachusetts Court had construed and interpreted the parent statute of 1914 in the familiar decision of *Lorando* v. *Gethro,* 228 Mass. 181, 117 N. E. 185 and had held, amongst other tenets that:

> P. 185 "This clause (the liability of the insurance company shall become absolute) - - - leaves open for determination the question whether the policy of insurance covers the casualty in issue, or whether otherwise the insurer is liable to the assured. It does not prohibit any ground of defense which ordinarily would be open to an insurer in an action brought against it by the insured on the policy. - - - - - "
>
> See, also, *McCarthy* v. *Rendle,* 230 Mass. 35, 119 N. E. 188 (1918); *Kana* v. *Fishman,* 276 Mass. 206, 176 N. E. 922 (1931); *Goldberg* v. *Insurance*

Co., 279 Mass. 393, 400, 181 N. E. 235 (1932); *Sheldon* v. *Bennett*, 282 Mass. 240, 184 N. E. 722; note, 46 Harvard L. Review, 1325.

But our Legislature in adopting P. L., 1927, c. 146 subsequent to the 1914 Massachusetts law and the judicial pronouncements of *Lorando* v. *Gethro, supra,* and of *McCarthy* v. *Rendle, supra,* preferred to promulgate its statute with a detailed enumeration of the defenses available to an insurer. P. L., 1927, c. 146, § 4, R. S., c. 60, § 303, amended.

This court said in *Laforge* v. *Insurance Co.* (1941), 137 Me. 208, 212, in reference to the defenses—"conditions"—presently listed in R. S., c. 60, § 303, amended:

> "The statute *R. S. Chap. 60, Sec. 177,* makes the liability of an insurer absolute except under the conditions set forth in Sec. 180. Fraud and collusion constitute a statute designated defense - - - - - -
>
> " - - - - As there is no relation of trust between the assured and the insurer, the general rule obtains that he who asserts fraud must prove it by clear and convincing evidence - - - - - - "

In *Colby* v. *Ins. Co.* (1935), 134 Me. 18, 26, this court quoted with approval from *Francis* v. *London, G. & A. Co.*, 100 Vt. 425, 430, 138 A. 780, 781, as follows:

> "It has come to be well established in the law of insurance that forfeitures of policy contracts are not favored and that to avert the same courts are always prompt to lay hold of any circumstance that indicates an election to waive a forfeiture already incurred - - - - "

Amongst the defenses catalogued in R. S., c. 60, § 303, amended, lack of mere or simple cooperation is not to be found:

> "**Sec. 180, Chap. 60, R. S., 1930,** (presently incorporated in *R. S. c. 60* § *303* amended) enumer-

> ates certain defenses open to the insured in cases such as this, among which lack of cooperation does not appear but fraud or collusion between the judgment creditor and the insured is included. The two defenses are not synonymous. Lack of cooperation may include fraud or collusion or may consist simply in refusal to act." *Medico* v. *Assurance Corp.* (1934), 132 Me. 422, 426.

In the same opinion the court continued as follows:

> P. 426. "In the instant case, the defense is based on comparison between a statement made to an investigator by the insured and testimony given by him in the trial of the tort cases, which it is alleged reveals inconsistencies and contradictions only to be accounted for by wrongful intent on the part of the insured. If the evidence warranted such a conclusion, fraud or collusion would be proven. The giving by the insured of intentionally false testimony, material in its nature *and prejudicial in its effect,* would be good ground for releasing the insurer from liability." (Italics supplied.)
> P. 427. "- - - - to escape liability, the insurer must show that the variances between different statements of the insured *resulted in substantial prejudice and injury* - - - - - -"

In the tort action and prior thereto there was no collusion between the judgment creditor, plaintiff, and the insured, Jerome Dostie, but quite to the contrary this plaintiff resisted Dostie's collusive overtures. The testimony of this plaintiff and that of Jerome Dostie in the tort trial save for Dostie's cross examination were contrary and antithetical. Jerome Dostie before and during that trial apart from his replies under cross examination had however notably and designedly dishonored his relation of candor and cooperation with the defendant insurer and had knowingly falsified to this defendant his blameworthy involvement in the accident. Such behavior was fraudulent and this defendant must be deemed to have demonstrated affirmatively such

fraud upon this record here by clear and convincing evidence.

In the instant case there were supplied to the presiding justice pleadings, stipulations, exhibits and a printed report of testimonial evidence which had been elicited at the prior, jury trial. The justice was not privileged to observe or hear any of the witnesses who testified. *Mellen* v. *Mellen,* 148 Me. 153, 157; *Allen* v. *Kent,* 153 Me. 275, 276.

Upon the record before us despite the fraud perpetrated by the insured upon the insurer damage resulting therefrom to the insurer has not been manifested. *Dubovy* v. *Woolf,* 127 Me. 269, 272. In no regard is it perceptible that the insurer would conscionably have fared better monetarily had its assured been forthright with it. There has been no demonstration that the insurer defendant could or would have savingly and equitably compromised the tort claim or that the insurer's defense of the insured could have been more effectively and withal creditably conducted had the insured seasonably communicated the objective truth to his insurer. There is no tenable or confident reason to opine that the result of the jury trial would have been a verdict of not guilty had Jerome Dostie been candid all the while with his insurer. There is no inducive cause in this case to believe that the ultimate and rectified verdict in the tort action was not a commensurate and just financial compensation for this plaintiff's injuries. That truth is especially authenticated by the mature consideration of the controverted jury verdict both in respect to its propriety and its subsequent measured mitigation in amount of damages by the learned justice who administered the jury trial. The insurer's experience with its mendacious assured was distressing but the falsification itself under the circumstances of the tort action produced no demonstrated or aggravated damage. Rather, as here, in the absence of evidence which could fairly entitle it to exoneration the in-

surer, a paid and professional surety, should respond in damages to this plaintiff who was guiltless of wrongdoing, to such extent within the limit of the insurance policy and the unpaid balance of the court judgment as the negligently inflicted injuries of the plaintiff have been adjudged to warrant and as this defendant had empirically and contractually obligated itself to satisfy. Our "reach and apply" process has been an equitable concept and remedy since the original P. L., 1927, c. 146, § 2.

This defendant further contests its liability in this case for the asserted cause that the assured did not give to it notice of the accident within the period required by the insurance policy. Such defense is affirmative in nature. *Colby* v. *Ins. Co., supra.* It does not expressly appear in the record that the contract of insurance was made in this State but counsel have implied and indicated by their arguments that the policy was issued in Maine. The policy is dated June 27, 1959 at a time when R. S., c. 60, § 303 was in force. The trial in the tort action took place and the judgment was entered in September, 1961. The attorney furnished to Jerome Dostie by this defendant conducted Dostie's defense throughout the trial. R. S., c. 60, § 303 decisively ordains that notice to an insurer is sufficient:

> " - - - - provided - - - - that before the recovery of said judgment the insuring company had had notice of such accident, injury or damage - - - - "

Following Jerome Dostie's despoiling cross examination at the jury trial his attorney afforded to him by this defendant insurer reexamined Dostie and persisted in such defense rôle for the duration of the trial and the postlude of motions without at any juncture endeavoring to withdraw from his assignment or disclaim and without undertaking to subject Dostie to reservations as to the liability of defendant insurer.

Verdict was rendered and judgment ordered thereon in the tort action on September 15, 1961. September 18, 1961 the counsel supplied to Jerome Dostie by this defendant insurer filed a motion for judgment *n.o.v.* and a motion for a new trial. Hearing upon the motions was had on September 25, 1961. October 19, 1961 the presiding justice granted a conditional remittitur of $4,000 from the verdict. October 20, 1961 by docket entry counsel so supplied to Dostie withdrew from the tort case and orally informed Camire's counsel of such withdrawal. October 23, 1961 the defense counsel wrote to Camire's attorney confirming the withdrawal and on behalf of this defendant insurer disclaimed liability "under the policy to indemnify Jerome Dostie in this matter." The record in the case does not divulge whether withdrawing counsel apprised Jerome Dostie of the withdrawal or of the disclaimer. November 14, 1961, by or on behalf of Camire a consent to the order of remittitur was docketed.

The two following quotations are approved in *Colby* v. *Ins. Co.*, 134 Me. 18:

> @ 25 "- - - - The insured loses substantial rights when he surrenders, as he must, to the insurance carrier the conduct of the case - - - - "
>
> @ 27 "- - - - The loss of the right to control and manage one's own case is itself a prejudice - - - - "

It must be observed that the tort trial plight of defense counsel and of this defendant insurer was engendered by Dostie's iniquities. Nevertheless, *arguendo,* were the grievances of the defendant insurer of a gravity to justify disclaimer, defendant availed itself of no communicated decision to disclaim for some 35 days after the verdict.

> "- - - - The company, however, could not, after having acquired information sufficient to warrant a disclaimer, continue in defence of the action and, upon the rendition of an adverse verdict, then for the first time rely upon such information and with-

> draw. It was bound to exercise good faith and diligence." *Klefbeck* v. *Dous,* 302 Mass. 383, 387.
>
> "- - - - Here, however, the corporation, after the breach of the condition came to its knowledge, persisted in the control and conduct of the trial to its conclusion without demur - - - - - - It cannot now be heard to disclaim liability." *Barbeau* v. *Koljanen,* 299 Mass. 329, 333.

The prolongation of defense counsel's service without reservation, disclaimer or change of capacity in the jury trial after the cross examination of Dostie, apart from commendable motives of professional loyalty and constancy, was for Dostie not indisputably beneficial. True the insurer's attorney sought and achieved a remittitur. But as to pragmatic utility it must remain speculative whether Dostie bereft of an insurance subsidy, by his own exertions or with the aid of chosen counsel, might not have acquired a release for a very modestly realistic sum. Dostie without a financially responsible insurer would undoubtedly suffer very materially in the financial estimation of a plaintiff. Moreover Dostie presently finds himself confronted with the threat, at least, of the hardships of the Financial Responsibility Law, R. S., c. 22, §§ 75-82, as amended.

It was not for the defendant insurer to linger in chancing a verdict and thereafter to benefit by a successful judgment or in the alternative to deny coverage in the event of a plaintiff recovery. Jerome Dostie despite his culpability was entitled to seasonable notice of disclaimer. Defendant's conduct constituted waiver.

The mandate must be:

Appeal sustained.
Judgment vacated.
Cause remanded to Superior Court for further consideration in accordance with this opinion.

STATE OF MAINE
vs.
ROBERT J. GILLIS

Somerset. Opinion, April 7, 1964.

Automobiles. O.M.V.I. Blood Tests. Evidence.

The injection of evidence pointing to refusal or failure to have a blood test for the purpose of creating an inference of guilt therefrom would result in a mistrial.

ON EXCEPTIONS.

This case is on exceptions to the denial of respondent's motion for a mistrial. The issue being whether or not there was an abuse of discretion on the part of the court in not granting a mistrial. Exceptions overruled.

Lloyd Stitham,
Clinton B. Townsend, County Attys., for Plaintiff.

Casper Tevanian, for Defendant.

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

WILLIAMSON, C. J. This case is before us on exceptions to the denial of the respondent's motion for a mistrial. The respondent was found guilty by a jury of operating a motor vehicle in Fairfield when under the influence of intoxicating liquor.

The error charged is stated in the bill of exceptions as follows:

> "Upon direct examination of Complaining Witness [a Fairfield police officer] by the County Attorney, Complaining Witness was asked:
>
> "Q. And what conversation did you have with [the respondent] at the police station?

"A. Well, he was told his rights and what he could do if he didn't think he was intoxicated, and he asked to use the phone and we let him use the phone.

"Because of the injection into the trial of the above conversation, Respondent's attorney moved for a mistrial on the following stated ground:

* * * * * * * * *

"I make a motion for a mistrial on the ground that the answer as given by the previous witness, the police officer, could only come up with one meaning, and that is he had available to him, if he so desired, the medium of a blood test which he refused to take."

The pertinent portion of the statute on operating a motor vehicle when under the influence of intoxicating liquor reads:

"The failure of a person accused of this offense to have tests made to determine the weight of alcohol in his blood shall not be admissible in evidence against him." R. S., c. 22, § 150.

"The only privilege given by the statute (if in fact a statute is necessary to give it) is, that a failure to permit a blood test to be made, is not evidence against an accused." *State* v. *Demerritt,* 149 Me. 380, 386, 103 A. (2nd) 106. "[The statute] provides protection for the respondent from any prejudice which might result from his refusal or failure to have tests made." *State* v. *Munsey,* 152 Me. 198, 200, 127 A. (2nd) 79.

We are not here concerned whether the protection is based upon a constitutional privilege against self-incrimination. It is sufficient that the Legislature by statute has provided the protection. Cf. *State* v. *Banks,* 78 Me. 490, 7 A. 269.

If we set aside the evidence to which the respondent has objected, we find, first, that there was no other evidence

touching in any way upon a blood test, and second, that the evidence of the only witnesses in the case, two Fairfield police officers, fully warranted the guilty verdict.

The issue is whether there was abuse of discretion on the part of the court in not granting a mistrial. *State* v. *Sanborn,* 157 Me. 424, 173 A. (2nd) 854. The position of the respondent is that the evidence of the police officer could only mean to the jury that the respondent refused or failed to have a blood test. The State agrees, as do we, that if this were so a mistrial would be required.

The respondent is entitled to protection against an unfavorable inference from doing what he has a right to do; namely, not to have a blood test. *State* v. *Hedding* (Vt.), 172 A. (2nd) 599. The Michigan and New York cases below illustrate the situation when the refusal or failure to have a blood test is plainly indicated in evidence.

In *People* v. *Reeder* (Mich.), 121 N. W. (2nd) 840, 842, the facts were as follows:

[By State]

"Q Did you at any time advise him of his rights as to taking a blood test, Sergeant?

"A Yes, right after he was in the police car."

Under a statute requiring that an accused be informed of his right to a blood test and that a refusal to have the test was inadmissible, the court held that the respondent could possibly have been prejudiced by the evidence quoted and ordered a new trial.

In *People* v. *Stratton* (N. Y. App. Div.), 143 N. Y. S. (2nd) 362, affirmed 133 N. E. (2nd) 516, the court held it was reversible error to permit a physician to testify that he requested permission of the motorist to take a specimen of his blood to determine alcoholic content and that the motorist refused permission.

The State in the case at bar rejects the contention of the respondent that the answer given by the police officer could convey to a jury no other meaning than that the respondent, having been informed of his "right" to a blood test and having produced none at trial, must necessarily have refused to submit to such a test. On the contrary, the State contends that the evidence refers: first, to a bundle of "rights," that is to say, not to make a statement which could be used against him, to have an attorney, to bail, to a speedy trial, and to other unnamed rights; and second, neither by suggestion nor innuendo to the offer or refusal of a blood test. In brief, the position of the State is that the evidence with its wide sweep of meaning is withdrawn from the prohibition of the statute, and was therefore properly admissible.

In our view neither the respondent nor the State present the correct meaning of the evidence in question. The evidence did not mean only the refusal to have a blood test as respondent argued. On the other hand, the "right" or opportunity to have a blood test along with other "rights" may readily be said to be within the fair meaning of the evidence and might be so understood by a jury.

Even though it contained no direct reference to a blood test, the answer of the police officer, if seasonably objected to, would doubtless have been stricken and the jury instructed to disregard it in order to avoid even the possibility of prejudice. There was no reason for the State at this stage to introduce affirmative evidence of the fair conduct of the police or which might tend to show such conduct with reference to a blood test. No one would question the fairness of the police in informing a motorist of an opportunity to have a blood test, or of assisting him in procuring, for example, the services of a physician. Here, however, the action of the police with respect to such fair play was not under attack. *State* v. *Munsey, supra.* To permit under such circumstances the introduction of evidence which

might lead a jury to assume that the rspondent had refused to have the test might diminish if not destroy the value of his privilege of refusal. *People* v. *Stratton, supra.* In *Stratton,* however, the respondent's counsel seasonably objected to the offending evidence and promptly moved that it be stricken and the jury be instructed to disregard it. No such requests were made to the presiding justice at any stage of the instant trial. The respondent's attorney did no more than to make a subsequent motion for mistrial after completion of the examination of the witness.

The right of the respondent to a mistrial as a matter of law, however, does not necessarily follow from the receipt of the evidence of the police officer.

We are satisfied that there was corrective machinery available within the trial to remove any measurable possibility of prejudice arising from the evidence stated in the bill of exceptions. The presiding justice had the opportunity in instructing the jury to explain with care and understanding that failure or refusal to have a blood test is not admissible, and that no inference of guilt may be drawn from such failure or refusal. Since there had been no specific or direct reference to a blood test in the evidence, no delineation of the rights described by the officer to the respondent and no evidence whatever as to whether or not any blood test had ever subsequently been attempted or procured, the presiding justice had the further opportunity to instruct the jury that they were not permitted to guess, speculate or conjecture as to whether or not a blood test was ever discussed or refused or attempted or completed, and that under the circumstances no inference of any kind with respect to the taking of a blood test could properly be drawn.

Jurors and judges live in the world of the automobile. The existence of tests to determine the alcoholic content of the blood and use of such tests in "driving under the in-

fluence" cases, is common knowledge in our State. There is no reason why jurors should not understand and accept the rule that the failure or refusal to have a test is not in the case (unless in some appropriate manner raised by the respondent), and that no inference of guilt is to be drawn therefrom. The statutory rule against taking into consideration the fact that respondent does not take the stand presents a comparable problem. *State* v. *Banks, supra.*

The charge to the jury in the instant case is not contained in the record. We may therefore properly assume that the law was correctly stated to the satisfaction of the respondent. If otherwise, he would have objected.

We conclude therefore that the evidence complained of, although properly subject to a seasonable motion to strike, did not compel the granting of a mistrial. There was no abuse of discretion.

In reaching this decision we do not open the door to the State to introduce evidence pointing to refusal or failure to have a blood test for the purpose of creating an inference of guilt therefrom. *People* v. *Reeder, supra; People* v. *Stratton, supra.*

The injection of evidence for such a purpose would result in a mistrial. The court at *nisi prius* and the Law Court would act swiftly and with certainty to prevent such an improper activity on the part of the prosecution and to deter others from following a like path. See *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684.

The evidence complained of does not indicate an intention on the part of the State to violate the principles of fair play.

For further illustrative material see *State* v. *McCarthy* (Minn.), 104 N. W. (2nd) 673, 87 A. L. R. (2nd) 360, with anno.: Evidence—Alcohol Test—Refusal, p. 370; 44 Minn.

Law Rev. 673-704—"Chemical Testing for Intoxication"; comment upon, or admission into evidence of, refusal, by Professors M. C. Slough and Paul E. Wilson.

The entry will be

Exceptions overruled.

EVELYN A. BICKFORD
vs.
CHARLES BERRY

ROLAND H. BICKFORD
vs.
CHARLES BERRY

(See Page 9)

Waldo. Opinion, April 21, 1964.

Trial. Pre-Trial.

Contention of defendant as stated in a pre-trial order as to conduct of plaintiff-driver just before the accident eliminated from the case issues of fact and factual defenses inconsistent therewith.

Defenses not tendered at pre-trial conference are treated as waived.

PER CURIAM.

This opinion by the court is supplemental to an opinion rendered on January 22, 1964, 160 Me. 9.

Wendell R. Atherton, for Plaintiff.

Rudman & Rudman,
by *Paul L. Rudman,* for Defendant.

Intervenors:

Verrill, Dana, Walker, Philbrick & Whitehouse
Sewall, Strater, Erwin & Winton
Brown, Wathen & Choate
Linnell, Perkins, Thompson, Hinkley & Thaxter
Berman, Berman, Berman
Farris & Foley

PER CURIAM.

On January 22, 1964 we filed an opinion granting appeals and in effect ordering a new trial in these companion cases. The defendant now brings to this court his petition for review and reconsideration seeking the correction of what he deems to be manifest errors of law.

In our opinion we referred to representations made at pre-trial conference by defense counsel as to the nature and theory of the factual defense to be offered. These representations were incorporated into the pre-trial order. They presented succinctly the issues of fact tendered by the defendant. With respect to these representations we said in our original opinion: "This contention has the force of testimony, either for or against the defendant, depending upon the view a jury may take of the factual aspects of the case." It is to this sentence in particular that the petitioner specifically addresses our attention.

Upon reconsideration we are satisfied that the sentence does not express comprehensively our intended statement of the law and should be deleted from the opinion. The result of the case is not thereby changed.

We would substitute for the deleted sentence the following:

> "This contention effectively eliminated from the case issues of fact and factual defenses inconsistent with

those tendered by defendant at pre-trial, incorporated in the pre-trial order and never subsequently altered or changed by the presiding justice. Defenses not tendered at pre-trial conference are treated as waived. *Taylor* v. *Reo Motors* (1960), 275 F (2nd) 699, 704; *Miller* v. *Brazel* (1962), 300 F (2nd) 283; *McCarthy* v. *Lerner Stores Corp.* (1949), 9 F. R. D. 31; *First Federal Savings & Loan Association* v. *U. S.* (1961), 295 F. (2nd) 481; *Kline* v. *S. M. Flickinger Co.* (1963), 314 F. (2nd) 464. Specifically there was eliminated from the case any claim or contention by the defendant that he was in the act of lawfully passing the plaintiffs from the rear at the time of the collision. This was of great importance as affecting the elements of proof required of the plaintiffs and as affecting the duty owed by plaintiff driver in making a left turn under the existing circumstances. Cf. *White* v. *Schofield,* 153 Me. 79, 86; *Verrill* v. *Harrington,* 131 Me. 390, 395. There was further eliminated any claim or contention that the defendant was impelled to his left or wrong side of the highway to the point of collision by any non-negligently produced mechanical failure or skid. The issues to be tried were those fixed by the pre-trial order. A representation and commitment as to the defense is binding upon the defendant until amended with court approval. Such representation and commitment under the special circumstances of the instant case when considered with the evidence in the case afford and constitute a jury question. Upon the issues of fact thus tendered by the parties for trial, the evidence as it stood when defendant's motions for directed verdicts were addressed to the presiding justice would permit a jury to find that the plaintiff driver in the exercise of due care after giving ample warning of his intention to turn left executed a left turn and had nearly cleared the highway before being struck by the

defendant's vehicle; that the defendant, although not attempting to pass the plaintiff from the rear and not skidding or operating out of control, nevertheless negligently drove his vehicle to his left or wrong side of the road and into the plaintiff's vehicle; and that under these circumstances the plaintiff's failure to see the defendant was not a proximate cause of the accident. One who fails to look and see is not negligent as a matter of law when it is not apparent that what he would have seen would have changed his subsequent conduct in the exercise of ordinary care. *Tinker* v. *Trevett,* 155 Me. 426, 429."

We further delete from our original opinion the phrase included in the eighth full paragraph thereof "which, as we have said, has the force of testimony."

If either party has proper occasion to insert new issues prior to a new trial of this cause, he may present a motion for modification for consideration by the presiding justice.

So ordered.

Motions to intervene denied.

CUMBERLAND COLD STORAGE CO.

RE: APPLICATION FOR CONTRACT CARRIER PERMIT

Kennebec. Opinion, May 7, 1964.

Public Utilities. Transportation.

Evidence relating to refrigeration problems in transportation of frozen foods, nature of equipment of existing common carriers and to volume of frozen food carriage involved established existence of need as basis for granting a contract carrier permit for transportation of frozen goods in refrigerated units from cold storage plant in Portland to retail stores in the State of Maine.

If factual finding upon which Public Utilities Commission decree is based is supported by such evidence as taken alone would justify their conclusion, its finding is final.

Although application for contract carrier permit to transport frozen foods was supported by specific shippers, permit authorizing transportation of frozen foods to retail stores in the state was not invalid on ground that it was a broader grant than that applied for.

A permit to transport frozen foods in refrigerated units from cold storage plant to retail stores was not subject to objection that it in fact granted a common carrier certificate.

Proposed shipments from cold storage plant to retail store within the state were intrastate in nature and grant of contract carrier permit for such transportation was not subject to objection that evidence of interstate shipments had been considered.

ON APPEAL.

On appeal from a decree of the Public Utilities Commission granting a contract carrier permit to appellee. Appeal denied.

Harry H. Marcus,
Frank M. Libby, for Plaintiff.

Raymond E. Jensen,
Robert W. Donovan, for Defendant.

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

MARDEN, J. On appeal from a decree of the Public Utilities Commission granting a contract carrier permit to appellee.

Cumberland Cold Storage Co., hereinafter termed Cumberland applied to the Public Utilities Commission, hereinafter termed Commission for a permit as a contract carrier for the purpose of transporting "Frozen Food in refrigerated units for Super Markets and Frozen Food Processors and Brokers including, but not limited to, A & P Tea Co., Shaw's, I.G.A., Columbia Markets, from Cumberland Cold Storage Co. in Portland to Super Markets in the State of Maine." To this application several holders of certificates for common carriage intervened. Upon hearing, the Commission granted a permit authorizing the transportation of "Frozen foods in refrigerated units from Cumberland Cold Storage Co. at Portland to retail stores in the State of Maine." From this grant the intervenors appeal upon the following points:

> "1. The Order, Judgment and Decree of the Commission is unwarranted in law because it is not supported by any substantial evidence and is predicated on erroneous applications of law.
>
> "2. If there was any substantial evidence presented, the Order, Judgment and Decree of the Commission is unwarranted in law because it is broader in scope than the evidence justifies.
>
> "3. If there was any substantial evidence presented, the Order, Judgment and Decree of the Commission is unwarranted in law because it fails to distinguish properly between common carrier and contract carrier rights and in effect grants a common carrier certificate under the guise of a contract carrier permit.

> "4. The Commission over Intervenors' objections erroneously permitted supporting witnesses to give evidence of interstate shipments, and erroneously relied on such evidence in making its findings and its Order, Judgment and Decree."

The legislative policy affecting the operation of motor trucks for hire is to be found in Chapter 48, § 19, R. S. The definition of contract carrier and the criteria governing consideration of an application for a permit for contract carriage is to be found in Section 23 of the same Chapter, as revised.

Extracted from subparagraph III of Section 23, it is declared that no permit for contract carriage shall be granted:

> (1) if the commission shall be of the opinion that the proposed operation of any such contract carrier will be contrary to the declaration of policy of sections 19 to 33, or otherwise will not be consistent with the public interest, or
>
> (2) if the granting will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory by rail or over the same general highway route or routes or
>
> (3) if an increase in the number of contract carriers operating in the area to be served by the applicant will interfere with the use of the highways by the public. * * *
>
> (4) Permits granted by the commission shall authorize only such operations covered by the application as the commission finds to be justified by the evidence, and
>
> (5) no permit shall be granted unless it appears that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of sections 19 to 33, inclusive, and to the rules and regulations of the commission issued thereunder.

The basis of Cumberland's application is that present service available from common carriers for the transportation of frozen foods is inadequate, both as to schedule of possible deliveries and the necessary temperature control. The need which Cumberland alleges is refrigerated transportation to move the orders released by its storers to retail markets upon demand, unrestricted by regular schedules or regular routes, under efficient temperature control, within the tolerances accepted by the industry and expressed in tables prepared by U. S. Department of Agriculture.*

The thrust of the appeal is aimed at what intervenors contend is a finding by the Commission of need unsupported by any substantial evidence (Point 1) and that if it be found that substantial evidence was offered of need, the permit proposed by the Commission is broader than is "justified by the evidence" (Point 2). Additionally, appellant urges the permit here granted fails to distinguish properly between common and contract carrier rights (Point 3) and that evidence dealing with interstate shipments was erroneously applied by the Commission (Point 4).

Factually a finding is justified that Cumberland operates a cold storage facility of very substantial capacity (fifty million pounds) into which is shipped both from within and without the State varieties of frozen foods which are held to producer-storer's order within a temperature range of zero to minus five degrees in accordance with accepted frozen food merchandising practices, and temperature tolerances advocated by the U. S. Department of Agriculture. From this bank of frozen foods, distributors and retail stores within the State draw their supplies in varying amounts by placing orders with the producers of the goods, which in turn authorize Cumberland to fill the orders. In

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* Not in effect at the time of the hearing before the Commission but in effect since September 21, 1963 is § 228 B ["Storage and Transportation of Frozen Foods"] Chapter 32, R. S. reflecting legislative concern on temperature control. (Chap. 186, P. L., 1963.)

some instances, and particularly in the Portland area, the purchaser furnishes his own transportation and thereupon assumes risk of temperature control, — deterioration of the foods by the periods of non-refrigerated transportation to which the food is exposed. In about 80% of the shipments out of Cumberland, Cumberland is requested to choose the carrier for movement of the goods and in these instances, and inherent in the responsibility of a frozen food purveyor, Cumberland seeks to procure transportation which will in transit hold the temperature of the shipment to no higher than zero degrees. Any exposure of the frozen products to higher temperature initiates deterioration in its quality.

The intervenors, with one exception, Congdon, operate, as common carriers, refrigerated transportation, the types being trailers with built-in refrigeration units, or in some instances smaller so-called straight units, — trucks with refrigerating equipment. These common carriers by definition and in practice operate on schedules over regular routes, and the problems of Cumberland in delivering by common carrier, and in trying to comply with customers' orders, are a repetition of those discussed in *Bangor & Aroostook Railroad Co. Re: Application To Amend P. U. C. Certificate J #44* as reported in 159 Me. 86, 188 A. (2nd) 485.

From the record Cumberland has never had more than one-half trailer load (7½ - 8 tons) going out of Portland and the efficiency of temperature control is proportional to the extent to which the load fills the trailer. The smaller the portion of the trailer load occupied by the frozen product, the less efficiently can the temperature be held at not above zero, and a jury hearing the evidence could find that it is impossible to hold frozen goods at zero or below in small fractions of a trailer load. As the volume of each frozen food shipment offered decreases, the problem of the common carrier is increased in service supplied and tem-

perature control. In less than trailer load shipments, — and when the common carrier can plan in advance, the frozen foods are stored in the front end of the trailer adjacent to the refrigerating unit, insulation is then inserted and the remaining space is filled with dry freight, the presence of which accentuates the problem of temperature control. If a less than trailer load shipment of frozen food is offered after the loading of the trailer has begun, either a reloading is involved or the frozen foods are packed in insulated hampers and attempt is made to hold the temperature by the use of dry ice. Of the five intervenors upon behalf of which evidence was offered (Cole's, Fox & Ginn, Sanborn's, Maine-Border and Congdon) three operated trailers, evidence as to a fourth is unclear, and a fifth admittedly operated no refrigerated transportation. From the record, only two intervenors had any "straight" refrigerated transportation (Sanborn's and Cole's) and the smaller straight units, or in the case of Cole's Express, three units of "pick-up" size, were stationed and used in areas or for purposes not consistent with Cumberland's needs. Cole's Express had "pick-ups" stationed in Bangor, Houlton and Presque Isle for deliveries of frozen foods from its terminals in those locations to the addressees. Sanborn's Motor Express has four straight units, the location of only one of which is identified as being in Portland and used in that area to transport from its interstate terminal to Portland area addressees.

The volume of frozen food carriage from Cumberland in relation to total carriage was characterized as from one-tenth of one percent in the case of Cole's Express to approximately one percent in the case of Sanborn's Motor Express, less than one percent in the case of Fox & Ginn, and "a very small percentage" in the case of Congdon Transportation. The total frozen food transport from Cumberland during the first quarter of 1963 was 5 shipments totalling 3,375 pounds by Congdon Transportation and during the

first four months of 1963 was 12 shipments totalling 11,597 pounds by Cole's Express.

Our law, by which the validity of the Commission's decree is tested, has been stated a number of times, the most recent being *Bangor & Aroostook Railroad Co., supra,* at page 89, in which it was said 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."

The evidence, the substantiality of which is tested here and emphasized by the intervenors, is whether or not the applicant has shown a need for its proposed service and, paraphrasing, if there be evidence of need it was "for the Commission to determine in the exercise of a sound discretion whether or not the satisfaction of that need would be consistent with the public interest and the public policy announced by the Legislature." *Merrill* v. *Maine Public Utilities Commission,* 154 Me. 38, 43; 141 A (2nd) 434; *Richer, Re: Contract Carrier Permit,* 156 Me. 178, 185; 163 A. (2nd) 350. The record here confirms substantial evidence of need and the finding of the Commission on this point is warranted.

Substantial evidence supporting a finding of need having been confirmed, appellants now urge (Point 2) that the permit granted by the Commission violates criterion (4) ante because it is a broader grant than that either applied for or "justified by the evidence." At this point the application and the permit quoted earlier in the opinion must be compared. The portion of the permit which is criticized is that it grants broad authority to carry frozen foods not limited to the shippers supporting the petition and to the areas covered by the testimony. No suggestion has been made that a distinction should be made between "super markets" mentioned in the application and "retail stores" fixed in the permit. No case has been cited to us fixing legally a dis-

tinction and the only case we have found is *Rosen* v. *Pustilnik*, 204 N.Y.S. (2nd) 221, 223 (Supreme Court 1960) which is not on point and for the purposes of this case we draw no distinction. The decree complies with the mandate found in Section 23 III of Chapter 48, R. S., as amended.

Intervenors contend that the appearance of the Manufacturer's representative of three interstate processors of frozen foods, a local distributor, and the buyer for a chain store operating in Bangor must be considered as supporting only the grant of a permit for contract carriage for their needs. We must accept their testimony as supporting proof of a need by both applicant and retail outlets in the carriage of frozen foods within the State. The phrasing of the permit is not unwarranted and is justified by the evidence.

Intervenors' point three contends that the permit granted Cumberland in effect grants a common carrier certificate, and fails to distinguish properly between common carrier and contract carrier rights. The distinction between these types of license is made clear in *Public Utilities Commission* v. *Johnson Motor Transport*, 147 Me. 138, 145; 84 A. (2nd) 142. The findings which we have determined the evidence justifies, and which we have recited earlier in the opinion, make it clear that this distinction has been observed. Cumberland does not seek and has not been granted authority to carry all kinds of goods for anyone on schedule and over established routes. Cumberland has sought and has been granted authority to transport a particular class of merchandise, in special equipment, through private negotiations with those who seek the transportation, — subject, of course, to Commission supervision. The permit is not unwarranted for this reason.

Intervenors' point four reserved procedurally was neither briefed nor argued, but we have not been advised that it was waived. We find nothing to indicate that any collateral

reference to interstate shipments was considered or is reflected in the Commission's decree and as a matter of law, expressed in *Atlantic Coast Line Railroad Company* v. *Standard Oil Company of Kentucky,* 275 U. S. 257, 268 (1927), the character of the proposed shipments from Cumberland are properly characterized as intrastate.

Remaining statutory criteria and found by the Commission to be met are not criticized. However, the affirmed finding of "need" reflects "inadequacy" of common carriage under criterion (2) and, reiterating *Richer, supra,* at page 187, the possible loss of some traffic ("1%," "a very small percentage") cannot well be the basis for a finding of impairment of efficient public service. We find nothing in the record to weaken the Commission's finding that the proposed operation is consistent with the statutory policy expressed in criteria (1), (3) and (5).

Appeal denied.

ROBERT H. MOTTRAM, PETR. FOR WRIT OF ERROR CORAM NOBIS

vs.

STATE OF MAINE

Cumberland. Opinion, May 8, 1964.

Criminal Law. Coram Nobis.

Failure to appoint counsel for petitioner at hearing on petition for writ of error *coram nobis* was not error where petitioner elected to act as his own counsel and at no time professed his indigency.

Newly discovered evidence is a ground for new trial, but not for writ of error *coram nobis.*

ON APPEAL.

This is an appeal from the dismissal of the petition and denial of petitioner's writ of error *coram nobis.* Appeal denied.

Thomas F. Monaghan,
Earl J. Wahl, for Plaintiff.

John W. Benoit, Asst. Attorney General, for State.

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

SULLIVAN, J. On December 10, A.D. 1962, Robert H. Mottram filed in the Superior Court his petition for a writ of error *coram nobis* under the provisions of R. S., c. 126-A, additional, P. L., 1961, c. 131, to vacate the judgment of conviction rendered against him at that court in October, 1960, for the crime of larceny.

The Petitioner complains of having been denied his right to a fair trial and to equal justice at his jury trial in 1960

and alleges several particulars to instance such asserted abuses.

The State opposed Mottram's petition and moved for its dismissal. The petition and motion were heard by a Justice of the Superior Court who dismissed the petition and denied the writ of error *coram nobis.* Petitioner prosecutes this appeal from that decision.

Petitioner's statement of his points of appeal is restricted by him to 2 grievances:

> "1. The Court erred in failing to appoint counsel to represent Robert Mottram at his hearing on the Petition For a Writ of Error Coram Nobis.
>
> "2. The Court erred in its determination that the evidence presented by Robert Mottram was not newly discovered."

The Petitioner has abandoned his first point of appeal by his declination to argue or support it. The contention has no merit. The Petitioner in self advocacy supplied his own petition and in writing thus advised the court:

> "That thru circumstances he now elects to act as his own Counsel in re — his Petition."

At no time did the Petitioner profess his indigency. *Nadeau* v. *State,* 159 Me. 260, 264.

Several weeks prior to the hearing upon the petition the justice presiding wrote to Mottram, as follows:

> "According to a Motion appearing to be executed by you re Petition for Writ of Error Coram Nobis filed in said Clerk's office December 10, 1962 you in substance stated that you elect to act as your own counsel with respect to said petition. In the event you desire counsel to represent you on March 5, 1963 in re Motion to Dismiss and do not have financial means to employ counsel and desire the Court to appoint counsel for you, advise at once."

At the commencement of the hearing upon the petition for the writ of error *coram nobis* the following dialogue appears in the record:

"THE COURT: The matter for consideration today is a petition for a writ of error coram nobis by Robert H. Mottram against the State of Maine. Mr. Mottram, I understand that you do not have an attorney?

"MR. MOTTRAM: That is correct.

"THE COURT: And that you are representing yourself?

"MR. MOTTRAM: That's correct.

"THE COURT: Is that correct?

"MR. MOTTRAM: Yes."

The notice of appeal in this case was signed by Mottram, "Petitioner, Pro Se."

Petitioner's first point of appeal is devoid of merit.

The 2nd point of appeal reads as follows:

"2. The Court erred in its determination that the evidence presented by Robert Mottram was not newly discovered."

This 2nd point of appeal as phrased must be deemed inept. Since 1941 (P. L., 1941, c. 203) a statutory law has afforded a specific and distinct process for the obtaining of new trials on the ground of newly discovered evidence. R. S., c. 106, § 15. R. S., c. 126-A, additional, P. L., 1961, c. 131 (now repealed), the act under which Petitioner sought relief in the instant case contains this preclusion:

Sec. 1. - - - "The remedy of coram nobis provided in this chapter is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any other review of the sentence or conviction."

Petitioner could not have been aggrieved by a determination of the court that petitioner's evidence was not newly discovered in the conventional significance of such a classification for had the justice concluded to the contrary mere newly discovered evidence would not sustain the issuance of a writ of error *coram nobis*. *Dwyer* v. *State*, 151 Me. 382, 395; *Coram Nobis* by Eli Frank, § 3.02(c) and authorities; R. S., c. 126-A additional, *supra*.

Lest it may appear, however, that this court is extending to this Petitioner only technical and summary consideration additional comment seems appropriate.

In 1958 Petitioner had been tried and adjudged guilty of the same charge of larceny which is involved here. In 1960 after hearing upon a writ of error *coram nobis* such guilty judgment had been recalled by the Superior Court. Petitioner had been retried and again convicted in October, 1960. The petition in the case at bar seeks a recall of that latter judgment. Prior to the trial of 1958 Petitioner and others for the prosecuting officials had submitted themselves to interviews which were vocally recorded upon 6 double records. The Petitioner in the court below at his hearing upon the instant petition complained that the recollective testimony given by certain of the State's witnesses at his second trial in 1960 was contrary to statements contained upon the sound recordings of the interviews participated in by the Petitioner and others in 1958. Petitioner here protests that the machine supplied for petitioner's trial counsel by the State before and during the period of the petitioner's second trial for reproducing the interviews was grossly inadequate and rendered inaudible 90% of the taped conversation. The State at such second trial did not offer the sound recordings in evidence. Petitioner sought to introduce them *in toto* at that trial but failed because the interviews were concededly an admixture of the admissible and inadmissible without ready and facile provision for separa-

tion. *State* v. *Mottram,* 158 Me. 325, 335. Petitioner now contends that by the judicious use of the tapings had they been available to him and the jury in audible rendition before and during the second trial he could have demonstrated the perjury or at least the objective untruth of critical State testimony. Suffice it to say that the decided case of *State* v. *Mottram,* 158 Me. 325, 335, and the transcript in the instant case reveal that the Petitioner and his trial counsel at the second trial were accorded plentiful access to the sound recordings by court and State counsel. The reproducing device the use of which the State placed at the convenience of Petitioner and his counsel was the same which had been utilized by Justice Pomeroy when not long before Petitioner's second trial that justice had played at least one-half of the recording discs at the *coram nobis* hearing of this Petitioner in 1960. The Petitioner conducting the *coram nobis* hearing of 1960 without counsel had been present in court while Justice Pomeroy listened to the "playbacks." Petitioner does not represent that the discs played by Judge Pomeroy were not audible and intelligible but rather that he, the Petitioner, was sitting in the court room too far away from such reproduction of the interview to hear it all. Petitioner's counsel of the second trial acknowledges that the State had offered to him full resort to the recordings and spent some hours listening to much of them. He asserts, however, that the audibility was only 10%. No complaint was raised by the Petitioner or by his counsel concerning lack of time or of opportunity to hear the records. All pertinent cross examination of State witnesses was the respected right of the Petitioner during his second trial. Petitioner had been present and collaborated in the making of more than half of the sound recordings. Neither he nor his trial counsel requested leave of court or cooperation of State counsel to correct any inaudibility in sound reproduction. With the Petitioner indisputably present in the court room at his second trial State's counsel, Peti-

tioner's former attorney and the court discoursed as follows:

State's attorney:

"- - - - If he (Mottram's counsel) wishes to play them back again, or Mottram for any reason wishes to listen to them, they are available for counsel to use, but I would object for these reasons to the entire records being played on a machine to the jury."

- -

Mottram's counsel: "Now, as to the contention that my Brother has, if Your Honor please, I agree with my Brother that there are many immaterial and irrelevant matters on the records. I also am forced to agree with him they are not completely intelligible, that I had a difficult time understanding and following some parts, but on some of the records I found some vital information that I think would be of value to the jury.

THE COURT: "If those vital parts that you refer to could be separated from that which is not intelligible and that which is not material and separated from matters that perhaps might be matters that would offend the issues in this case or might tend to be confusing rather than aiding, then I should admit that part of the record, if it can be separated, that you desire and which you think would be helpful to the defense in this case; but if it is all intermingled so that you cannot separate it, then I would be compelled to exclude the use of those records for the reasons that I have just stated." *State* v. *Mottram,* 158 Me. 325, 336, 337.

Petitioner's counsel in the case at bar states in his brief:

"This case today, before this tribunal is a cumulative part of State v. Mottram found in 155 Me. page 394 and State v. Mottram found in 158 Me. page 325."

Testifying in the present case counsel who had defended Mottram at the latter's second trial said:

> "- - - - I did ask Mr. Chapman, (State's attorney at the second trial) and I believe the Court also, that I wanted some time with you (Mottram) to listen to the records with me, and they told me that they would be very glad to co-operate - - - - -"

Petitioner at his second trial recited his recollection of some of the conversation during his interview recorded upon the discs. His former trial counsel explains that at the second trial of this Petitioner the introduction of the sound recordings was sought for the purpose of impeaching the credibility of a police officer and one or two more of the witnesses who had testified at the call of the State in the course of the second trial.

If it be the theory of this Petitioner, howsoever untenable (*Shalit* v. *Shalit,* 126 Me. 291, 294), that some of the conversation memorialized by the sound recordings constitutes newly discovered evidence solely because Petitioner, belatedly dedicating himself after the conclusion of the second trial, only then came to evaluate its impeaching potency, nevertheless such evidence would be incompetent in this *coram nobis* undertaking because of the restrictive provisions of R. S., c. 126-A, additional, *supra,* and because, if newly discovered evidence obtain, the special remedial process of R. S., c. 106, § 15 is the prescribed operative procedure. As this court said in *Dwyer* v. *State,* 151 Me. 382, 395:

> "- - - - The proceeding, on the writ, (coram nobis), is not to revise a decision made by the court or jury. It is not an appeal, or a motion for a new trial or newly discovered evidence, or a claim that the original record is false. - - - -"

See *annotation, 33 A. L. R.,* 84, 85.

"- - - - and the writ (coram nobis) will not lie where the party complaining knew the fact complained of, at the time of, or before trial, or, by the exercise of reasonable diligence, might have known it, or is otherwise guilty of negligence in the matter." *49 C. J. S., Judgments,* § 312, P. 564. See, also, *State* v. *Hudspeth,* 191 Ark. 963, 88, S. W. (2nd) 858, 861; *Coram Nobis,* Eli Frank, § 3.01, P. 23.

The mandate must be:

Appeal denied.

UNIVERSAL C. I. T. CREDIT CORPORATION

vs.

LAWRENCE J. CYR, ET AL.

Kennebec. Opinion, May 12, 1964.

Bills and Notes. Fraud. Forgery.

If maker not intending to sign a promissory note is tricked into doing so by fraud and deceit and without negligence on his own part, instrument is a forgery and is void as to all parties.

Whether signer of note, claiming that his signature thereto had been procured by fraud and deceit and without intention on his part to sign a note, is estopped by his own negligence from asserting that note is void is a question of fact for jury, and under certain circumstances it may be a question of law.

Evidence warranted finding that payee of note signed by home owners who had purchased siding and other improvements had defrauded home owners in execution of note.

Home owners who were defrauded by payee in execution of note in connection with purchase of home improvements but who were not illiterate or inexperienced in business matters and who would not have been confused if they had read what was so plainly stated on note were negligent as a matter of law in signing note, and were estopped from asserting fraud against holder in due course.

ON APPEAL.

This is an appeal by the Plaintiff from the denial of his motion for judgment notwithstanding the verdict. Appeal sustained. Remanded for assessment of damages.

Marden, Dubord, Bernier & Chandler,
by *Richard J. Dubord,*
Lawrence D. Ayoob, for Plaintiff.

John Marshall,
Daniel J. Murphy, for Defendant.

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

WILLIAMSON, C. J. This is an action on a negotiable promissory note by the Universal C.I.T. Credit Corporation, an indorsee and holder in due course, against the makers. The defense is that through fraud on the part of the payee the defendants executed the note without negligence on their part. The jury found for the defendants. The case is before us on appeal from denial of a motion for judgment for the plaintiff notwithstanding the verdict.

Apart from the alleged fraud, the plaintiff is plainly a holder in due course under the Uniform Negotiable Instruments Act, which reads:

> "**Sec. 52. What constitutes holder in due course.** — A holder in due course is a holder who has taken the instrument under the following conditions:
>
> "**I.** That it is complete and regular upon its face;
>
> "**II.** That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;
>
> "**III.** That he took it in good faith and for value;

> "IV. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." (R. S., c. 188.)

See also *Kellogg* v. *Curtis,* 69 Me. 212; *Farrell* v. *Lovett,* 68 Me. 326.

The controlling issue was stated in *Branz* v. *Stanley, et al.,* 142 Me. 318, 320, 51 A. (2nd) 192, as follows:

> "For it is well settled in this jurisdiction that if not intending to sign a promissory note she was by fraud and deceit and without negligence on her own part tricked into signing that which afterwards proved to be a note the instrument is a forgery and void as to all parties. And whether she is estopped by her own negligence from denying her signature was a question for the jury. *National Bank v. Hill,* 102 Me. 346, 66 A. 721, 120 Am. St. Rep. 499; see Negotiable Instruments Act, R.S. 1944, Chap. 174, Sec. 23; 8 Am. Jur. 318"

Negligence which was a question for the jury in *Branz* may also under certain circumstances be a question of law.

In *Kellogg* v. *Curtis,* 65 Me. 59, the court said, in a case involving execution of a completed negotiable note:

> "In our opinion, the facts of this case clearly show a heedlessness by the defendant and want of care. We by no means mean to be understood as saying that a person may be holden in every case where his signature to a note has been surreptitiously obtained. Many cases might occur where the maker would be in no fault. But the defendant signed a paper which he knew was to be effectual for some purpose by means of his name thereto, and was in fault for intrusting it with an adversely interested party, without knowing himself what it was. By this act he inflicts a loss upon an innocent party unless he bears the loss himself. We think he should bear the penalty of his own folly and

> mistake. *Caveat emptor* does not apply in such a case."
>
> * * * * * * * * * * * * * *
>
> "What constitutes negligence in a case like this, where the facts are clear and unequivocal, is a question of law."

See also *Abbott* v. *Rose,* 62 Me. 194; *Biddeford National Bank* v. *Hill,* 102 Me. 346, 66 A. 721; Annot., 160 A. L. R. 1295.

The Kennebec Siding and Roofing Co. (Kennebec Venetian Blind & Window Co.) was engaged in selling and installing siding, roofing, doors, windows, and other housing materials. On February 10, 1960, the defendants, husband and wife, signed a "Contract of Sale" authorizing the installation of a garage door and siding for the barn, with other details.

On February 10, 1960, the defendants signed a "Property Improvement Statement" containing information about employment, income, property, debts, bank and credit references. There was also a statement including total cash cost of improvements $1339; time balance $1807.65; "No. of Mos. Requested 60."

The statement was addressed to "UNIVERSAL C.I.T. CREDIT CORPORATION: This statement is submitted to induce you to purchase my obligation arising from the improvements listed below: . ." Near the signatures are the words "NOTICE TO CUSTOMER: IMPORTANT READ BEFORE SIGNING."

Under date of March 2, 1960, we find a "CUSTOMER'S COMPLETION CERTIFICATE AND AUTHORIZATION" addressed to the Universal C.I.T. Credit Corporation, in which the defendants over their signatures certified the contract had been satisfactorily completed "on premises indicated in my/our Property Improvement Statement,

which material and work constitute the entire consideration for my/our Promissory Note." Opposite the signatures the certificate reads: "IMPORTANT: Do Not Sign This Certificate Until All Materials And Work Contracted For Have Been Satisfactorily Delivered And Completed."

Also under date of March 2, 1960, the defendants executed a note to the Kennebec Venetian Blind & Window Co. or order in the amount of $1807.65 payable in 60 monthly instalments. In large type at the outset of the note are the following words: "THIS IS A NEGOTIABLE PROMISSORY NOTE." At the end of the note we read:

> "Customer acknowledges receipt of a completed copy of this promissory note, including above Notice.
> s/Lawrence J. Cyr.
>
> "Customer (Person on whose life group credit life insurance will be obtained, if applicable.)
> s/Rosalie Cyr
>
> (Additional Customer, if any)"

The note was indorsed by the payee to the plaintiff without recourse, and, as we have said, the plaintiff is a holder in due course.

The "Property Improvement Statement," the "Customer's Completion Certificate and Authorization," the promissory note, and a "Dealer/Contractor Certification" executed by the "Kennebec Venetian Blind & Window Co. Mfgs.," the dealer, certifying the completion of the work and other facts, were on forms provided the dealer by the plaintiff. In fact the "Customer's Completion Certificate and Authorization" and the promissory note were executed in blank by the defendants *before* the work was *completed.* As we may expect, the work was never completed.

The defendants stoutly assert that they did not know they were signing a note, that they thought they were signing

a paper having something to do with credit or financing of the project, but in any event not a note. The evidence warranted a finding that the dealer defrauded the defendants in the execution of the note. There remains the question whether the defendants were negligent as a matter of law in executing the note, and thus are estopped from raising the question of fraud.

There is no suggestion that the defendants were illiterate, or inexperienced in business matters as in *C.I.T. Corp.* v. *Panac* (Cal.), 154 P. (2nd) 710, 160 A. L. R. 1285, cited by the defendants. The evidence is undisputed that the defendant Lawrence J. Cyr had financed automobiles with banks and had borrowed money on notes.

We cannot escape the conclusion that the defendants were utterly heedless in signing the note. If they had read what was so plainly stated, no confusion could have arisen. Their trust in the salesman was misplaced. The dealer had the plaintiff's money, loaned on the strength of defendant's note. One must lose, and the loss here falls on the defendants.

On this record defendants were negligent as a matter of law. The plaintiff was entitled to the direction of a verdict in its favor. Maine Rules Civil Procedure, Rule 50(c); *Nisbet* v. *Linberg*, 157 Me. 61, 170 A. (2nd) 148.

The entry will be:

Appeal sustained.

Remanded for assessment of damages and entry of judgment for the plaintiff notwithstanding the verdict.

INHABITANTS OF TOWN OF CAMDEN
vs.
INHABITANTS OF TOWN OF WARREN

Knox. Opinion, May 18, 1964

Paupers. Infants.

Wife on marriage to resident of Warren acquired pauper residence there.

Illegitimate daughter acquired pauper residence with her mother on her mother's marriage to resident of Warren.

Son born to mother who had pauper settlement at Warren connatally derived settlement at Warren from his mother.

Unwed mother could emancipate minor child.

Emancipation is question of law but whether or not there has been emancipation is one of fact.

Evidence of subsequent conduct of parent and child is relevant to intent of parent at time of claimed emancipation.

Abandonment of child to grandparent may constitute emancipation.

Best test of emancipation is separation and resulting freedom from parental and filial ties and duties, which law ordinarily bestows at age of majority.

Evidence that unwed mother left her mother's home and her son, did not return and sent no communication other than birthday card five years after her departure established her emancipation of child, and child retained pauper residence in place where she left him.

ON REPORT.

This case is reported on an agreed statement of facts for the determination of residency of a pauper child. Judgment for the Plaintiff. Judgment for the State of Maine.

Charles F. Dwinal, for Plaintiff.

Charles T. Smalley,
Christopher S. Roberts,
George C. West, Asst. Attorney General, for Defendant.

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

SULLIVAN, J. All parties appearing in this case agree to all material facts and upon their request this action is reported to this court for determination. M. R. C. P., Rule 72(b).

AGREED STATEMENT

"This question involves the pauper settlement of one Woodrow W. Carter, a minor at the time this action was commenced. The action was brought by the Town of Camden against the Town of Warren for the recovery of $396.34 expended for pauper supplies for the said Woodrow W. Carter. After the commencement of the action the State of Maine, - - - - requested to be made a party defendant in this matter. It is agreed that Woodrow W. Carter and his family did fall into distress and that the Town of Camden did furnish them necessary pauper supplies to the amount of $396.34 as alleged and that all necessary pauper notices and denials were duly sent and received.

"Lucille Carter, the mother of Woodrow Carter, was born in Bath, Maine, March 9, 1921, the illegitimate daughter of Grace Carter; Grace Carter married William F. Peters of Warren, Maine, on August 21, 1931, and took her daughter Lucille with her to Warren, Maine; Mr. Peters then had and still has a pauper residence in Warren; Grace Peters still lives in Warren, Maine, with her husband.

"Lucille Carter, the illegitimate daughter of Grace Peters, while living with her mother in Warren, had an illegitimate son, Woodrow W. Carter, who

was born in Rockland, Maine, on June 14, 1939; Lucille Carter was living in Warren with her mother and step-father and illegitimate son, Woodrow, when she became of age in 1942 and she continued to live in Warren, unmarried, until 1946, at which time she left Warren, worked for a short time in Portland, Maine, and then went to New York City where she has remained ever since; Since she left Warren she has not contributed to his support nor has she communicated with him in any way except to send him a card on his twelfth birthday.

"Woodrow Carter continued to live with his grandmother, Grace Peters, and her husband, in Warren until some time in 1956, and on March 31, 1956, at the age of sixteen, he married Judith Wiggins of Camden, Maine, and they have lived in Camden since their marriage.

"When Lucille left Warren she left her son, Woodrow, with her mother; he then being seven years of age.

"The Woodrow Carter family first requested and received pauper supplies on May 7, 1958, and the recovery requested by the Town of Camden is for supplies furnished during 1958 and 1959.

"----------it may be further stipulated that Lucille Carter has received no pauper aid from within the State of Maine since she moved to New York in 1946."

In 1931 Grace Peters concomitantly with her marriage acquired a pauper residence in Warren. R. S., c. 94, § 1, 1. Lucille Carter, illegitimate daughter of Grace, by derivation and contemporaneously participated in such Warren settlement with her mother, R. S., c. 94, § 1, 111, until 1946 at least. R. S., c. 94, § 3.

In 1939 Woodrow W. Carter connatally derived from Lucille, his mother, a settlement at Warren. R. S., c. 94, § 1, 111. If emancipated during his minority, Woodrow W.

Carter retained his Warren settlement until after his majority in 1960, a date prior to which the pauper supplies in this controversy had been furnished to him by Camden. R. S., c. 94, § 1, VI; *Milo* v. *Kilmarnock,* 11 Me. 455, 458; *Carthage* v. *Canton,* 97 Me. 473, 476.

Our resolution of the mixed legal and factual issue of emancipation in the case at bar will not extend to consideration of the effect of emancipation upon the legal obligation of the relinquishing parent to furnish the child with necessary support not otherwise provided.

Lucille Carter was the only legally accredited parent of Woodrow Carter.

> "As the father can emancipate his child, so that he may gain a settlement in his own right, the mother, by the settlement law standing in his place, must necessarily possess the same power - - - -"
> *Dennysville* v. *Trescott,* 30 Me. 470, 473.

Unwed mothers may emancipate.

> "As to the power of minors to acquire a settlement in their own right, we are not aware of any distinction between legitimate and illegitimate - - - -"
> *Milo* v. *Kilmarnock,* 11 Me. 455, 458.
> *In re Sonnenberg* (Minn.), 99 N. W. (2nd) 444.
> *Plainville* v. *Milford* (Conn.), 177 A. 138.
>
> Compare assumptive language of *Sidney* v. *Winthrop,* 5 Me. 123, 125; *Biddeford* v. *Saco,* 7 Me. 270, 273; *Augusta* v. *Mexico,* 141 Me. 48, 49.

Emancipation:

> " - - - - is a question of law, whether or not there has been an emancipation is one of fact. In this case both questions are submitted to the court."
> *Carthage* v. *Canton,* 97 Me. 473, 476.

As for intentions:

> " - - - - a mixed question of law and fact, little dependent upon mere intentions, when it is perceived, that other prevailing facts have prevented such intentions from having any important influence upon the condition of the children."
> *Sanford* v. *Lebanon,* 31 Me. 124, 128.

> " - - - - The language of her conduct seems to be plain and not to be misunderstood. The conduct of the pauper seems to speak a similar language, he has not followed her, or sought her aid or submitted to her control - - - - "
> *Wells* v. *Kennebunk,* 8 Me. 200, 202.

Retrospection can be demonstrational:

> " - - - - it is frequently of the greatest importance to ascertain the subsequent conduct of parent and child, as this may throw great light upon the intention of the parent at the time of the claimed emancipation."
> *Carthage* v. *Canton, supra,* @ 476.

The relinquishment or abandonment of the child may be to a grandparent. *Wells* v. *Kennebunk,* 8 Me. 200, 202.

> "Nor is it requisite that the emancipation should be express and positive. It may be inferred from the acts and conduct of the parties. But it must be proved by such facts, as indicate its existence."
> *Dennysville* v. *Trescott,* 30 Me. 470, 473.

Indicants of emancipation are compiled by this court in *Thomaston* v. *Greenbush,* 106 Me. 242, 244:

> "The legal effect of the father's conduct was an emancipation of the children in 1899. The general scope of that term has been variously defined by this court as 'the destruction of the parental and filial relations,' *Sanford v. Lebanon,* 31 Maine, 124, 'the voluntary acts of the parent in surrendering the rights and renouncing the duties of his

> position, or, in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them.' *Monroe v. Jackson,* 55 Maine, 59; 'An absolute and entire surrender, on the part of the parent, of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position. It leaves the child, so far as the parent is concerned, free to act upon its own responsibility and in accordance with its own will and pleasure, with the same independence as though it were twenty-one years of age. Indeed the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties, which the law ordinarily bestows at the age of majority. *Lowell v. Newport,* 66 Maine, 78."

Lucille Carter, born out of wedlock and a stepchild, at the age of 18 became an unwed mother in a community of small and quite staid population. When her child attained the age of 7 years Lucille left her mother's home and her son, never to return during the span of thirteen years important to this controversy. But for a birthday card sent by Lucille to her son 5 years after her departure this mother sent no communication, no testimonial of solicitude or of longing, no material or spiritual benefactions to her son during his formative boyhood and critical adolescence. Objectively such unnatural behavior is the antithesis of motherhood. No moral judgment will be hazarded here. Possible sensitivities, discouragements, frustrations, adversities, underprivilege, etc., are intangibles beyond the pale of our responsibility in this matter. Apart from consideration of mere intentions or of culpability,

> "The language of her conduct seems to be plain and not to be misunderstood. The conduct of the pauper seems to speak a similar language."
> *Wells* v. *Kennebunk, supra.*

The legal effect of this mother's conduct was an emancipation of her child and such is an irrepressible inference from the acts and conduct of the parties.

The mandate must be:

Judgment for the Town of Camden against the Town of Warren for the amount of $396.34, interest and costs. Judgment for the State of Maine.

RODNEY P. WRIGHT

vs.

LEWELLYN R. MICHAUD, ET AL.

ORONO ZONING BOARD OF APPEALS

Penobscot. Opinion, May 22, 1964.

Constitutional Law. Property. Zoning. Evidence. Municipal Corporations. Mobilehome Parks.

Constitutional guaranties relating to due process and equal protection were not intended to limit subjects upon which police power may be exercised.

Private property is held subject to implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare.

Neither Fourteenth Amendment to the United States Constitution nor Maine Constitution prohibits zoning legislation. U. S. C. A. Const. Amend. 14.

To constitute a valid exercise of police power, restriction imposed by zoning ordinance must bear a substantial relation to public health, safety, morals or general welfare.

It is common knowledge that a mobilehome, however elaborately built or landscaped, is often detrimental to surrounding property.

Legislature intended in enacting enabling act to allow municipalities to plan for future.

Test of validity of zoning ordinance is whether prohibition is unreasonable, arbitrary or discriminatory, based on reasonably foreseeable future development of community.

Every presumption is to be made in favor of constitutionality of zoning ordinance passed in pursuance of statutory authority and it will not be declared unconstitutional without clear and irrefutable evidence that it infringes paramount law.

When zoning ordinance does not appear unreasonable on its face, objecting party must produce evidence to show that it is in fact unreasonable in its operation.

Town zoning ordinance provision prohibiting location of individual mobilehomes anywhere in town was not unreasonable, arbitrary or discriminatory where the ordinance permitted a mobilehome park in a residence and farming zone provided that it be set back 200 feet from any right of way.

ON REPORT.

This is a review of denial of application for a zoning variance to permit use of a residential and farming zoned area for parking a mobilehome. Appeal denied.

Malcolm S. Stevenson, for Plaintiff.

Needham & Needham, for Defendant.
by *Amicus Curiae* and *Barnett I. Shur*

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

SIDDALL, J. On report. The Appellant's application for a permit to "park" a mobilehome in a zone denominated as "Residential and Farming" in the zoning ordinance of the Town of Orono was denied by the Building Inspector. Although the record does not contain a copy of the appeal or decision thereon, the stipulation of the parties shows that

the Appellant appealed from the decision of the Building Inspector, requesting a variance from the zoning ordinance to park his mobilehome in that zone. The stipulation also disclosed that the appeal was denied by the Board of Zoning Appeals, the board finding no facts to justify a variance for undue hardship.

The Enabling Act relating to municipal development is set forth as amended in R. S., 1954, Chap. 90A., Sec. 61. That part of the act which authorizes municipalities to enact zoning ordinances is contained in Par. II, Section B and reads as follows:

> "B. A zoning ordinance shall be drafted as an integral part of a comprehensive plan for municipal development, and promotion of the health, safety and general welfare of the residents of the municipality.
>
> 1. Among other things, it shall be designed *to encourage the most appropriate use of land throughout the municipality;* to promote traffic safety; to provide safety from fire and other elements; to provide adequate light and air; to prevent overcrowding of real estate; to promote a wholesome home environment; to prevent housing development in unsanitary areas; to provide an adequate street system; *to promote the coordinated development of unbuilt areas;* to encourage the formation of community units; to provide an allotment of land area in new developments sufficient for all the requirements of community life; to conserve natural resources; and to provide for adequate public services." (Emphasis supplied.)

The zoning ordinance of the Town of Orono divides the town into the following types of use zones:

1. Residence and Farming Zone

2. Residence A. Zone
3. Residence B. Zone
4. Business Zone
5. Industrial Zone

The Residence and Farming Zone permits among other uses single and two family dwellings subject to certain limitations relating to the size of the lot. The Board of Appeals may permit a mobile park in that zone provided it be set back 200 feet from any right of way.

The following pertinent provisions are found in the ordinance:

> "No individual trailer or mobilehome shall be allowed to locate in any zone in the Town of Orono and no trailer or mobilehome shall constitute a single resident use, whether on foundation or not." Sec. 1803
>
> Art. III, Sec. 302
>
> "1. Mobilehome: Mobilehome shall mean any vehicle used or so constructed as to permit its being used as a conveyance on the public streets and highways and duly licensed as such, and constructed in such a manner as will permit occupancy thereof as a dwelling or sleeping place for one or more persons, and provided with a toilet and a bathtub or shower.
>
> m. Mobilehome Park: Mobilehome Park shall mean a plot of ground on which two or more mobilehomes occupied for dwelling or sleeping purposes are located.
>
> q. Trailer: Trailer shall mean any vehicle used or so constructed as to permit its being used as a conveyance on the public streets and highways and duly licensed as such, and constructed in such a manner as will permit occupancy thereof as a dwelling or sleeping place

for one or more persons, and not provided with a toilet and a bathtub or shower."

The stipulated issues are summarized as follows:

1. Was the decision of the Orono Board of Appeals arbitrary, contrary to the weight of the evidence, and an abuse of discretion?

2. Is Section 1803 prohibiting the location of individual mobile homes anywhere in the Town of Orono, even if all the other requirements of the particular zone are fulfilled, arbitrary and discriminatory and in violation of the Constitution of the State of Maine and the Fourteenth Amendment to the Constitution of the United States?

3. Is Section 1803 in excess of the authority granted to the Town of Orono by the Enabling Act?

4. Does Section 1803 apply to mobile homes from which wheels are removed, and a form of foundation is to be constructed?

The provisions of the Enabling Act delegate broad police powers to municipalities to adopt zoning ordinances as an integral part of a comprehensive plan for municipal development and promotion of the health, safety, and general welfare of its inhabitants. The geography, the economic and industrial development, the residential necessities, the nature and extent of residential, business and industrial growth of one municipality may be entirely different from those in another municipality.

The Enabling Act does not attempt to specify the needs of any particular city or town in the field of zoning. It places no limitation upon the legislative action of a municipality in the enactment of zoning ordinances seeking to accomplish the intended purposes of the act, except those dictated by constitutional limitations. Subject to those limita-

tions, to be hereafter discussed, Section 1803 of the zoning ordinance is not in excess of the authority granted by the statute.

The Appellant contends in view of the definitions of a trailer and a mobilehome (Sec. 302, Par. (l) and (q)) that Sec. 1803 of the ordinance does not apply to a mobilehome from which wheels are removed and a foundation therefor is to be constructed. The parties stipulated that all wheels and mobile underpinnings were to be removed from the Appellant's mobilehome, and a foundation created by use of insulation sideboards around cement blocks to which the home would be attached. Sanitation was to be provided by use of a 500 gallon septic tank. An artesian well, located nearby, was to be available for fire protection. A lawn with 150 foot frontage was contemplated, and trees and shrubbery were to be planned later on the property.

Courts of other jurisdictions have differed in their treatment of mobilehomes and house trailers in ordinances of this type. In *Anstine* v. *Zoning Board of Adjustment of York Township* (Penn.) 190 A. (2nd) 712 (1963), the court concluded that the removal of the undercarriage of a mobilehome to which the wheels were attached, and the bolting of the structure to a concrete block foundation, created a *fixed* rather than a *mobile* structure. In *Lescault* v. *Zoning Board of Review of the Town of Cumberland* (R. I.) 162 A. (2nd) 807 (1960), it was held that a trailer set on a foundation of concrete blocks was a one-family dwelling and was clearly within the requirements of the zoning ordinance. *In Re Willey* (Vt.) 140 A. (2nd) 11 (1958), the trailer was mounted on cinder blocks and 2 x 3 timbers. It was connected with city sewer and water lines. The court held that the trailer was mobile when it was brought to the lot but became fixed to the realty by various connections and was properly classified as a one-family house under the zoning ordinance. On the other hand in

Town of Manchester v. *Phillips* (Mass.) 180 N. E. (2nd) 333 (1962), the court found that the zoning by-laws of the Town of Manchester, which limited to single residence districts detached one-family dwellings and which defined "dwelling" as a building to be used as living quarters but not including overnight camps, trailers, or mobilehomes, excluded a mobilehome type of unit from the category of dwellings, whether the unit was equipped with wheels or not.

In *Town of Brewster* v. *Sherman* (Mass.) 180 N. E. (2nd) 338 (1962), the Town of Brewster had excluded trailers from areas other than existing commercial trailer parks or camps. The trailer in question was to be transformed into an immovable single family residence permanently affixed to the land by means of a cement block foundation and connected to water, electricity and a sewerage disposal system. The court held that the prohibition of residence in any "trailer or tent" sufficiently described this type of trailer or mobile home unit whether it remained mobile or was affixed with substantial permanence to the land. See also *Astoria* v. *Nothwang* (Or.) 351 P. (2nd) 688 (1960).

These cases were decided under statutes and ordinances of various types. In none of them do we find a provision similar to Section 1803 wherein it is specifically stated that no individual trailer or mobilehome shall be allowed to locate in any zone in the Town of Orono and that neither shall constitute a single residence use, whether on a foundation or not. This provision, if constitutional, prohibits the use of individual trailers or mobilehomes, whether on a foundation or not, except that in the Residence and Farming Zone an exception is permitted upon approval of the Board of Appeals for a Mobilehome Park, provided that it be set back not less than 200 feet from any right of way.

The vital issue in this case concerns the constitutionality of Section 1803.

The constitutional guaranties relating to due process and equal protection were not intended to limit the subjects upon which the police power of a state may be exercised. *State* v. *Robb,* 100 Me. 180, 185.

Private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare. *York Harbor Village Corporation* v. *Libby, et al.,* 126 Me. 537, 540.

Neither the Fourteenth Amendment of the Constitution of the United States, nor the Constitution of this State, prohibits zoning legislation. *Bolduc* v. *Pinkham, et al.,* 148 Me. 17, 19.

A classification must not be arbitrary. It must be natural and reasonable and based upon an actual difference in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens. If a classification, though necessarily discriminatory, stands these tests, it is not a denial of equal protection of the laws. *York Village Corporation* v. *Libby, et al., supra,* at page 543.

In order to constitute a valid exercise of the police power the restriction imposed by zoning ordinances must bear a substantial relation to the public health, safety, morals or general welfare of the public. *York Harbor Village Corporation* v. *Libby, supra; Toulouse, et al.* v. *Board of Zoning Adjustment,* 147 Me. 387, 393.

In the early days of zoning, municipalities were given rather limited powers in relation thereto. *York Harbor Village Corporation* v. *Libby, supra,* was a comparatively early case in the history of zoning. The ordinance in that

case was enacted under the provisions of P. L., 1925, Chap. 209, which permitted cities of over a certain population and village corporations to restrict by ordinance or by-law buildings or camping grounds to be used for particular purposes to certain parts or zones in the city or village corporation. At that time no provision had been made for comprehensive planning for municipal development. In that case the court said:

> "It is suggested, but we think not proved, that offensiveness to some supersensitive eyes is the only respect in which camping grounds affect the public welfare.
>
> If this were true and proved, we are not prepared to say that we should hold the restrictions to be reasonable and valid, — even if one of the reactions were a depreciation in value of surrounding property.
>
> But the fact 'that considerations, of an aesthetic nature also entered into their passage would not invalidate them.' *Welch vs. Swazey,* 214 U.S. 91, 53 L. Ed. 930."

Since that decision great progress has been made in the field of zoning throughout the country, resulting in a multitude of litigated cases and many irreconcilable decisions dealing with the respective rights of the public and individual property owners relating to the interpretation and constitutionality of various enabling acts and zoning ordinances enacted pursuant thereto. With the development of the law of zoning and the inclusion in enabling acts of provisions for comprehensive planning for municipal development there has been a tendency to broaden the scope of the meaning of the term "general welfare" in determining the purposes for which zoning ordinances may be enacted.

In *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954), the court in upholding the District of Columbia Redevelopment Act said:

> "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."
>
> "The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include mere expediency." *Opinion of Justices* (Mass.) 128 N. E. (2nd) 557, 561 (1955).

See also *Vickers* v. *Township Committee of Gloucester Township* (N. J.), 172 A. (2nd) 218, 221 (1961); *Pierro* v. *Baxendale* (N. J.), 118 A. (2nd) 401, 407 (1955); *Fischer* v. *Bedminster Township* (N. J.), 93 A. (2nd) 378, 382 (1952); *Lionshead Lake, Inc.* v. *Wayne Township* (N. J.), 89 A. (2nd) 693, 697; *Opinion of the Justices* (Mass.), 128 N. E. (2nd) 563, 566, 567.

In considering the provisions of a comprehensive zoning ordinance the legislative body may take into consideration the nature and character of the community and of its proposed zone districts, the nature and trend of the growth of the community and that of surrounding municipalities, the areas of undeveloped property and such other factors that necessarily enter into a reasonable and well-balanced zoning ordinance. We do not feel that aesthetic considerations alone will warrant zoning restrictions against individual mobilehomes. However, we are satisfied that with the development of zoning in this state, a municipality in determining whether there should be a prohibition of individual mobilehomes throughout the municipality, may properly consider, among other factors, the impact of the use of that type of structure upon the development of the community.

There has been a complete revolution in the construction of mobilehomes during the last twenty-five years. Today the modern mobilehome is equipped with all the necessities and conveniences of comfortable living, compressed into an area of sufficient size to meet the needs of an increasing number of people. Such a structure, however elaborately it may be constructed or equipped, does not lose its appearance as a mobilehome by becoming affixed to the realty. Due to the necessity of travel upon the highways to its point of destination it will necessarily have a limited width. As expressed by the Massachusetts Court in the case of *Town of Manchester v. Phillips, supra:* "It looks like a trailer, has the qualities of a trailer superstructure, and has been built as a trailer." It is common knowledge that such a structure, however elaborately built or landscaped, is often detrimental to surrounding property.

The Appellant maintains that the exclusion of individual trailers within the entire township is unconstitutional. It appears from the stipulation that the mobilehome was to be placed on a one-acre lot approximately one mile from the center of the town. We infer from the stipulation of issues that all of the other requirements of the zone in which the mobilehome was to be used were met. The stipulation was short. It contained no information with reference to the nature or character of the community, or the zone districts, the trend of growth of the community, the areas of undeveloped property, or any other factual information. Therefore, we must determine whether the ordinance is reasonable, discriminatory, or arbitrary upon its face.

We are not concerned in the instant case with the question of whether mobilehomes may be prohibited in certain zones and allowed in others. The issue is whether the provision of the zoning ordinance excluding individual mobilehomes throughout the Town of Orono is valid, bearing in mind that an exception is permitted, upon approval of the

Board of Appeals, for a Mobilehome Park in the Residence and Farming Zone. The Appellant cites the case of *Village of LaGrange* v. *Leitch* (Ill.), 35 N. E. (2nd) 346 (1941). In that case the restrictions contained in the zoning ordinance were directed at the *permanent* use to which the property in the various zones was to be devoted. A trailer was used as a temporary office to sell lots. The court held that in view of the *limited* use made of the trailer it could not be said that the zoning ordinance restrictions, as applied to the trailer, bore any relation to the betterment of the health, safety or welfare of the public. Appellant also cites *Gust* v. *Township of Canton* (Mich.), 70 N. W. (2nd) 772 (1955). In that case the zoning ordinance prohibited the establishment or operation of trailer camps anywhere in the township. The court held that in determining whether prohibition of lawful use of land by zoning ordinance has real and substantial relationship to public health, safety, morals or general welfare, in absence of proof on subject, presumption of existence of such relationship and validity of ordinance is resorted to, but not when there are proofs upon which a judicial determination thereof can be made, as when the contrary is proved by competent evidence or appears on the face of the ordinance. The evidence presented showed that landowner's 33 acres of land were located in the open country, and it was not contended that establishment of trailer camps on the land *at the time* would be detrimental to the public health, etc. In holding the ordinance invalid, the court held that the test of the validity of an ordinance is not whether the prohibition may at *some time in the future* bear a real and substantial relationship to the public health, etc., but whether it *presently* does so.

We believe it was the intention of our legislature in enacting the Enabling Act to allow municipalities to plan for the future. The test is whether the prohibition is unreasonable, arbitrary, or discriminatory based upon the rea-

sonably foreseeable future development of the community. See *Duffcon Concrete Products* v. *Borough of Cresskill* (N. J.), 64 A. (2nd) 341, 350 (1949).

In *Vickers* v. *Township Committee of Gloucester Township* (N. J.), 181 A. (2nd) 129 (1961), the Township by ordinance prohibited trailer camps from the entire municipality. Claim was made that such total prohibition was illegal. The court held that a municipality need not provide a place for every use; that it need not open its borders to a use which it reasonably believes should be excluded as repugnant to its zoning scheme. After considering the evidence bearing on the issue the court upheld the ordinance.

The facts in *Napierkowski* v. *Gloucester Township* (N. J.), 150A (2nd) 481 are similar to those in the present case. In that case a zoning ordinance prohibited the use of trailers upon any tract of land within the Township of Gloucester except upon a trailer camp conducted in full compliance with the provisions of the ordinance. The court in upholding the validity of the ordinance said:

> "Provisions for the utilization of trailers in licensed trailer parks as distinguished from the private lot of the trailer owner does not amount to total prohibition, but rather falls within the confines of reasonable regulation. We are cognizant of the fact that there presently are no trailer parks or camps within the township. The township is, however, not obligated to furnish trailer park facilities and so long as such parks are not totally prohibited we need not consider the question of whether the character of the township is such that even exclusion of trailer parks is permissible."

We note that in practically all of the cases in which the question of the reasonableness of a zoning ordinance is raised that extensive testimony or detailed stipulations, bearing on the relationship of the restrictions imposed to the general welfare, were presented. "In considering the

reasonableness of the particular ordinance the general situation, the setting, so to speak is material." *York Village Corporation, supra.*

Every presumption is to be made in favor of the constitutionality of an ordinance passed in pursuance of statutory authority. It will not be declared unconstitutional without clear and irrefutable evidence that it infringes the paramount law. *Donahue* v. *City of Portland,* 137 Me. 83. If it does not appear unreasonable on its face, the objecting party must produce evidence to show that it is in fact unreasonable in its operation. *State* v. *Small,* 126 Me. 235, 237. "The agreed statement in the case contains nothing but the by-law itself bearing on this point. It, therefore, becomes a question of whether upon its face it is unreasonable." *State* v. *Small, supra.*

The principle that zoning ordinances are presumed to be constitutional is one almost universally recognized in jurisdictions throughout the United States. The Law of Zoning and Planning, Rathkopf, Vol. 1, page 21-1 and cases cited.

In the instant case there was no prohibition of mobilehomes throughout the municipality. The use of mobilehomes in Mobilehome Parks was permitted as an exception in the Residence and Farming Zone, upon approval of the Board of Appeals. We are not called upon to determine whether a municipality may constitutionally prohibit the use of mobilehomes throughout its territory. The zoning ordinance is presumed to be valid. No evidence was presented, and we find nothing in the stipulation filed or in the ordinance itself which would give us reason to find that Section 1803, taken as a part of the entire ordinance, is unreasonable, arbitrary or discriminatory.

The Appellant claims that the decision of the Board of Appeals rejecting a variance request was arbitrary, con-

trary to the weight of the evidence and an abuse of discretion.

Section 1102 (a) (2) of the ordinance provides that the Board of Appeals may grant variances from the strict letter of the ordinance in cases of practical difficulty or undue hardship, provided there is no substantial departure from the intent of the ordinances. This authority of the Board of Appeals is limited by Sec. 301 (s) which authorizes a variance "only for height, area, and size of structure or size of yards and open spaces," and provides that the establishment or expansion of a use otherwise prohibited shall not be allowed as a variance.

In view of the fact that the use of individual mobilehomes were prohibited by Section 1803 of the ordinance the Board of Appeals had no jurisdiction to grant the requested variance.

The entry will be

Appeal denied.

GERARD L. FREVE, PETITIONER
vs.
STATE OF MAINE, ET AL., RESPONDENTS

Oxford. Opinion, June 5, 1964.

Conspiracy. Criminal Law.

Variance between indictment charging conspiracy of twelve persons and proof under which three were found guilty, others were found not guilty and others were released from indictment by entry of nolle prosequi was not a material variance and convictions were valid.

When an alleged conspirator is found not guilty, conviction may be had against other alleged conspirators.

ON APPEAL.

This is an appeal from the denial of petitioner's writ of habeas corpus. Appeal denied.

Gerard L. Freve, Pro se.

John W. Benoit, Asst. Attorney General, for Respondents.

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

TAPLEY, J. On appeal. The petitioner filed a petition for writ of habeas corpus under provisions of Chap. 310, P. L., 1963. The petitioner claims that an error of law exists in the proceedings under indictment #515, returned at the February, 1963 Term of the Superior Court, within and for the County of Oxford, in that where an indictment charging conspiracy and naming twelve respondents, only three of whom were found guilty, one of the three being the petitioner, the convictions were invalid.

Upon satisfactory proof of indigency, the petitioner was provided with court appointed counsel. Counsel for the re-

spondent and counsel for the petitioner agreed that the issues raised by the petition were entirely those of law and a hearing was had before a Justice of the Supreme Judicial Court on this basis. After a full and complete hearing the justice denied the writ and affirmed judgment and sentence.

The indictment is based on Sec. 25 of Chap. 30, R. S., 1954, stating in part:

> "If two or more persons conspire and agree together — to commit a crime — they are guilty of a conspiracy —."

The indictment charged twelve respondents with the crime of conspiracy, five of whom were tried, three were convicted and two were found not guilty, one of the three convictions being that of the petitioner. A nolle prosequi was entered by the State as to the other seven respondents.

The petitioner, in effect, charges a variance between the indictment charging conspiracy and the proof where some respondents were found guilty and others not guilty, while other respondents were released from the indictment by the entry of nolle prosequi. The variance between the number of defendants charged in the instant indictment with conspiracy and the number of defendants convicted is not a material variance.

> "Variance between an indictment charging an offense involving several persons and proof establishing guilt against some of them only is not material - - -." 27 Am. Jur., Indictments and Informations, Sec. 183.
>
> "- - - in case several are indicted for a crime which might have been committed by some, although not all, of the defendants, the jury may find some guilty and acquit the others." 42 C. J. S., Indictments and Informations, Sec. 259.

A conviction is valid under indictments where a number of persons are charged in the same indictment, some of

whom are found guilty, others not guilty, others having pleaded guilty and still others being discharged by the process of nolle prosequi. *Breese* v. *United States,* 203 F. 824 (4th Cir. Ct. of Appeals 1913); *Bryant* v. *United States,* 257 F. 378 (5th Cir. Ct. of Appeals 1919); *Harrison, et al.* v. *United States,* 7 F. (2nd) 259 (2nd Cir. Ct. of Appeals 1925); *Belvin, et al.* v. *United States,* 12 F. (2nd) 548 (4th Cir. Ct. of Appeals 1926); *Berger* v. *United States,* 295 U. S. 78 (2nd Cir. Ct. of Appeals 1935); *State* v. *McElroy,* 46 A (2nd) 397 (R. I. 1946); *Hannis* v. *United States,* 246 F. (2nd) 781 (8th Cir. Ct. of Appeals 1957).

When one alleged conspirator is found not guilty, a conviction may be had against other named respondents. *State* v. *Papalos,* 150 Me. 370. In *State* v. *Machesy, et al.,* 135 Me. 488, the court sustained convictions on a conspiracy charge where eighteen persons were named in the indictment, three of whom were not apprehended, nol pros was entered as to one, two were freed by the trial judge and three were found not guilty and nine were found guilty.

The decision of the justice who heard the case was correct and, therefore, the entry shall be,

Appeal denied.

THOMAS DOMENICO AND PASQUALINA DOMENICO
vs.
WALTER J. KAHERL

Cumberland. Opinion, June 8, 1964.

Appeal and Error. Damages. Evidence. Verdict. Trial.

Appeal from judgment rather than appeal from ruling of presiding justice was preferable procedure to be followed by plaintiff protesting denial of motion to set aside verdict on ground that damages awarded were inadequate and to order new trial on damages alone.

Generally, assessment of damages is for jury unless jury has disregarded testimony or acted under some bias, prejudice, or improper influence with result that damages awarded are either excessive or inadequate.

Where smallness of verdict shows that jury may have made a compromise, new trial will be granted.

Award of $350 to woman who was injured when she was eight months pregnant, in view of undoubted danger of miscarriage for period of one week and her justifiable apprehension in regard thereto, was clearly inadequate, revealing that jury must have disregarded or misapplied rules or compromised, and, accordingly, new trial was required on all issues.

ON APPEAL.

This is an appeal from the denial by the Trial Justice of the Plaintiff's motion to set aside the verdict because damages were inadequate, and for a new trial. Appeal sustained. New trial granted.

Robert A. Wilson,
Henry Steinfeld, for Plaintiff.

Woodman, Thompson, Chapman & Hewes,
by *Richard D. Hewes,* for Defendant.

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

SIDDALL, J. The plaintiff, hereafter termed the Appellant, while operating an automobile, was involved in an accident in the intersection of Munjoy and Wilson Streets in the city of Portland. She brought a complaint against the defendant, hereafter called the Appellee. The jury returned a verdict for the Appellant and assessed damages in the sum of $350.00. The Appellant filed a motion with the presiding justice to set aside the verdict on the grounds that the damages awarded were inadequate and to order a new trial on damages alone. Upon denial of this motion the Appellant, on the same ground, appealed from the judgment.

The Appellee makes objection to the appeal because it was an appeal from the judgment rather than an appeal from the ruling of the presiding justice. Upon the facts in this case an appeal from the judgment is proper and preferable under our practice. Field and McKusick M.R.C.P. Sec. 59.4.

As a general rule the assessment of damages is for the jury unless the jury have disregarded the testimony or acted under some bias, prejudice, or improper influence with the result that the damages awarded are either excessive or inadequate. *Conroy* v. *Reid,* 132 Me. 162, 166.

Where the smallness of a verdict shows that a jury may have made a compromise, a new trial will be granted. *Leavitt* v. *Dow,* 105 Me. 53.

At the time of the accident on December 15, 1962, the Appellant was earning $40.00 per week as wages. She was at that time eight months pregnant. In the event of recovery she was entitled to be compensated for her pain and suffering and loss of wages which were found to be the proximate consequences of the negligence of the defendant (Appellee).

There was considerable testimony of the Appellant and her husband bearing on the extent of her pain and suffering. Aside from this testimony the record shows that the Appellant was scheduled for a Caesarean section on or about January 7, 1963. On the day of the accident, Dr. McCann, her physician, was called to see her at the Maine Medical Center. He found her vomiting and complaining of pain in the back and legs. She had what was described as bad bruises on her legs and right shoulder, but no bruises were found on her back. Following a physical examination to determine the condition of the baby, Dr. McCann ordered sedation for the patient. She was referred to Dr. Jack Manol, an orthopedic specialist, in relation to the condition of her back. Thereafter, Dr. McCann had numerous telephone conversations with his patient and prescribed medication for her, but did not see her again until she was admitted to the hospital on December 27, 1962. On that date a Caesarean section was performed, 16 days prior to the expected date of the operation. The Appellant had had two previous Caesarean sections, one in 1944 and one in 1958, and she had numerous fibroid tumors of her womb which had been present for years. She had had several pregnancies which had not resulted in childbirth. The period of her recuperation was three weeks longer than in previous births. Apparently the child suffered no ill-effects from the accident and on cross-examination the doctor testified that the accident had no effect on the delivery of the child or on the healing of the womb; that it would be conjectural to say that the accident hastened the birth of the child; that the patient flowed excessively after the birth, but that condition was related to the fibroid tumor rather than to the accident.

Dr. Jack Manol testified that he examined the patient on December 19, 1962. X-rays of the lumbar-sacral spine were negative. There was a sprain of the lumbar-sacral spine but no dislocation of it. On account of her pregnancy Dr. Manol was unable to prescribe the normal type of treat-

ments usually prescribed for a lumbar-sacral sprain. However, after her recovery from confinement, 20 physiotherapy treatments were given to her at the Maine Medical Center between the dates of February 15 and April 18, 1963. Dr. Manol also testified that during this period of treatment the Appellant, in his opinion, was totally disabled and could not engage in the duties of her usual work, and that in his opinion a lumbar-sacral sprain such as found by him was consistent with the results of an accident in which the person seated behind the wheel of an automobile was thrown forward and backward. We note that Dr. Manol was not subjected to cross-examination.

Dr. Stephen Monaghan, an orthopedic specialist, testified for the defendant. He examined the Appellant on August 5, 1963. At that time the Appellant's back was essentially normal. Dr. Monaghan testified that she did not have any disability at the time he examined her, and that any back strain, in his opinion, had cleared up sometime prior to the time of his examination.

Any apprehension or anxiety suffered by the Appellant before the birth of the child, concerning the safety of the child or her own safety, was an element of damage in this case. There is no indication in the record that the Appellant did not have the sensibilities and feelings which a normal woman has for the safety of her unborn child. On the contrary there was ample testimony, in addition to her own and that of her husband, indicating that she was seriously upset over the possibility of injury to her child. We quote from the testimony of Dr. McCann in describing her condition at the time he saw her on the date of the accident.

"Q And she was nervous and distraught?

A She very definitely was extremely nervous and crying about her baby, wanted to know if her baby was well and if the accident had caused her any damage, especially to the baby.

Q Would you say, Doctor, that her condition was evidenced to you as an expert obstetrician of fear neurosis of losing her child?

A I can't use the word "neurosis"; I would say she was terribly agitated as to the condition of the child, and with good reason."

From the cross-examination of Dr. McCann we quote the following testimony:

"Q Going back to the time you saw her on December 14th, the date of the accident, did you have an opinion then as to the extent of the period of disability that she sustained as a result of this accident?

A Yes.

Q What was that period?

A From the standpoint of the pregnancy I think an additional week of watchful [sic] would determine whether this patient's afterbirth was going to separate and whether or not the accident had done any damage to the uterus. I think a week's observation would be sufficient to tell one way or the other whether or not the accident did affect the pregnancy.

And on redirect examination:

Q Doctor, during this period of watchful waiting that you referred to, that is the period in which you were concerned whether or not there might have been injury to the child and she might lose the child?

A That is right.

Q That is not a period of disability?

A Well, that is what I tried to make quite clear. This is as pertains to the pregnancy. I felt a week's watchful waiting would determine whether or not this accident caused separation of the afterbirth or any damage to the uterus."

Thus, the medical evidence disclosed that for a period of one week after the accident, termed by Dr. McCann a period of watchful waiting, it was not known whether there had been an injury to the child which might cause the loss of the child. During that period of time the mother, as well as her doctor, was aware that she might lose her child. The evidence is clear that she was disturbed over that possibility. Her mental distress, physical damage being present, was an element of damages for which she was entitled to be compensated.

If it were not for the aspect of mental anguish we would not disturb the findings of the jury on the question of damages. However, in view of the undoubted danger of miscarriage for the period of one week after the accident, and the Appellant's justifiable apprehension in regard thereto, having in mind her history of difficulty in childbirth, damages of $350.00 are clearly inadequate. The jury must have disregarded or misapplied the rules of damages or have compromised as to the Appellee's liability. Under these circumstances we cannot send the case back for a rehearing on damages only. A new trial of the entire case must be had.

The entry will be

Appeal sustained.
New trial granted.

UNITY TELEPHONE CO.
AND
AMERICAN SURETY CO. OF NEW YORK.
vs.
DESIGN SERVICE CO., INC.

Waldo. Opinion, June 12, 1964.

Subrogation. Equity. Liability.

Subrogation is device adopted by equity to compel ultimate discharge of obligation by him who in good conscience ought to pay.

Subrogation may arise from agreement between parties or by operation of law where one person has been compelled to pay debt which ought to have been paid by another, thus becoming entitled to exercise remedies which creditor possessed against other.

Subrogation is legal consequence of acts and relationship of parties.

Subrogation is machinery by which equities of one party are worked out through legal rights of another.

Surety's right of subrogation against his principal is absolute, but against third persons is conditional on equities involved.

Where legal fault was found to exist on part of supervising company, which was sued by telephone company and surety company for breach of contract of supervision and inspection, paid surety defense was not applicable.

Where construction company and supervising company were obligated to perform services by telephone company under separate contracts their liability to telephone company for breach of respective contracts was not joint but several and construction company's surety, which prior to action had agreed to pay telephone company specified sum for construction company's failure to construct according to contract, was not entitled to contribution from supervising company.

ON APPEALS.

This case is on cross-appeals. An action by telephone company and surety company for breach of contract of supervision and inspection. Held, that surety became subrogated to obligee's rights against principal and company which had been guilty of negligently failing to perform necessary inspection and supervision of principal's contract. Appeal sustained; case remanded for entry of judgment in favor of surety company and for entry of judgment in favor of telephone company.

Irving, Isaacson by *Linnell and Choate,*
by *G. Curtis Webber,* for Plaintiff.

Silsby and Silsby,
by *Herbert L. Silsby, II,* for Defendant.

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

MARDEN, J. This matter comes to us on cross-appeals.

As a Rural Electrification Administration project in 1955 the Unity Telephone Co. (Unity) proposed to convert its system to a dial system and as an element of it, contracted with L. W. Lander, Inc. (Lander) to construct two dial equipment buildings. The American Surety Co. (Surety) issued a performance bond in favor of Unity conditioned on Lander's proper execution of its contract. Unity also contracted with Design Service Co., Inc. (Design) to provide all engineering services for the project which included Design's obligation to supervise the Lander construction.

Lander failed to construct according to his contract and Unity filed a complaint against Lander for damages. The record does not indicate the disposition of this complaint, but before a complaint was filed by Unity against Design,

Surety agreed with Unity to indemnify Unity up to $4,500 provided that Unity should first exhaust its remedies against Design, and apply any recovery as a credit on the $4,500 for which Surety then obligated itself.

Unity complained against Design and in the course of hearing before jury, Design filed a motion that Surety be substituted as the real party-plaintiff in interest. The trial court denied this motion and following verdict in favor of Unity against Design in the amount of $5,244.72 Design moved for judgment *n.o.v.* and for a new trial, which motion was likewise denied by the trial court. Design's appeal was sustained and a new trial granted. *Unity Telephone Company* v. *Design Service Company of New York, Inc.*, 158 Me. 125, 179 A. (2nd) 804.

Upon this remand to the trial court, Surety was joined as plaintiff in an amended complaint, Design filed amended answer and it was stipulated that the case should be submitted to the Superior Court, jury waived. It was also stipulated:

> That a determination of the equities of the subrogated claim of Surety to the rights of Unity against Design should be made on the basis of the record of the evidence adduced at the prior trial.
>
> That at all relevant times Lander was financially irresponsible and a judgment recovered against it would have been worthless.
>
> That in the present action Surety stands subrogated to the rights of Unity against Design to the extent of $4,500, but that this stipulation is made without prejudice to Design's right to contend that such subrogated rights cannot succeed against it or to Surety's rights to pursue any direct cause of action it may have against Design.
>
> That Surety has paid Unity $4,500.
>
> That final judgment should be entered for Unity against Design in the amount of $744.72 (the dif-

> ference between the amount Surety agreed to and did pay Unity, and the amount of the verdict against Design).

Upon consideration by the Superior Court, it was held that the law of contribution should be applied and that the loss to Unity of $5,244.72 should be equally borne by Design and Surety, and judgment was so rendered, reflecting the stipulation as to the $744.72.

Both Design and Surety appealed, claiming error in applying the theory of contribution rather than the theory of subrogation. Design contends that the contribution theory can stand only if Design and Surety are liable to each other, which they are not, and that under a subrogation theory the equities of the case do not justify shifting Surety's burden to Design.

Surety contends also that the theory of subrogation applies, but that the equities of the case require exoneration of Surety.

The controversy is founded upon disagreement as to the application of the principles of subrogation to the current facts. Expressed in factual terms, Design urges (1) that its breach of obligation to inspect and supervise Lander's work, whereby Lander would not have failed in the performance of his contract, did not contribute in any way to the damage occasioned Surety and (2) that Surety was paid for the risk which occurred. Surety argues that the only risk which it was compensated to take was the insolvency of its principal, that it could proceed against any person against which Unity could proceed, that Lander's insolvency is only fortuitous and that Design, whose negligent conduct contributed to Unity's damage, is responsible to it in full.

Preliminarily it is proper to say that consideration of the principles of contribution by the Superior Court were not unjustified in the light of the language in the reported case,

but neither Surety nor the relative issues of subrogation and contribution were before the court at that time, and at the present stage of the case both parties urge that the principles of contribution are not applicable, and that the principle of subrogation applies, but disagree upon its application.

The liability of Lander and Design to Unity was not joint but several. Lander and Design were not co-obligors to Unity. If it be accepted that both Lander and Design were obligated to Unity on a "common obligation," although stemming from separate contracts, — which is the basis of "contribution" *inter se,* 13 Am. Jur., Contribution § 9, Surety is not standing in Lander's shoes, is not substituted for Lander, but for Unity. We agree with counsel that the foundation for contribution is not present. See *Maryland Casualty Co.* v. *Gough,* 65 N. E. (2nd) 858, [14, 15] 866 (Ohio 1946) and *Southern Surety Co.* v. *Tessum,* 228 N. W. 326, [2] 329 (Minn. 1929).

In general terms and as applied to our present problem, subrogation is frequently referred to as a "doctrine of substitution" and may be defined as the substitution of one person in the place of another with reference to a lawful claim. It is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. It may arise from agreement between the parties or by operation of law where one person has been compelled to pay a debt which ought to have been paid by another, thus becoming entitled to exercise the remedies which the creditor possessed against the other. 50 Am. Jur., Subrogation, § 2. Legal subrogation follows as the legal consequence of the acts and relationship of the parties. Same, § 5. It is a machinery by which the equities of one party are worked out through the legal rights of another. Same, § 6.

Owing to its equitable origin the doctrine is governed in its operation by principles of equity and the equities of the parties will be weighed and balanced, Same, § 11.

The right of a surety on subrogation against his principal is absolute but against third persons is conditional upon the equities involved. Same, § 111.

The statement that subrogation will not be enforced to the prejudice of other rights of equal or higher rank, Same, § 13, represents the weight of authority but there are cases *contra.* See comment note 137 A. L. R. 700, 706.

This doctrine as expressed in the general rule that an insurer, on paying a loss, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss, has been recognized in *Leavitt* v. *Canadian Pacific Railway Company,* 90 Me. 153, 160, 37 A. 886, and in *Home Insurance Co.* v. *Bishop,* 140 Me. 72, 78, 34 A. (2nd) 22, and instances of a liability or collision insurer, having paid off a claimant, proceeding in subrogation against a third party are common.

We are aware of no case which has reached this court involving the subrogation rights of a compensated surety against a third party, and American decisions divide themselves into two categories, — each with conflicting rationale, — as might be expected where the several courts are charged with weighing equities.

1. Cases establishing a majority rule that where recovery by the surety depends solely upon the balance of the equities between the surety and a third party, surety, to prevail, must establish a "superior equity."

Where equities are considered equal no recovery is allowed. Characteristic of such case is one where the surety on a fidelity bond indemnifies an employer for misuse of funds by an employee, its

principal, and seeks by subrogation to recover from a bank or other endorser, which in good faith and without negligence has cashed checks forged by the defaulting employee. See *National Surety Corporation* v. *Edwards House Co., et al.*, 4 So. (2nd) 340 (Miss. 1941); *Meyers* v. *Bank of America, N. T. & S. Association*, 77 P. (2nd) 1084, [8] 1089 (Cal. Sup. Ct. 1938) (comment on lack of privity between surety and third party); *United States Fidelity & Guaranty Co.* v. *First National Bank in Dallas, Texas, et al.*, 172 F. (2nd) 258, [15] 263 (Fifth CCA 1949) (comment on obligee's election to recover from surety); *American Surety Co. of New York* v. *Multnomah County*, 138 P. (2nd) 597, [14-16] 609 (Ore. 1943) and see *National Surety Corporation* v. *Allen-Codell Co., et al.*, 70 F. Supp. 189 where inequitable conduct of surety precluded "superior equity."

Into this category falls a line of cases, contributing greatly to numerical strength of the majority rule, which deny subrogation rights to a "paid" surety where the third party defendant, though legally liable, is not guilty of negligence or of an active wrong. These cases are characterized as standing for the "compensated surety defense"[1] and seem to have been led by *American Bonding Co. of Baltimore* v. *First Nat. Bank of Covington, et al.*, 85 S. W. 190 (Ky. 1905), followed by *Louisville Trust Co.* v. *Royal Indemnity Co.*, 20 S. W. (2nd) 71 (Ky. 1929) and recognized in *Security Fence Company* v. *Manchester Federal Savings & Loan Association*, 136 A. (2nd) 910, [2-4] 912 (N. H. 1957) and *Bank of Fort Mill* v. *Lawyers*

[1] See "The End of the 'Compensated Surety Defense' in Subrogation Cases" by Bunge & Metge in 22 Insurance Counsel Journal 453 (1955).

Title Insurance Corporation, 268 F. (2nd) 313, [1, 2] 315 (Fourth CCA 1959).

There are, however, cases to the contrary and see *National Surety Co.* v. *National City Bank,* 172 N. Y. S. 413 (Sup. Ct. A.D. 1918) and *Liberty Mut. Ins. Co.* v. *First National Bank in Dallas,* 245 S. W. (2nd) 237 (Texas 1951) wherein the Supreme Court of Texas disagrees with the Circuit Court of Appeals in *Fidelity, supra,* in a case involving similar facts and the same defendant.

As between an innocent surety and a wrong doing (negligent) third party, the equity of the surety is superior and the recovery is allowed. See *Dantzler Lumber & Export Co.* v. *Columbia Gas Co.,* 156 So. 116 (Fla. 1934); *National Surety Corporation* v. *Lybrand,* 9 N. Y. S. (2nd) 554 (Sup. Ct. A.D. 1939); *Martin* v. *Federal Surety Co.,* 58 F. (2nd) 79 (Eighth CCA 1932) and *Security Fence Company, supra.*

See also restatement, Security, § 141, Subrogation and subparagraph (c) with comment.

2. Where, although equities between the surety and the third party may be considered equal, the third party has a contractual obligation to the obligee on the bond, as, to use the same type of illustration, where the third party is a bank which, in cashing checks forged by a defaulting employee, has guaranteed prior endorsements or is made responsible by a negotiable instrument statute. Here it has been held that the surety may recover in subrogation on the contractual obligation of the third party to the obligee on the bond. See *Standard Acc. Ins. Co.* v. *Pellecchia, et al.,* 104 A (2nd) 288 (N. J. 1954), in which the late Chief Justice Vanderbilt discusses subrogation at length and at p. 299

directs his comment to the rights of the "paid" and subrogated surety. Also *Liberty Mut. Ins. Co., supra,* and *State, for Use of National Surety Corp.* v. *Malvaney, et al.,* 72 So. (2nd) 424 (Miss. 1954), which case is factually close to the one at bar.

If it be considered that the existence of a contractual duty owed by the third party to the obligee on the bond creates "equities" in favor of the obligee, — and surety, the general rule remains inviolate.

In considering equities in the present case a sentence on p. 136 of the *Unity* case in 158 Maine, which reads "In sum and in substance, we are constrained to state that as a result of the agreement between the American Surety Company and Unity a serious problem of inequity and injustice has been created and in its creation, Unity is not without being subject to censure" ostensibly has bearing. However, the issue before the court at that time was upon the propriety of requiring Surety to come into the case openly as a party-plaintiff and the reference to inequity as applied to Unity was not made in a valuation of its position against Design, but as a party to the arrangement with Surety whereby Surety was proceeding as a concealed plaintiff-in-interest.

In the case before us Surety paid off Unity for the default of its principal, Lander, and became subrogated to Unity's rights against Lander and any third person obligated to Unity. Whether we apply the doctrine of subrogation by weighing equities between Unity (and Surety) and Design or to the contractual obligation of Design to Unity the result is the same. In equity, Unity (and Surety) are innocent, by jury determination Design was guilty of negligently failing to perform the necessary inspection and supervision of the Lander contract, and Unity-Surety equities are superior to those of Design. If the right of Surety

on subrogation is to rest upon the presence or absence of a contractual obligation owed by Design to Unity, that presence and liability under it has been determined.

Contrary to Design's contention that its breach of contractual duty did not contribute to Unity's damage, a jury has found otherwise. Design shares the responsibility of Lander's default and thus contributed to the cause of Surety's liability. While the finding of legal "fault" in Design's conduct removes the applicability of the "paid surety defense," — were we inclined to consider it, *Pellecchia* in [15] at p. 302 points out that "(t)his argument loses sight of two fundamental facts; first, that even if the surety recovers against the third party on subrogation it still has been put to the expense of paying agent's commissions on the writing of its bond, to the necessity of investigating the insured's claim and of settling or litigating it, and, second, that the amounts of recoveries by subrogation are taken into consideration in arriving at the amount of premiums to be charged for surety bonds." We adopt *Pellecchia.*

Surety is entitled, under the doctrine of subrogation, to recover from Design $4,500.

It does not become necessary to discuss point 3 of Surety's appeal.

As to Design Service Co., Inc. appeal sustained. As to American Surety Co. New York appeal sustained.

Case remanded to the Superior Court for entry of judgment in favor of American Surety Co. of New York for $4,500.00 and for entry of judgment in favor of Unity Telephone Co. for $744.72.

HAROLD J. CLUKEY
vs.
STATE OF MAINE

Penobscot. Opinion, June 29, 1964.

Indictment. Double Jeopardy. Mistrial. Criminal Law.

Conditions which will warrant discharge of jury and which, if they appear of record, will bar plea of former jeopardy are: (1) consent of respondent; (2) illness of court, member of jury, or respondent; (3) absenting from trial of member of panel or respondent; (4) where term of court is fixed in duration and ends before verdict; and (5) where jury cannot agree.

Defendant can be tried anew upon same charge where mistrial is ordered upon his motion or with his consent.

New trial and subsequent conviction could not be avoided on claim of double jeopardy, where mistrial had been granted on record showing that respondent's counsel stated that respondent had instructed him to move for mistrial.

Defense counsel's failure to assert plea of double jeopardy after mistrial, did not establish inadequate representation, where record disclosed that defendant himself had requested mistrial.

ON APPEAL.

Petitioner appeals from denial of his petition for a writ of error *coram nobis* claiming double jeopardy. Appeal denied.

Norman S. Reef, for Plaintiff.
John W. Benoit, Asst. Atty. Gen., for State.

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

WEBBER, J. In 1962 the petitioner, Harold J. Clukey, was tried by a jury upon an indictment charging a felony. In the course of the trial the presiding justice concluded

that certain words uttered by a witness for the State and an inquiry on the part of counsel for the State during a colloquy with the court might improperly prejudice the mind of the jury against the then respondent. In the absence of the jury the presiding justice expressed this concern to counsel and indicated that if the respondent desired to request an order for mistrial such request would be granted. The respondent then conferred with his counsel who thereafter stated to the court: "May it please the Court, the defendant instructs me to move for a mistrial." The motion was granted forthwith. Two days later the respondent, still represented by the same counsel, pleaded guilty to the charge which had been the subject of the trial so abruptly terminated. He was thereupon sentenced and is now in custody.

On July 23, 1963 Mr. Clukey filed a petition for the writ of error *coram nobis*. Upon his request for new counsel and proof of indigency his present attorney was appointed by the court. The petition in effect charges that at the time of his conviction and sentence the petitioner was "not represented by adequate counsel" and that this inadequacy was evidenced by the failure of counsel to assert on his behalf the plea of double jeopardy. The petitioner makes no other accusation of lack of skill or diligence on the part of his former attorney. The underlying and decisive question is whether or not there was any occasion for competent counsel to claim double jeopardy under the circumstances then existing. The justice below denied the petition and the petitioner's appeal is before us.

The principles which govern mistrial were fully set forth in *State* v. *Slorah,* 118 Me. 203, 209, 106 A. 768, 771, as follows:

> "Certain conditions, if arising in the trial of a case, have come to be well recognized as constituting that 'urgent necessity' which will warrant the discharge of a jury, and if they appear of record

> *will bar a plea of former jeopardy:* (1) *the consent of the respondent,* (2) illness of the court, a member of the jury, or the respondent, (3) the absenting from the trial of a member of the panel or of the respondent, (4) where the term of court is fixed in duration and ends before verdict, (5) where the jury cannot agree." (Emphasis ours.)

The statement above quoted was incorporated in the opinion of the court and in the dissenting opinion in *State* v. *Sanborn,* 157 Me. 424, 440, 457, 173 A. (2nd) 854, 862, 871. The law is settled that where mistrial is ordered upon the respondent's motion or with his consent he can thereafter be tried anew upon the same charge. The petitioner seems not to disagree. His position, if we understand it correctly, is summarized by one sentence in his brief: "We had no consent in this case, although the record reveals that there was consent." As to this we can only say that the record before us stands uncontradicted. There is not a scintilla of evidence to cast doubt upon the decisive fact that the petitioner not only consented to the mistrial but initiated that action by motion after being given leave to do so by the court. The petitioner could not thereafter avoid a new trial or his subsequent conviction by claiming double jeopardy and his then counsel had no reason to suggest such a futile action. For reasons of his own not apparent or important here, the petitioner saw fit to waive his right to a new trial and to offer a plea of guilty. Upon his plea he was convicted and properly sentenced. He shows no reason why the writ of error *coram nobis* should issue.

Appeal denied.

A. H. BENOIT & COMPANY
vs.
ERNEST H. JOHNSON
STATE TAX ASSESSOR

Cumberland. Opinion, July 1, 1964.

Laches. Taxation. Sales and Use Tax.

In absence of clear manifestation of intention that property or title to garments should pass to buyer, before alteration of garments by retail store, the alterations constituted "services that are part of sale" within sales and use tax definitions of sale price, and charges for the alterations were part of the "sales price."

"Laches" is omission to assert a right for an unreasonable and unexplained period under circumstances prejudicial to adverse party.

For surmounting considerations of public policy, neither the defense of waiver, equitable estoppel, or laches can avail against the State in the instant case.

ON REPORT.

In this sales tax case, plaintiff appeals judgment favoring tax assessor. Appeal denied; judgment for state tax assessor.

Malcolm S. Stevenson, for Plaintiff.

Ralph W. Farris, Sr.,
Jon R. Doyle, Sr., Asst. Attys. Gen., for Defendant.

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

SULLIVAN, J. This case is reported to this court by agreement of the parties for such final decision as the rights of the parties may require. M. R. C. P., Rule 72.

The facts are stipulated as follows:

"1. A. H. Benoit & Company (hereafter referred to as Benoit's), is a retail store in Portland, Maine, which sells, inter alia, clothing for women and children. In its advertising the store sets forth a sales price for each article of clothing. When clothing is purchased in the store one sales slip is used for the purchase of an article or articles of clothing. A separate sales slip is utilized for any alteration to be made in articles of clothing purchased in the store. At the time the clothing is purchased a sales slip recording the price and sales tax is given to the customer. In the case of charge sales a copy of the sales slip is sent to the store accounting office for billing. The same is true with any sales slip involved for alterations.

"The area and personnel involved in making alterations in articles of clothing constitute a separate department in Benoit's store. The employees, performing this work are Benoit employees. Charges for alterations are based on a scale according to the functions to be performed but are generally standard for the geographic areas in which the Benoit's store operates. Generally speaking Benoit does not offer these services to the general public. While the clothing which is being altered is in Benoit's possession the risk of loss is upon Benoit's.

"The customer, with the exception of choosing the clothing, relies upon Benoit's for the accuracy of measurements, fit, etc. when they are requested. Benoit's guarantees the fit of altered article to the customer's satisfaction. The customer has the right to refuse to accept the altered clothing if it is in her opinion not satisfactory; if this occurs any monies paid will be refunded.

"2. On September 26, 1963, the State of Maine, Bureau of Taxation, made an assessment of sales tax against A. H. Benoit & Company for $267.30, which assessment covered the period September 1, 1961 to June 30, 1963. The above tax is attributable to charges for alterations made by Benoit's.

"3. On October 11, 1963, A. H. Benoit & Company petitioned the State of Maine, Bureau of Taxation, for reconsideration of said assessment.

"4. On November 18, 1963, a hearing was held on said petition before Ernest H. Johnson, State Tax Assessor.

"5. On December 27, 1963, the assessment was reconsidered by the State Tax Assessor and found to be correct.

"6. On January 21, 1964, A. H. Benoit and Company appealed from the decision on reconsideration to the Cumberland County Superior Court in accordance with section 33 of Chapter 17, R. S. of Maine, of 1954, as amended, and in accordance with Rule 80-B of Maine Rules of Civil Procedure."

The following are the issues stipulated by these parties:

"1. Whether charges for alterations of clothing whether separately stated or not, are to be considered part of the taxable sales price, as services that are a part of a sale.

"2. Does the failure, by the State of Maine, Bureau of Taxation, to assess sales taxes against A. H. Benoit & Co., in regards to alteration charges, from the effective date of the Maine Sales and Use Tax Law until September 26, 1963, constitute laches or waiver."

The Sales and Use Tax, R. S., c. 17, § 2, in its pertinence here contains the following definition:

" 'Sale price' means the total amount of the sale - - - - price - - - - of a retail sale including any services that are a part of such sale, valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property of any kind or nature - - - - nor shall 'sale price' include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated - - - - - - "

The Uniform Sales Act, R. S., c. 185, contains this subjoined text:

> "**Sec. 18. Property in specific goods passes when parties so intend.** —
>
> "**1.** Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> "**II.** For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.
>
> "**Sec. 19. Rules for ascertaining intention.**—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer
>
> "Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.
>
> "Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing is done."

- -

The Uniform Sales Act, R. S., c. 185, § 76, defines "deliverable state;"

> "Goods are in a 'deliverable state' within the meaning of this chapter when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

> "- - - - it is not necessary in order to preclude the presumption of an immediate transfer of the property in the goods that the work to be done by the seller shall be such as to change the character of the goods - - -"
>
> Williston on Sales, Revised Edition, § 265, Vol. 2, P. 17.
>
> "- - - - If the property has passed, the risk of accidental loss or damage rests upon the buyer. If the property has not passed, the risk still remains with the seller - - - -"
>
> Williston, *supra,* § 273, Vol. 2, P. 38.

This court in *Wallworth's Sons* v. *Daniel E. Cummings Co.* (1937), 135 Me. 267, 269, 194 A. 890, 891, noted:

> "The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. - - - - - Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties - - - - -"

The stipulated facts in the instant case relate that there is no delivery of the garment until the alterations have been made by the seller. While the clothing to be altered remains in the seller's possession it is conceded that the risk of loss is borne by the seller. *"The customer has the right to refuse to accept the altered clothing if it is in her opinion not satisfactory; if this occurs any monies paid will be refunded."*

For want of a clear manifestation of an intention that property or title passes to the buyer before alteration of a garment (Williston, *supra,* Vol. 2, § 265, P. 18) the factual concordance of these parties confirms (R. S., c. 185, § 19, Rule 2, *supra*) that the alterations by consensual agreement are accomplished prior to the consummation of the sale of the clothing and constitute *"services that are a part of such*

sale." (R. S., c. 17, § 2, *supra.*) The charge for alterations must be deemed to be a component of the "*sale price.*" The seller's practice of recording such a charge separately in its accounting system is not meaningful under the circumstances of this controversy. Nor are we persuaded that the alterations in contemplation here are within an undistended purview of the classification, "*labor or services used in installing or applying or repairing the property sold.*" The seller "*guarantees the fit of altered article to the customer's satisfaction.*" It thus appears that the customer bargains for a garment which after alteration will not only fit her or the child but will be "*in her opinion*" satisfactory to the customer.

Our considered resolution of the first stipulated issue of these parties is that the charges for clothing alterations as reported and particularized by the parties must be considered a part of the taxable sales price of the clothing and as services which are a part of a sale.

A Sales and Use Tax became statutory law in this State on May 3, A. D. 1951. P. L., 1951, c. 250. No tax which A. H. Benoit & Company was obligated to collect and transmit for alteration charges was assessed by the Bureau of Taxation from May 3, 1951 until the tax here challenged was demanded on September 26, 1963 for alteration charges during the period from September 1, 1961 to June 30, 1963. Benoit & Co. protest that the State has accordingly precluded itself by an imputable waiver or because of chargeable laches from exacting the tax now litigated.

Benoit & Co. argues that the State Bureau of Taxation, as an administrative agency of government, by its inaction through twelve years, by its silence in any regulation relative to "the ambiguous Statutory language, and by its publication in the Information Bulletin of language suggesting non-taxability of the subject matter," "by its delay, coupled with acquiescence through both silence and publication of

non-taxability" has "in effect precluded itself from now making an arbitrary singular retroactive assessment" against Benoit & Co. to the latter's detriment.

The language of R. S., c. 185, § 76 pertinent to the instant case contains no perceptible or indicated ambiguity. No evidence of arbitrariness in the disputed assessment is discernible or demonstrated.

Benoit's in asserting waiver by the State employs the term waiver much as it was recognized in *Houlton Trust Co.* v. *Lumbert,* 136 Me. 184, 186, 5 A. (2nd) 921, 922:

> " ' - - - - A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with will be deemed to have waived it.' "

Benoit & Co. also couches in its defense the element of equitable estoppel:

> " - - - - The doctrine of estoppel rests on an act that has misled one who, relying on it, has been put in a position where he will sustain a loss or injury - - - - "
>
> *4 One Box Machine Makers* v. *Wirebounds Co.,* 131 Me. 70, 78, 159 A. 496, 499.

Benoit's plies the defense of laches, an omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party. *Stewart* v. *Grant,* 126 Me. 195, 201, 137 A. 63.

For surmounting considerations of public policy neither the defense of waiver, equitable estoppel nor laches can avail against the State in the instant case:

"There can be no laches, waiver or estoppel imputed to the State."

In re Moss' Will, 277 App. Div. 289, 98 N. Y. S. (2nd) 777, 780.

See, also, *People* v. *Minuse,* 190 Misc. 57, 70 N. Y. S. (2nd) 426, 429.

"It seems to be universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental functions of collecting taxes legally due. The reason for the rule is obvious: no administrative officer is vested with the power to abrogate the statute law of the State, nor to grant an individual an exemption from the general operation of the law - - - -"

Comptroller of Treasury, Retail Sales Tax Division v. *Atlas General Industries,* 234 Md. 77, 198 A. (2nd) 86, 90.

" - - - - Collection of a tax is a governmental function in the performance of which a city may not be bound or estopped by unauthorized acts of its officers.

City of Bayonne v. *Murphy,* 7 N. J. 298, 81 A. (2nd) 485, 492.

" ' - - - - Beginning with *Wood v.* [*Missouri*] *K. & T. Railway Co.,* 11 Kan. 323, 349, there is a long and undeviating line of decisions - - - which holds that laches and estoppel do not operate against the state, that no procrastination of public officials prejudices the state, and that their tardiness neither bars nor defeats the state from vindicating its sovereign rights, except where positive statutes so provide - - - ' "

State ex rel. Boynton v. *Wheat Farming Co.,* 137 Kan. 697, 22 P. (2nd) 1093, 1101.

See, Vol. 30, C. J. S., Equity, § 114, P. 526; 1 A. L. R. (2nd) § 5, P. 344.

"Bearing in mind that local, county and State taxes are all included in one tax, it is clear that in this State the town is the State for the purpose of col-

> lecting such taxes. In full realization of the fact that few cases can be found bearing squarely on the point, we are nevertheless of the opinion that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right."
>
> *Inhabitants of Town of Milo* v. *Milo Water Co.*, 131 Me. 372, 379, 163 A. 163.
>
> See, also, *State* v. *Bean*, 159 Me. 455, 458, 195 A. (2nd) 68.

The subjoined statement of this court in *State* v. *York Utilities Co.*, 142 Me. 40, 44, 45 A. (2nd) 634, 635-636, is very germane here:

> "Counsel for the defendant contends, however, that the state tax department for many years assessed the excise tax against the defendant in accordance with the defendant's present interpretation of it and that such interpretation acted on for many years should be controlling on the court. The presiding justice, who wrote an exhaustive opinion on this subject, has a sufficient answer to this claim. He said: 'While in a doubtful case, such a consideration should have weight, and perhaps great weight as a guide to judicial interpretation of a statute it cannot overcome the clear meaning as expressed in the statute itself. Such consideration is at best but a guide to the ascertainment of legislative intent. To make it a hard and fast rule for the construction of statutes would result in transferring the legislative and judicial functions to administrative agencies, a result fostered elsewhere but which as yet has obtained no foothold here in Maine.'
>
> "Both the wording of the statute in question and its relationship to other provisions show clearly what the legislature intended. The effect is not absurd or unreasonable. Neither an administrative agency nor the court has any right to modify its provisions."

In *Claiborne Sales Co.* v. *Collector of Revenue,* 233 La. 1061, 99 So. (2nd) 345, 347, the Louisiana Court states the rule as follows:

> " 'The mere failure of public officers charged with a public duty to enforce statutory and constitutional provisions in respect to the levy and collection of taxes, or the acquiescence of public officers in conditions that exempted certain property from its fair share of the burdens of taxation, should not be permitted to stand in the way of the correct administration of the law, or be construed to estop more diligent and efficient public officers when they attempt to perform their duty by bringing in to the revenue proper subjects of taxation that had theretofore been allowed to escape the payment of taxes.' "

Henderson v. *Gill,* 229 N. C. 313, 49 S. E. (2nd) 754, dealt with an affair wherein a tax auditor and collector had given misleading advice and instructions to a retailer who relied thereon and thus became deprived of the opportunity to collect or feasibly recoup sales taxes from purchasers as the law required. The retailer was adjudged by the court to be liable for the tax.

> " - - - - The imposition and collection of taxes are, of course, governmental functions; and the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid; and under the law as we understand it neither can their conduct or advice create an estoppel against the State by these retail merchants on the theory of their mere agency since they are the agents of the law, with a fixed liability to account for the tax imposed - - - - "
> 49 S. E. (2nd) at 756.

The mandate shall be:

Appeal denied:
Judgment for the
State Tax Assessor.

LUCIEN ROY
vs.
GEORGE COOPER AND P. B. MUTRIE
MOTOR TRANSPORTATION, INC.

York. Opinion, July 14, 1964.

Public Utilities Commission. Statutes of Limitations.

Section 14 of Chapter 48, R. S., 1954 supplement, applies only to claims against motor transportation carrying passengers for hire.

As to claims against motor transportation carrying freight for hire, the general statutes of limitations provided by section 90, chapter 112, R. S., 1954 supplement, applies.

ON APPEAL.

On appeal from a dismissal of complaint urging that statute of limitations provided by R. S., Chapter 48, 814 does not apply. Appeal sustained.

James H. Dinean, for Plaintiff.

Woodman, Thompson, Chapman, and Hewes, by *Richard D. Hewes,* for Defendant.

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

MARDEN, J. On appeal from a dismissal.

Plaintiff complains that on April 12, 1960 the operator (Cooper) and the lessee (Mutrie) of a motor tank truck, by negligent conduct, caused the truck to overturn, whereby its cargo of gasoline was discharged onto plaintiff's property to his damage. It is stipulated that the defendants Cooper and Mutrie were, at all times pertinent to the action, subject to the supervision and control of the Public Utilities Commission. The complaint was brought August 30, 1963, defendant pleaded in special defense the statute of limita-

tions created by Chapter 48, § 14, R. S. Supplement,[1] and moved that the complaint be dismissed. The trial court dismissed the complaint to which plaintiff appeals urging that the special period of limitation of actions provided in R. S., Chapter 48, § 14 does not apply and relies upon *Steele* v. *Smalley*, 141 Me. 355, 44 A. (2nd) 213.

To illustrate the applicability of *Steele* to the present action, a review of the development of the present Section 14 of Chapter 48 is helpful.

Chapter 66 of the Revised Statutes of 1930, entitled "Motor Vehicles Carrying Passengers for Hire," in Section 11, provided a period of "one year next after the cause of action occurs" as the time within which actions of tort for injuries to the person or property caused by the operation of motor vehicles subject to the supervision and control of the Public Utilities Commission could be initiated. As indicated by the title to the Chapter, the only motor vehicles then subject to the supervision and control of the Public Utilities Commission were those carrying persons for hire.

In 1933 (P. L., 1933, Chapter 259) the legislature recognized the business of operating motor trucks for hire in the carriage of freight, established classes within that industry of common and contract carriers, and placed such carriage under the supervision and control of the Public Utilities Commission. This act made no mention of the subsisting Chapter 66, above mentioned, was not an amendment to it and embodied no statute of limitations as applying to tort claims against the newly recognized type of public carriage.

In the 1944 revision of the statutes the above mentioned Chapter 66 became Chapter 44, entitled "Operation of Motor

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[1] "Civil actions for injuries to the person or for death and for injuries to or destruction of property, caused by the ownership, operation, maintenance or use on the ways of the state of motor vehicles or trailers, subject to the supervision and control of the commission, shall be commenced only 2 years next after the cause of action occurs."

Vehicles for Profit" but the first 16 sections of the chapter concerned motor vehicles carrying passengers for hire and, except for minor amendments not here pertinent, were a repetition of Chapter 66, R. S., 1930, including, as Section 12, the special statute of limitations for actions caused by the operation of motor vehicles "subject to the supervision and control of the public utilities commission." Sections 17 to 31, inclusive, of Chapter 44 concerned motor vehicles carrying freight for hire and, in pertinent detail, are collectively the Chapter 259 of the Public Laws of 1933. To reiterate, Chapter 44 of the Revised Statutes of 1944 was a consolidation of Chapter 66, R. S., 1930 and Chapter 259, P. L., 1933, but the distinction of the respective subject matters was retained, and was the state of the law when *Steele* came to this court.[2]

The only changes to the section of the statute with which we are concerned, since 1944, is a 1947 amendment (P. L., 1947, Chapter 156) which increases the period of limitation from the 1 year to 2 years, the 1954 revision in which the subject of Chapter 44 becomes Chapter 48 and the amendment of 1961 (P. L., 1961, Chapter 317, Section 121) which revises the working of the section to conform to Rule 2 of the Maine Rules of Civil Procedure.

Steele v. *Smalley* controls the present case. Section 14 of Chapter 48, R. S., 1954 Supplement applies only to claims against motor transportation carrying passengers for hire. As to claims against motor transportation carrying freight for hire the general statute of limitations provided by Section 90, Chapter 112, R. S., 1954 Supplement, applies.

Appeal sustained.

[2] The dates involved in *Steele* do not appear in the reported case. Records in Cumberland County reveal that the Writ was dated April 26, 1945, entered at the June Term of that year, defendant's plea of general issue, with brief statement, raising the special statute of limitations was filed, plaintiff's demurrer to the plea, and hearing thereon all occurred on June 6, 1945. The 1944 revision of the statutes, according to the foreword in Vol. I, became effective December 30, 1944.

IN RE: ESTATE OF CHARLES OTIS FOSS

Cumberland. Opinion, July 16, 1964.

Wills. Inheritance.

The power of devising by will has been termed a legal incident to ownership and one of the most sacred rights attached to property.

Intestacy statutes are provided to fill the vacuum created when there is no plan of distribution by the decedent and to provide an orderly pattern based upon the presumption that the surviving spouse and those who stand in closest relationship within the blood line are the natural objects of the decedent's bounty.

ON APPEAL.

On appeal from the Probate Court by agreement of the parties on an agreed statement of facts under the provisions of R. S., Chapter 15, Section 32, as amended. Appeal sustained. Cases remanded to the Probate Court for further proceedings in accordance with this opinion.

Mark L. Barrett, for Helen C. Kelley.

Edward F. Dana, for Canal National Bank.

Bernstein, Shur, Sawyer and Nelson,
by *C. Daniel Ward,* for Children's Hospital.

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

WEBBER, J. This was an appeal from the Probate Court by agreement of the parties on an agreed statement of facts under the provisions of R. S., Chapter 153, Section 32, as amended.

Charles Otis Foss died testate on March 3, 1963 survived by his widow but leaving neither issue nor kindred. The widow and testator were living together at his decease. His

entire estate consists of personal property. His will made certain specific bequests including some provision for his widow with an ultimate remainder over to charitable beneficiaries, one of which is appellant here. The widow seasonably waived the will and the corporate executor petitioned for determination of the extent of her interest after waiver. The Probate Court determined that she was entitled to the entire net estate to the exclusion of all other takers named in the will. The court on appeal is required to interpret the provisions of R. S., Chap. 170, Secs. 14 and 20.

R. S., 1944, Ch. 156, Sec. 1, Subsec. I provided (as to descent of real estate) in part: "If no kindred, the whole to the widow." Sec. 20 (as to descent of personal property) provided that "the residue shall be distributed * * * by the rules provided for the distribution of real estate." Sec. 14 provided (as to the share of a widow who waived the provisions of a will) that she would take "the same distributive share * * * as is provided by law in intestate estates." By reference to Secs. 1 and 20 therefore the widow waiving the will, there being no kindred, took all.

P. L., 1945, Chap. 76 added an exception to R. S., 1944, Chap. 156, Sec. 14 in these terms: "Except that if such testator, or testatrix, died *leaving no kindred,* such widow or widower shall have and receive the same * * * distributive share of the real and personal estate of such testator or testatrix as is provided by law in intestate estates of persons deceased *who die leaving kindred.*" (Emphasis ours.) After this amendment the widow's waiver produced the same share for her that she would have received by intestacy if the decedent left kindred but less than she would have received by intestacy if the decedent left no kindred. Stated otherwise, a widow could thereafter under no circumstances receive by mere waiver a distributive share of the net personal estate in excess of one-half thereof. This

provision was designed to protect the right of a testator to dispose effectively of at least one-half of his net personal estate without risk that his dispositive actions could be negated by action of his surviving spouse.

R. S., 1944, Chap. 156, Sec. 1, Subsec. I was amended by P. L., 1949, Chap. 439 to provide in part that in the case of intestacy where the decedent left no issue, his widow who lived with decedent at the time of his death would take up to $5,000 plus one-half of the remaining net estate in competition with his kindred. Subsequent references in this opinion to the "widow" will pertain only to widows who otherwise qualify as having lived with the decedent at the time of his death, such decedent having left no issue.

The revision of 1954 incorporated the provisions above described into Chap. 170, Secs. 1, 14 and 20. The $5,000 preferential share of the widow was increased to $10,000 by P. L., 1957, Chap. 290. The 1957 amendment, however, went further and provided in part with respect to the rules of descent of personal property, no issue surviving (amending R. S., Chap. 170, Sec. 20) as follows:

> "B. If the residue found by the probate court was more than $10,000, the sum of $10,000, and of the remaining personal property, ½ to the widow and ½ to the next of kin of equal degree, not beyond kin in the 2nd degree. If no such kindred, the whole of the remaining personal property to the widow."

No effort was made by the legislature to change the waiver section by direct amendment and it must now be determined what effect the above quoted change in the rules of descent had upon the waiver section and particularly upon the exception inserted into that section in 1945. All agree that since the determination of the shares to be distributed under the waiver section are by its terms dependent upon the provisions of the sections dealing with the distribution of shares in intestate estates, changes in the latter necessarily

affect the former and they cannot be considered or construed independently.

The view taken by the court below and asserted by the appellee here is that the exception adopted in P. L., 1945, Chap. 76 and now appearing as part of R. S., Chap. 170, Sec. 14 was repealed by implication arising from its inconsistency with the provisions of P. L., 1957, Chap. 290. The appellant urges that the manifest intention of the legislature was to amend R. S., Chap. 170, Sec. 14 by implication so that "leaving kindred" as used in the exception would now read "leaving kindred within the 2nd degree." Both parties recognize that since 1957 the exception can no longer be literally applied in the situation in which the testator leaves no kindred whatever. The word "kindred" therein becomes meaningless when resort is had as it must be to Sec. 20. There remains unanswered the question "what kindred" or "what degree of kindred" since Sec. 20 now recognizes two classes and deals with them differently. We have no alternative therefore to seeking the general legislative intent and purpose with respect to Secs. 1, 14 and 20 read and construed together.

We may not overlook the fact that while in its several amendments of the intestacy sections the legislature clearly evidenced a policy of liberalizing benefits to the surviving spouse, its retention of the 1945 exception in the waiver section evidenced just as clearly a policy of imposing certain restrictions on such benefits except in estates of modest size. In short, the spouse competing with the decedent's more remote kindred in an intestacy situation was favored to a greater extent than was a spouse competing with the named objects of a testator's bounty for shares in substantial estates.

The obvious policy and purpose underlying the 1945 exception was, as already noted, to assure that a testator could dispose of a portion of his estate with some certainty that

his wishes would be carried out, and that it would not lie within the power of his widow to destroy utterly his testamentary plan. If the 1957 amendment has repealed the exception by implication, no testator would have such assurance in the future. This would be a drastic and far reaching change in legislative policy which we would expect to find accomplished by direct amendment of the waiver statute (Sec. 14) itself rather than by such an oblique approach as the mere amendment of the descent statutes (Secs. 1 and 20). It seems to us more probable that the legislature inadvertently omitted the amending of Sec. 14 in such a way as to conform it to the changes made in Secs. 1 and 20 and preserve the policy of limiting to some degree the power of a surviving spouse to defeat the wishes of a testator. Such a result is accomplished if we treat the direct amendment of Secs. 1 and 20 as an amendment by implication of Sec. 14 to which it is so closely related by reference. Thus amended, the applicable portion of Sec. 14 would be construed as though it read:

> "When a provision is made in a will for the widow of a testator * * * and such provision is waived as aforesaid, such widow * * * shall have and receive * * * the same distributive share of the * * * personal estate of such testator * * * as is provided by law in intestate estates, except that if such testator * * * died leaving no kindred within the 2nd degree, such widow * * * shall have and receive the same * * * distributive share of the * * personal estate of such testator * * * as is provided by law in intestate estates of persons deceased who die leaving kindred within the 2nd degree. * * * . "

The construction which we have above set forth as to Sec. 14 preserves and harmonizes both legislative policies, whereas any other construction is completely destructive of at least one of them. The legislative policy which appears to attach more importance to testamentary disposition than to the remote ties of blood relationship is not unlike that

which enables a testator to deprive his children of his bounty by appropriate expression in his will. This right of a testator to eliminate issue as takers obtains even though the beneficiaries substituted and preferred by him are strangers to the blood. Although the legislature has created protective bounds beyond which a testator may not go in reduction of the share of the surviving spouse, it has never departed from the principle that the right of testamentary disposition is considered to be of great importance. Just as the widow in an intestacy situation must yield a share of the estate to the kindred within the 2nd degree, so also must she yield a portion to the takers named in her husband's will.

In the case of intestacy there is no formulation of any plan of distribution by the decedent. The intestacy statutes are provided to fill the vacuum thus created and provide an orderly pattern based upon the presumption that the surviving spouse and those who stand in closest relationship within the blood line are the natural objects of the decedent's bounty. The statutory plan is at best designed only to serve as a substitute for a testamentary plan and to carry out what would normally be assumed to be the wishes of the decedent. When a testator presents a plan by will which meets certain minimum requirements for the protection of surviving spouse and children, it is controlling and there is no need for a statutory device. The power of devising by will has been termed a legal incident to ownership and one of the most sacred rights attached to property. *Deering* v. *Adams* (1853), 37 Me. 264, 269.

We think the language employed by the court in *Farris, Atty. Gen.* v. *Libby,* 141 Me. 362, 365, 44 A. (2nd) 216, 218 has application here. The court said:

> "And it is the intent of the legislature which controls, not the particular language which has been used to express that intent. It is the obligation of all concerned, and the particular duty of this court,

> to approach the solution of a problem such as this, not in a spirit of captious insistence on the letter of the law, but with tolerance and understanding to carry out its spirit. To that end, all parts of the statute should be read as a whole; ambiguities should be resolved; we should seek to neutralize the effects of obvious omissions; and we must assume that the legislature did not intend an absurd result or one which is clearly harmful."

We are confident that if and when the legislature concludes that it should abandon its policy of providing some protection of the right of testamentary disposition in such cases as this it will do so by clear and unequivocal amendment of Sec. 14 either by outright repeal of the exception or appropriate modification thereof. Until such legislative change of policy is clearly evidenced, the amendments must be deemed to disclose nothing more than an inadvertent omission and an unintended failure to modify the word "kindred" in Sec. 14 in the same manner as it was modified in the intestacy sections.

Thus in the instant case, treating the exception in Sec. 14 as amended to conform to the present language of Sec. 20, there being no kindred within or without the 2nd degree, the widow will take that share which she would have taken had there been kindred within the 2nd degree. This share will comprise $10,000 plus one-half of the remaining net personal estate.

Appeal sustained.

Case remanded to the Probate Court for further proceedings in accordance with this opinion.

IN RE: ESTATE OF ANNIE MARDEGIAN

Cumberland. Opinion, July 16, 1964.

Wills. Inheritance.

When no kindred of the second degree survived the testatrix, the exception in Sec. 14, as amended by P. L., 1957, Chap. 290 applies, the share of widower is limited to $10,000 plus such share of remaining net estate as would descend to surviving spouse of one who died leaving kindred within the second degree.

ON APPEAL.

On appeal from Probate Court on agreed statement of facts under the provisions of R. S., Chap. 153, Sec. 32. Appeal sustained. Case remanded to the Probate Court for further proceedings in accordance with this opinion.

Walter F. Murell, for Estate.

Ronald L. Kellam, for Marka Mardegian.

Verrill, Dana, Walker, Philbrick and Whitehouse, for Haigayian College and American National Hospital

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

WEBBER, J. This was an appeal from the Probate Court by agreement of the parties on an agreed statement of facts under the provisions of R. S., Chap. 153, Sec. 32.

Annie Mardegian died testate on June 19, 1962 survived by her widower and by a second cousin. She left both real and personal estate. Her will made provision for her husband and her kinsman. The residue was divided between a college and a hospital, appellants here. The widower seasonally waived the will and upon a petition for determina-

tion of value, the probate court determined that the entire net estate, being in excess of $10,000, passes to the widower.

In our opinion in a companion case captioned *In Re Estate of Charles Otis Foss* filed simultaneously herewith we have considered the effect of P. L., 1957, Chap. 290 on R. S., Chap. 170, Sec. 14 with particular reference to the exception contained therein. It is unnecessary to repeat here the reasons which prompted the result which we reached in *Foss*. They have equal application here since the statutes involved relate to a testatrix as to a testator, to a surviving spouse regardless of sex and to real estate as well as to personal estate. Since in *Foss* we were dealing only with personal estate, we need only add here the special provision relating to real estate set forth in P. L., 1957, Chap. 290, Sec. 1 as follows:

> "**B.** If the residue of the estate * * * is more than $10,000, of the real estate, 2/3 to the widow and 1/3 to the next of kin of equal degree, not beyond kin in the 2nd degree. If no kindred within the 2nd degree, the whole to the widow; and to the widower shall descend the same * * * ."

In *Foss* we concluded that since 1957 the applicable portion of Sec. 14 must be construed as though it read:

> "When a provision is made in a will for the * * * widower of a testatrix * * * and such provision is waived as aforesaid, such * * * widower shall have and receive the same share of the real estate and the same distributive share of the real and personal estate of such * * * testatrix as is provided by law in intestate estates, except that if such * * * testatrix died leaving no kindred within the 2nd degree, such * * * widower shall have and receive the same share of the real estate and the same distributive share of the real and personal estate of such * * * testatrix as is provided by law in intestate estates of persons deceased who die leaving kindred within the 2nd degree. * * * ."

Thus in the instant case, no kindred within the 2nd degree having survived the testatrix, the exception in Sec. 14 as amended by implication by P. L., 1957, Chap. 290 applies and the share of the widower is limited to $10,000 plus such share of the remaining net estate as would descend to the surviving spouse of one who died leaving kindred within the 2nd degree.

Appeal sustained.

Case remanded to the Probate Court for further proceedings in accordance with this opinion.

HARVEY R. COLE
vs.
WINFIELD C. LORD

Cumberland. Opinion, July 21, 1964.

Lease. Negligence. Motions. "Latent Defect."

The standard to be applied in considering a motion for judgment *n.o.v.* is the same as that applied in a motion for a directed verdict.

In the absence of express agreement on the part of the landlord, and in the absence of fraud, the tenant under the principle of *caveat emptor* takes the property for better or worse.

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 due care.

If, at the time of the letting, there is a latent or concealed defect in the premises which renders their occupancy dangerous, and which is known to the lessor or should have been known to him, and which is not known to the lessee or discoverable by him in the exercise of ordinary and reasonable care, the lessor owes the duty to the lessee to disclose that defect to the lessee, and a failure to do so is actionable negligence in the event that injury results.

ON APPEAL.

Plaintiff appeals the granting of defendant's motion for a directed verdict. Appeal denied.

Bernstein, Shur, Sawyer and Nelson,
by *Sumner Bernstein,* for Plaintiff.

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

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

SIDDALL, J. This is a complaint seeking damages for personal injuries alleged to have been suffered by the plaintiff when he came in contact with a piece of pipe which was located in the cellar of premises leased by the defendant to the plaintiff. The case was tried solely on the issue of liability.

At the conclusion of the evidence the defendant moved for a directed verdict on the grounds that the plaintiff had not proved negligence on the part of the defendant and had not proved the plaintiff's due care. The court reserved his decision on the motion. The jury returned a verdict for the plaintiff. The defendant then, upon the grounds stated in his motion for directed verdict, addressed a motion to the presiding justice to set aside the verdict and enter a judgment for the defendant in accordance with his motion for a directed verdict. This motion was granted and the plaintiff filed an appeal.

[1] The standard to be applied in considering a motion for judgment *n.o.v.* is the same as that applied in a motion for a directed verdict. Field and McKusick, Maine Civil Practice, Section 50 (c) p. 406. (Reporter's Notes)

We summarize briefly the pertinent facts in this case in the light most favorable to the plaintiff. Plaintiff on January 16, 1960, leased from the defendant certain premises consisting of the ground floor and basement of property located in Portland. Prior to the lease the plaintiff had looked over the leased premises accompanied by the agent of the defendant, but did not examine the cellar. The lease contained no provision requiring the landlord to make repairs. The plaintiff did not go into the cellar prior to the date of the lease. After the date of the lease he went into the cellar for the purpose of pouring water into the humidifier in front of the furnace. No inspection was ever made of the entire cellar area. The cellar was divided into a small room near the cellarway stairs and a larger room in which the furnace was located. The stairway to the basement and the area in front of the furnace were lighted by three lights controlled by a switch at the head of the stairway. Protruding outward from the wall behind the furnace was a rusty pipe about 2½ inches in diameter with an elbow on it bent downward. There appears to be no testimony with reference to the length of the pipe, but from an examination of one of the exhibits in the case, a plan drawn according to scale, the pipe appears to be about two feet in length, and located approximately 10 feet to the rear and to the left of the furnace. The testimony of the plaintiff fairly indicates that prior to the accident he did not know of any light fixtures in the rear of the furnace and did not look for them. The defendant had some wood or small boards of different sizes piled up against the wall in the rear of the furnace. The plaintiff wished to use some of the wood to make repairs in the shed, and received permission to do so. On September 14, 1960, he went behind the furnace, and while on his knees pulling out the wood to throw it into the lighted area he was called from the stove. He stood up, and in the process of doing so came in contact with the pipe.

The defendant knew of the existence of the pipe, and the plaintiff did not know of its existence, and never made any examination or inspection of the area in the cellar in which the pipe was located. The inference to be gathered from the testimony is that the area in the rear of the furnace was dark and without illumination from the three lights controlled by the switch at the head of the stairs.

[2] It is a general principle of law that in the absence of an express agreement on the part of the landlord, and in the absence of fraud, the tenant, under the principle of *caveat emptor,* takes the property for better or worse. See *Jacobson* v. *Leaventhal,* 128 Me. 424, 426, 148 A. 281, 68 A. L. R. 1192; *Hill* v. *Day & Foss,* 108 Me. 467, 468, 81 A. 581; *Bennett* v. *Sullivan,* 100 Me. 118, 122, 60 A. 886; *McKenzie* v. *Cheetham,* 83 Me. 543, 548, 22 A. 469; *Gregor* v. *Cady,* 82 Me. 131, 136, 19 A. 108.

There is no claim in this case that the pipe constituted a nuisance.

The plaintiff calls our attention to the cases of *Miller* v. *Hooper,* 119 Me. 527, 112 A. 256, and *Jacobson* v. *Leaventhal,* 128 Me. 424, 148 A. 281, 68 A. L. R. 1192. In *Miller* on page 528 of 119 Me., on page 257 of 112 A. the court said:

> "The duties which a landlord owes to his tenants and their households are established by many judicial decisions. He must make such repairs as he expressly agrees to make. He must disclose to the tenant any hidden defects of which he knows or should know. No further duty devolves upon him in respect to the premises of which the tenants are given exclusive possession."

In *Jacobson* on page 426 of 128 Me., on page 282 of 148 A. the court said:

> "The general principle, not questioned by either party, is that a tenant takes the leased premises

> for better or for worse, with no obligation on the part of the lessor to make repairs. The liability for injuries caused by a dangerous concealed defect, known to the lessor and not made known to a tenant, is an exception to this rule."

Miller involved a suit for injuries on a common stairway under the control of the landlord. In *Jacobson* the plaintiff was injured on a stairway located in property leased by plaintiff's husband. No claim was made that the injury was due to a latent defect, and recovery was sought from the landlord on the theory that he had agreed to make repairs and had failed to do so. The case turned upon the question of whether the action should have been brought in contract or in tort. The court held that the action should have been brought for breach of contract. In neither of these cases was the question of the liability of a landlord for latent defects in leased premises under the exclusive control of the tenant an issue. The quoted statements cannot be taken as an expression of law on the facts of the instant case.

The plaintiff also cites the case of *Shackford* v. *Coffin,* 95 Me. 69, 71, 49 A. 57, 58. The court in that case said:

> "Plaintiff was injured by a defective stairway to a tenement leased by defendant to plaintiff. Whatever the defect was, — whether from rotting of the timber or planking or otherwise, — there is no evidence that defendant knew of its existence. In such case the rule caveat emptor applies. The plaintiff had as much knowledge in regard to it as the defendant. All that was visible or known to the defendant or his agent was visible to the plaintiff.
>
> "If the landlord had known of a secret defect not *discoverable* by the tenant, he was bound to disclose it." (Emphasis ours.)

In *McKenzie* v. *Cheetham,* 83 Me. 543, 549, 22 A. 469, 470, the court said:

> "The rule [that caveat emptor applies] is subject to an exception arising from a duty which the law, under certain circumstances, imposes upon the lessor because of the relation subsisting between him and his lessee. For if, at the time of the letting, there is some latent or concealed defect in the premises, consisting of original structural weakness, decay, or infectious disease, which the lessor knows renders their occupation dangerous, and is not known to the lessee or discoverable by his careful inspection, the law makes it the duty of the lessor to disclose it; and a failure to do so is actionable negligence if injury results."

Our court in the recent case of *Levesque* v. *Fraser Paper Limited,* 159 Me. 131, 189 A. (2nd) 375, had occasion to define the term "latent defect." In that case the court was dealing with a complaint brought by an employee of an independent contractor engaged in demolishing a building, against the owner of the building. The plaintiff in his pleadings declared there was a hidden or latent defect in the roof of the building being demolished which he, in the exercise of due care, could not have ascertained.

Our court in that case said: "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,* 330 Ill. App. 540, 71 N. E. (2nd) 799, 801 (Ill. 1947)."

We believe the court in using the term "careful inspection" in *McKenzie* used it in the sense of requiring ordinary and reasonable care on the part of a tenant in the inspection of leased premises.

[3] If, at the time of the letting, there is a latent or concealed defect in the premises which renders their occupancy dangerous, and which is known to the lessor, or

should have been known to him, and which is not known to the lessee or discoverable by him in the exercise of ordinary and reasonable care, the lessor owes the duty to the lessee to disclose that defect to the lessee, and a failure to do so is actionable negligence in the event that injury results.

[4] In the instant case the premises upon which the pipe was located were exclusively under the control of the plaintiff from the date of the lease on January 16, 1960, until the date of his injury. The plaintiff saw fit to accept the lease and continued to occupy the premises without making an examination of the area in which the accident happened. The pipe was not concealed in the sense that it could not be seen upon an examination of the cellar area. It was only concealed from view because it was located in an area of the cellar not illuminated. Ordinarily the question of whether there had been a reasonable inspection of the premises is for the jury. In the instant case the plaintiff during the eight months he had possession of the premises prior to the time he was injured made no examination or inspection whatever of the area in which his injury occurred. Had he done so, he would have discovered the existence of the pipe. In fact, the plaintiff testified that the pipe would have been clearly visible, if the area had been lighted. Under these circumstances the defendant was not negligent in not disclosing the existence of the pipe.

[5] Furthermore, the plaintiff himself was guilty of contributory negligence as a matter of law. He entered the unlighted area without first taking the precaution to determine whether his safety was thereby endangered. In doing so he eventually came in contact with the pipe. The injuries received by him were clearly the result of his own contributory negligence which bars his recovery.

The plaintiff is precluded from recovery on either of the grounds upon which the defendant based his motion for a directed verdict. A verdict against the defendant could not

be sustained upon the facts disclosed in this case, and the action of the presiding justice in setting aside the verdict of the jury and giving judgment for the defendant *n.o.v.* was proper.

The entry will be

Appeal denied.

WILLIAM S. ARMSTRONG, ET AL.
vs.
RAYMOND T. HENDRICKSON

York. Opinion, July 21, 1964.

Landlord and Tenant. Leases, Renewal.

Lessor waived requirement of written notice under lease renewable for a term of years by accepting rent from lessee without objection for twenty-six months in the renewal period.

ON REPORT.

The sole issue of this case is whether defendant's lease of premises was renewed. Judgment for defendant.

Ralph H. Ross, for Plaintiff.

Richard E. Dill, for Defendant.

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

WILLIAMSON, C. J. In this action under the forcible entry and detainer statute, the Municipal Court denied defendant's motion to dismiss the complaint and entered judgment for the plaintiffs. R. S., c. 122. On appeal to the Superior Court the case was reported to us for decision on an agreed statement.

The only issue which we need reach is: Was the defendant's lease of the premises renewed? If so, the judgment below was in error.

The essential facts are as follows: The plaintiff in 1960 by devise acquired certain property under lease to the defendant for a term of years. The lease was renewable for a period of years from June 30, 1961 under the following provision:

> ". . on the same terms and conditions as the present lease; provided only, that the LESSEE give the LESSOR, on or before May 30, 1956, notice in writing that he exercises the option to renew for one of the two five year options and like notice in the event the second five year option is exercised by the LESSEE."

The written notice required by the lease was not given. The lessee continued in possession of the property, used by him for many years as a filling and service station, at the expiration of the stated term, and paid the monthly rental to the plaintiff for each month from June 30, 1961 through August 1963. The plaintiff accepted the payments and did not in any manner advise the defendant that he did not consider the lease and the current renewal period to be in full force and effect until August 21, 1963. Indeed, apart from a telephone call in February 1960 informing the defendant that the plaintiff was the owner of the premises and that the rental payments should be sent to him, the plaintiff "did not call, write, speak to or otherwise contact or confer" with the defendant until August 21, 1963. The plaintiff then by letter from his attorney demanded that the defendant vacate the premises and for the first time contended that the defendant had violated the terms of the lease, in the words of the agreed statement, by "failing to expressly renew the lease."

We think it plain beyond the slightest doubt that the plaintiff waived the requirement of written notice by ac-

ceptance of the rent without objection for the long period of twenty-six months in the renewal period.

> "There was no explicit exercise of the option to renew either lease but the lessor continued to accept rent from the lessee, Throumoulos, after the termination of the first lease, and in each case permitted him or his sublessees to remain in possession and exercise dominion over the property after the expiration of the ten year period. Such holding over by the lessee is convincing evidence of intention to renew the option, obviated the necessity of further notice, and is binding on the lessor. *Oren Hooper's Sons v. Sterling-Cox Shoe Co.*, 118 Me. 404; 108 Atl. 353; 32 Am. Jur. 825."
> *Throumoulos, et al.* v. *Bernier,* 143 Me. 286, 287, 61 A. (2nd) 681.

In *Medomak Canning Co.* v. *York,* 143 Me. 190, 57 A. (2nd) 745, in which the court found there was no waiver of notice of renewal, the court said at p. 194:

> "Notice of the exercise of the option is for the benefit of the lessor, but lessor may waive an express provision for notice."

and again at p. 195:

> "Waiver is a voluntary, intentional relinquishment of a known right. It may be shown by words or acts, and may arise from inference from all the attendant acts as well as from express manifestations of purpose. Whether there has been a waiver established when it is to be implied from numerous acts is usually a question of fact. Whatever the evidence it must have probative force to prove the intention to waive."

For convenience we have referred to the plaintiff Armstrong, to whom the premises were devised subject to the lease, as the plaintiff. The plaintiff Coleman Oil Company, Inc. is a lessee under a lease from the plaintiff. Its case falls with that of the plaintiff.

The entry will be

Judgment for the defendant.

JOHN BEGIN
vs.
ALBERT J. BERNARD

Kennebec. Opinion, July 23, 1964.

Animals. Judgment.

Person sustaining consequential damages as result of a "dog bite" has a common law remedy available. R. S., 1954, c. 100, § 17.

To recover under common law for consequential damages as result of "dog bite" the plaintiff must show that defendant kept animal after notice of its injurious propensities. R. S., 1954, c. 100, § 17.

Under statute authorizing recovery of damages when dog does damage to a person or his property, remedy is available only to person sustaining the direct injury, and person sustaining only consequential damages is left to his common law remedy. R. S., 1954, c. 100, § 17.

Where court properly dismissed complaint which sought only to invoke the statutory remedy and it was apparent that there was no opportunity to give consideration to merits of claim, dismissal should be without prejudice, and thereby not preclude plaintiff from instituting new complaint stating claim as at common law.

ON APPEAL.

Plaintiff appeals the granting of defendant's motion to dismiss complaint on the ground that complaint failed to state a claim upon which relief can be granted. Appeal denied. Complaint dismissed without prejudice.

William H. Niehoff, for Plaintiff.

Frank E. Southard, for Defendant.

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

WEBBER, J. The plaintiff brought an action for medical expenses incurred by him and for loss of consortium result-

ing from an alleged injury to his wife said to have been caused by a dog owned and kept by the defendant. Defendant seasonably filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted. This motion was granted below and the plaintiff appeals.

The complaint seeks to enforce the remedy provided by R. S., Chap. 100, Sec. 17 as amended by P. L., 1961, Chap. 317, Sec. 303 which provides

> "**Sec. 17. Damage by dogs.** When a dog does damage to a person or his property, his owner or keeper * * * forfeits to the person injured the amount of the damage done, provided the said damage was not occasioned through the fault of the person injured, to be recovered by a civil action."

The issue is whether or not the statute may be broadly construed to permit the recovery of consequential damages by one not directly injured as to his person or his property but who has nevertheless suffered an appreciable indirect loss. The point has not heretofore been decided by this court.

The defendant directs our attention to a long line of cases construing the so-called "highway defect" statute (R. S., Chap. 96, Sec. 89 as amended), which under certain conditions permits recovery if any person shall receive "any bodily injury or suffers damage in his property." There is no important or distinguishing difference between the quoted portion of the statute and the equivalent language in R. S., Chap. 100, Sec. 17 *(supra)*.

It was held in 1841 that a father could not recover for injury to his minor child under the "highway defect" statute since there had been no injury to the parent's person or property. *Reed* v. *Belfast,* 20 Me. 246. In *Sanford* v. *Augusta* (1851), 32 Me. 536, 538, the injury was to the wife

and the suit was hers although the husband was joined as plaintiff as was then required in a suit for a personal injury to the wife during coverture. Holding first that the husband could not recover for medical expenses or loss of consortium for the reasons stated in *Reed,* the court went on to permit medical expenses presumably incurred by and chargeable to the husband to be added to the damages recovered by the wife. The court said at page 538:

> "Unless the person injured through a defective highway can recover in every instance where an action is maintainable, the whole damages sustained, in many cases an important part of the damages, could never be recovered, and the provisions of the statute would be unavailing. The more reasonable construction of the statute, however, and that which will best comport with its spirit and design, and give to it full force and effect, is, that it was intended to relieve those suffering, from the common law disabilities in this respect, and in all cases where an action can be maintained, to allow *the person injured* to recover the entire damages sustained by the injury, by a suit in proper form. The wife, when injured, to sue with her husband, and the minor by guardian, or next friend." (Emphasis ours.)

It is evident that the reference to "common law disabilities" pertains to the absence of any remedy at common law against a municipal corporation for so-called highway defects. See *McCarthy* v. *Inhabs. of Leeds* (1917), 116 Me. 275, 277, 101 A. 448; *Dugan* v. *City of Portland* (1961), 157 Me. 521, 522, 174 A. (2nd) 660. The court adhered strictly to its view that a husband could not recover under the statute for injury to his wife in *Starbird* v. *Inhabs. of Frankfort* (1852), 35 Me. 89. In *Bean* v. *City of Portland* (1912), 109 Me. 467, 84 A. 981, the injured wife and her husband brought their separate suits, he claiming loss of the wife's services and her medical expenses. The court stated succinctly that there was no legal foundation for

the husband's suit since he neither "received any bodily injury" nor "suffered damage in his property." An examination of these cases discloses that our court has never deviated from its position that the husband cannot recover for loss of consortium or for his wife's medical expenses under the statute. The court has yielded only to the extent of permitting the injured wife to include as a part of her own damages medical expenses and the like even though incurred by or chargeable to the husband and this only because the husband has no remedy available under the statute or at common law.

In *Close* v. *Terminal Co.* (1929), 128 Me. 6, 145 A. 388, our court employed the device used in *Sanford* v. *Augusta (supra)* and cited that case with approval. A minor plaintiff brought suit by his parent as next friend under the Federal Employer's Liability Act. Damages claimed included medical expenses incurred by the parent for treatment of the plaintiff. Noting that the parent himself could not recover these expenses under the Act (*N. Y. Central & Hudson R. R. Co.* v. *Tonsellito,* 244 U. S. 360), our court applied the rule in *Sanford* and permitted the minor plaintiff to recover all the damages flowing from his injury including the medical expenses.

The Rhode Island court has permitted the husband to recover for the loss of the services of his injured wife and for her medical expenses under a "highway defect" statute not materially dissimilar to our own. The court justified the husband's claim as damage to his "property" within the meaning of the statute. *Larisa* v. *Tiffany* (1919), 105 A. (R. I.) 739. The court summarily dismissed the Maine cases of *Sanford* v. *Augusta (supra)* and *Reed* v. *Belfast (supra)* by stating that it did "not consider them valuable as authorities."

Massachusetts has reached the same result as Maine in the construction of its "highway defect" statute in which

the controlling words are "bodily injury or damage to his property." In *Whalen* v. *City of Boston* (1939), 23 N. E. (2nd) (Mass.) 93, 94, the court by dictum cited with approval its holding in *Harwood* v. *Lowell,* 4 Cush. 310, that the words above quoted from the Act do not permit the recovery of the expenses for care and cure of the injured wife by the husband. "The word 'property' is limited to tangible property injured in the accident."

In its treatment of the "dog bite" statute, which is not significantly different in wording from the Maine Act above quoted, the Massachusetts court has however taken a position which produces a different result from that reached by it with respect to the "highway defect" statute. In 1847 in *McCarthy* v. *Guild,* 12 Metc. 291, the plaintiff sought to recover for the loss of services and for expenses resulting from injuries to his minor son by a dog. Holding that the plaintiff might recover, the court gave a broad construction to the statute which would provide "an adequate remedy for the entire damages that may result from any such injury." The court said in part:

> "But it is quite apparent that a remedy, confined to the case of an injury to the person, and to be enforced only by an action in the name of such person, would fall short of giving complete redress for injuries by dogs. Take the case of a married woman. Her right to recover would, in such case, be restricted to damages for her personal suffering, and this would be the whole extent of the recovery, if the statute has the limited application contended for by the defendant. Yet here would be unremunerated the claim of the husband for the loss of the service and the loss of the society of his wife, and all expenses incurred by him in physicians' bills, nurses' bills, etc."

This dictum at least suggests the probable disposition which would be made of the issue now squarely presented to us in the instant case. *McCarthy* was followed and reaffirmed

in 1962 in the case of *Rossi* v. *Del Duca,* 181 N. E. (2nd) (Mass.) 591. In *Rossi* the court noted for comparison but did not discuss *Wilson* v. *Grace,* 273 Mass. 146, 173 N. E. 524 and *Zarba* v. *Lane,* 322 Mass. 132, 76 N. E. (2nd) 318. In *Wilson* the plaintiff husband seeking to recover medical expenses resulting from injury to his wife was denied the procedural advantage conferred by a motor vehicle statute relating to proof of agency. For our purposes the significant fact is that the court somewhat narrowly construed the statutory phrase "for injuries to the person or to property" holding that such injury to the person must be "direct injury" and the injury to property does not include mere impoverishment of one's estate by the necessity of spending money. In *Zarba* the statutory phrase is sufficiently unlike those above noted to make the case readily distinguishable.

We are unaware of any strong or compelling reason for giving a broader interpretation to the language employed in the "dog bite" statute than is given virtually identical phraseology employed in the "highway defect" statute or a motor vehicle statute — especially when it is considered that the claimant of consequential damages for "dog bite" has a common law remedy available, whereas the claimant of consequential damages from "highway defect" has none.

That the common law remedy for "dog bite" still exists cannot be doubted. *Hussey* v. *King* (1891), 83 Me. 568, 575, 22 A. 476. It is merely that the elements of proof required at common law are more exacting than are demanded by the statute. At common law the plaintiff must show that the defendant kept the animal after notice of its injurious propensities. *Hussey* v. *King (supra).* The plaintiff in the instant case, if he can satisfy the requirements at common law, is not without a remedy even though he may not be entitled to recover under the statute.

We would be reluctant in the absence of the most compelling reasons to disregard the interpretation placed upon statutory phraseology in a number of cases spanning a period of many years. We note that the legislature has not seen fit to change the phrase "any bodily injury or suffers damage in his property" used in the "highway defect" statute even though the court has always narrowly and restrictively construed those words. We are unable to distinguish between that phrase and the very similar phrase "damage to a person or his property" found in the "dog bite" statute. We think it reasonable to suppose that the legislature, in providing a statutory remedy available against one who owns or keeps an animal which does injury to another, without regard to any fault on the part of the defendant, may well have intended that remedy to be available only to the person suffering the *direct* injury. We now hold that the person suffering only consequential damages is left to the remedy available at common law and must meet the additional requirements of proof thereby imposed. We can see no reason for giving a broader interpretation to a statutory phrase where the plaintiff still has an available remedy than has been given to what is in essence the same language in cases where the plaintiff was then left with no remedy whatever. If the statute is to be extended to afford relief for consequential damages, such an enlargement of the statute should come from the legislature and not from the court.

It follows that the action below in dismissing a complaint which sought only to invoke the statutory remedy was correct. It is apparent upon the record that the justice below had no occasion or opportunity to give consideration to the merits of plaintiff's claim. Under these circumstances dismissal of the complaint should be without prejudice. The plaintiff will not thereby be precluded from instituting a new complaint stating a claim as at common law. For discussion of the effect of dismissal of a complaint for failure to state a claim upon which relief can be granted, see

Russo v. *Sofia Bros.* (1941), 2 F. R. D. 80, 82; *Compania* v. *Stevenson* (1950), 11 F. R. D. 210, 211; *Daley* v. *Sears, Roebuck* (1950), 90 F. Supp. 562; *Crutcher* v. *Joyce* (1943), 10 Cir., 134 F. (2nd) 809; *Asher* v. *Ruppa* (1949), 7 Cir., 173 F (2nd) 10; *Riverside Oil* v. *Dudley* (1929), 8 Cir., 33 F. (2nd) 749, 750; and *Bartsch* v. *Chamberlin* (1959), 6 Cir., 266 F. (2nd) 357.

The entry will be

Appeal denied.

Complaint dismissed without prejudice.

DISSENTING OPINION

WILLIAMSON, C. J. I would sustain the appeal. In my view the husband should be permitted to recover for consequential damage, i.e., for medical expenses and loss of consortium arising from the alleged injury to his wife by a dog owned and kept by the defendant under the "dog" statute. R. S., c. 100, § 17, as amended.

The differences between the common law and the "dog" statute on liability of owners or keepers come from the elimination of scienter and the addition of fault of the injured person. For application of the common law where defendant is neither owner nor keeper, see *Andrews* v. *Jordan Marsh Co.*, 283 Mass. 158, 186 N. E. 71. See also Massachusetts General Laws Anno., c. 140, § 155.

In *Carroll* v. *Marcoux*, 98 Me. 259, 56 A. 848, in an action under the "dog" statute before the addition of fault, the court said at p. 263:

> "At common law the owner or keeper of a dog or a domestic animal was liable for damages done by the animal only in case the animal had a vicious or mischievous disposition known to the owner or keeper. We have a statute, however, which makes the owner or keeper of a dog liable for damage done by it without regard to the disposition of the

> dog, or the owner or keeper's knowledge, or his care or want of care."

The principle in the setting of a vicious horse case is found in *Sandy* v. *Bushey*, 124 Me. 320, 321, 128 A. 513.

> "In an action for an injury caused by such an animal, the plaintiff has only to allege and prove the keeping, the vicious propensities, and the scienter. Negligence is not the ground of liability, and need not be alleged or proved. This rule of liability of keepers of domestic animals finds its origin in the ancient common law and, except as modified by statute in case of injuries by dogs, is retained as the rule of law in this class of cases in this State. *Hussey v. King*, 83 Maine, 568; *Decker v. Gammon*, 44 Maine, 328."

The "dog" statute obviously changed the elements of liability. I find, however, no change from the statute in the elements of damage assessable under usual common law principles. The double damage provision removed in P. L., 1895, c. 115, does not affect the principle, as I see it. Thus the entire damage, direct to the wife and consequential to the husband, should be assessed when liability for the injury under the statute is established.

This is the rule in Massachusetts. *McCarthy* v. *Guild*, 53 Mass. 291 (1847), held that a defendant was liable under the statute for loss of a child's services and expenses of his cure. The court said, at p. 293:

> "We think the statute has only declared the general principle, giving double damages to any person injured by a dog, leaving us to recur to the principles of the common law, to ascertain the party legally entitled to recover for any particular injury, that may be the subject of an action. Giving the statute this construction, it provides an adequate remedy for the entire damages that may result from any such injury. The parent or master will recover his appropriate damages, and the minor or servant will, in his own name, recover for the personal suffering. This action may therefore be well sustained by the father for his damage

> for loss of service, or expenses incurred, by reason of the injury to his minor son."
>
> "A full answer to this contention is found in McCarthy v. Guild, 12 Metc. 291 (construing a predecessor of the present statute, which, while different in some particulars, is essentially similar on the point in issue). There, in permitting recovery for consequential damage by the parent of a child bitten by a dog, it was said: 'The object of the statute is to protect from injury by dogs. . . But it is quite apparent that a remedy, confined to the case of an injury to the person, and to be enforced only by an action in the name of such person, would fall short of giving complete redress for injuries by dogs. . . [The statute] provides an adequate remedy for the entire damages that may result from any such injuries. The parent . . . will recover his appropriate damages, and the minor . . . will, in his own name, recover for the personal suffering.' " *Rossi* v. *Del Duca* (Mass.) 181 N. E. (2nd) 591, 594 (1962).

The court, drawing a close analogy with the cases under the "highway defect" statute (R. S., c. 96, § 89 as amended), reaches a contrary conclusion. Under the "highway defect" statute the husband may not recover consequential damage. The wife may in her own action recover for loss of time and necessary and reasonable expenses. Of course, the wife may not recover for the husband's loss of consortium, which may be an important item of damage resulting from the wife's injuries. See *Britton* v. *Dube,* 154 Me. 319, 324, 147 A. (2nd) 452. This is the position of the court, as I understand the opinion, under the "dog" statute.

There are and have been no significant differences in the "dog" and "highway defect" statutes in Maine and Massachusetts.

In 1849 the Massachusetts Court in *Harwood* v. *City of Lowell,* 58 Mass. 310, citing *Reed* v. *Belfast,* 20 Me. 246, held under the "highway defect" statute that a husband may not recover for medical and other expenses, or for loss of consortium. The court said, at p. 311:

> "This is a several action brought by the husband, to recover consequential damage sustained by him, in the loss of the services of his wife, to which he claims by law to be entitled, during the period of her illness, caused by the accident, and also for the recovery of expenses for medical attendance, and other expense necessarily incurred thereby. The question is, can he recover?
>
> "It has been too long and too often held, now to be called in question, that the entire remedy for individuals, sustaining loss by defective highways in this commonwealth, depends on statute, and is not given by common law. The same statute law therefore which declares the right, and points out the remedy, must qualify it, and limit and control the extent of it. The question then depends on the construction of the statutes."

It is of interest, and I think of importance, to note that Chief Justice Shaw and Justices Wilde and Dewey were a majority of the court in both the *McCarthy* dog case of 1847 and the *Harwood* highway defect case of 1849. In each case the opinion of the court was unanimous.

I am satisfied that the Massachusetts cases were properly decided on sound and safe reasoning. *Hussey* v. *King*, 83 Me. 568, 22 A. 476, does not seem to be inconsistent with this result.

The court, as I read the opinion, requires a husband as here to base his claim for expenses and loss of consortium upon the common law relating to liability of the owner or keeper of a dog. The husband thus must establish scienter, although this element long since was removed by statute from the wife's action.

Must the husband establish due care on the part of his wife? Fault is a defense to her action, but this as we have seen would not be so at common law.

In the absence of defendant's liability to the wife, it is inconceivable that the defendant should be liable at common law to the husband. The elements of the husband's separate

action, as proposed by the court, are not therefore the elements of a common law action. A new element, i.e., the fault of the wife, has been introduced by the very "dog" statute which it is said does not permit recovery.

In this view the husband loses the benefit of elimination of scienter, but retains the burden of establishing no fault by his wife. This result, in my view, is not demanded by the "dog" statute.

I would therefore in this situation permit the husband under the "dog" statute to recover his consequential damages under usual common law principles flowing from the direct injuries to his wife.

SIDDALL, J., concurs in dissent.

RODNEY C. AUSTIN, PETITIONER
vs.
STATE OF MAINE

Knox. Opinion, July 27, 1964.

Indictments. Kidnapping. Legislative Intent.

Res judicata ordinarily operates to conclude all matters which might have been tried as well as all that were tried, but Supreme Judicial Court would consider question of defective indictment although it could have been presented on prior writ of error. R. S., 1954, c. 126, § 1 *et seq.*

Purpose of 1935 amendment of kidnapping statute was not to narrow but broaden scope of the law by adding as an element the act of seizure, conveyance, inveiglement or kidnapping of another by any means whatever and holding for ransom or reward. R. S., 1954, c. 130, § 14.

1935 amendment of kidnapping statute did not make "ransom or reward" an element of all courses of conduct characterized as kidnapping. R. S., 1954, c. 130, § 14.

Kidnapping indictment charging assault, confinement and forcible transportation both inside and outside the state was sufficient, notwithstanding fact that holding for "ransom or reward" had not been alleged. R. S., 1954, c. 130, § 14.

If there be categories of conduct prohibited within the letter of the statute and for which the sentence of imprisonment for life manifestly be inordinate, any remedy is legislative and not judicial.

ON WRIT OF ERROR.

Petitioner's writ of error alleges that he is serving a life sentence upon conviction under a defective indictment. In question is whether the 1935 amendment of kidnapping laws makes "ransom and reward" a necessary element of all courses of conduct which are violations of the reference statute. Writ of error dismissed. Conviction and sentence affirmed.

Edward J. Berman, for Plaintiff.

John W. Benoit, Asst. Atty Gen.,
Jerome Matus, Asst. Atty. Gen., for State.

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

MARDEN, J. On writ of error. Upon a ten count indictment (No. 1106) returned to the Superior Court in and for Lincoln County in November, 1959, petitioner was charged with kidnapping in counts 1 through 3, associated offenses not here pertinent in counts 4 through 9, and an allegation of previous conviction and State Prison sentence in count 10. Upon trial, at which petitioner was represented by court appointed counsel, he was found guilty on all counts except 7 (crime against nature) and sentenced to a mandatory life imprisonment.

Upon writ of error, in which he claimed that he was illegally sentenced, which writ was dismissed and petitioner

filed exceptions, this court considered the case and overruled the exceptions as reported in *Austin* v. *State of Maine,* 158 Me. 292, 183 A. (2nd) 515 (opinion filed August 6, 1962).

The petitioner's current writ of error was filed April 17, 1963, alleging that he is undergoing a life sentence upon conviction under a defective indictment. Upon finding of indigency, counsel was appointed, and the single justice to whom the petition was addressed, with agreement of petitioner's counsel, reported the case to this court upon the record, briefs filed in the reported case (158 Me. 292), and stipulation of the issues:

> "1. Whether the indictment numbered 1106 * * * as set forth in counts 1, 2 or 3 of said indictment, sufficiently sets forth the crime of kidnapping as defined in Chapter 130, Section 14 Revised Statutes of Maine upon which a sentence of imprisonment for life could be imposed.
>
> "2. Whether or not said issue as set forth above has been adjudicated by this court in its decision of State v. Austin reported in 158 Me. 292."

Considering first the second issue, it is agreed that the point raised in 1. above was not raised, briefed, argued or discussed in the reported case, and were it to be held that the question now raised were *res judicata* it could be so held only under the principle that a prior judgment between the same parties is conclusive "not only as to matters which were tried in the first action but as to all matters which might have been tried." *Pillsbury* v. *Kesslen Shoe Company,* 136 Me. 235, 237; 7 A. (2nd) 898. While it is clear that the present issue No. 1. could well have been presented in the reported case, and therefore could now be considered as having been adjudicated, we feel justified in giving it our attention for two reasons.

Firstly, the writ of error culminating in the proceeding before us was sworn to by the petitioner on April 16, 1963

and while its date of entry with a single justice of this court is not indicated, the State's answer was filed September 10, 1963, which antedates the operation of the statute granting special post-conviction habeas corpus (P. L., 1963, Chapter 310, effective September 21, 1963, now a part of Chapter 126, R. S.) "provided that the alleged error has not been previously or finally adjudicated or waived in the proceeding resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction."

Secondly, the issue now raised involves a matter of statutory interpretation unusually important to the administration of criminal law in the field with which it deals.

The question to be here answered is whether the 1935 amendment to our kidnapping law[1] makes "ransom or reward"[2] a necessary element of all courses of conduct which are violations of the reference statute. Petitioner contends that it does, and that the three counts of the indictment alleging kidnapping and on which he was convicted, absent the allegation of "ransom or reward" did not charge him with a crime.[3]

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[1] "Whoever unlawfully confines or imprisons another, or forcibly transports or carries him out of the state or from place to place within it, or so seizes, conveys, inveigles or kidnaps any person, by any means whatever and holds him for ransom or reward, shall be punished by imprisonment for life. * * *." R. S., 1954, Chap. 130, § 14.

[2] "Ransom or reward," — not necessarily synonymous. See *Gooch* v. *United States*, 56 S. Ct. 395.

[3] Count 1, omitting formal parts, a charge that on October 17, 1959 the petitioner on one S * * * feloniously did make an assault upon her, the said S "then and there feloniously and unlawully did confine and imprison for the space of 6 days, against the peace of the state, * * *."

Count 2, charged that the petitioner "did forcibly transport and carry from Nobleboro in said County of Lincoln to Jefferson in said County of Lincoln" said S * * * against the peace of the state, etc.

Count 3, charged that the petitioner, "did forcibly transport and carry out of the State of Maine" said S * * * against the peace of the state, etc.

If ambiguity exists, and the controversy here suggests that it does, we may properly examine the history of the statute. *Jenness* v. *State,* 144 Me. 40, 46, 64 A. (2nd) 184; 50 Am. Jur., Statutes § 294.

The development of the offense now defined as kidnapping began in antiquity. It was a capital offense under the Hebraic law. Exod. XXI, 16. It was described by Hawkins as an aggravated form of false imprisonment. I Hawk. P. C. 119 (Curwood Ed.). At a later period Blackstone describes it as the "forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another." Book the Fourth Blk. Comm. 219 (Book 4 Lewis's Edition, 1898, p. 1614).

It has long been recognized as a common law offense in this country. See *State* v. *Rollins,* 8 N. H. 550 (1837).

> "But interest in common law kidnapping is now only historical, because in all jurisdictions of this country kidnapping is now punished by statute, and these statutes have progressively extended the scope of the offense." Burdick, The Law of Crime, § 387, 1946 Ed.

See also Wharton's Criminal Law, 12th Ed., Vol. I, § 773.

"The elements of the crime necessarily are dependent upon the wording of the statute in the particular state under consideration * * *." *State* v. *Croatt,* 34 N. W. (2nd) 716, [1] 719.

Our State has from its beginning made kidnapping a statutory offense, R. S., 1820-1821, Chapter 22, § 1.[4] The offending conduct, simply stated, then was confined to

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[4] "Sect. 1. * * *, That if any person shall transport or carry, or cause to be transported or carried, any subject of this State, or other person lawfully residing and inhabiting therein, to any part or place without the limits of the same, * * * without his consent or voluntary agreement; or in order to remove such person from one part of the State to another part of the same, * * * ; every person so offending, * * * shall be punished * * *."

transportation of a Maine subject against his will (a) out of the State, or (b) from place to place within it.

In 1838 (P. L., 1838, Chapter 323) [5] the element of forcible or secret confinement was added, and intra-state movement seemingly deleted.

The first revisions of our Maine statutes, identified as the 1841 (R. S., 1841, Chapter 154, Section 20) [6] and 1857 (R. S., 1857 Chapter 118, Section 19) [7] revisions, returned the intra-state element and otherwise only refined the previous definitions.

As of the 1857 revision with its obviously disjunctive clauses, a charge of kidnapping could be founded upon any one of six courses of conduct ("acts") viz.:

1. Unlawful confinement (imprisonment) of another.
2. Forcible transportation of another out of the State.

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[5] "Section 1. Be it enacted * * *, That every person, who, without lawful authority, shall forcibly or secretly confine or imprison any other person, within this State, against his will, or shall forcibly carry or send such person out of this State, or shall forcibly seize and confine, or shall inveigle or kidnap any other person with intent either to cause such person to be secretly confined or imprisoned in this State against his will, or to cause such person to be sent out of the State against his will, or to be sold as a slave, or in any way held to service against his will; and every person, who shall sell, or in any manner transfer, for any term, the service or labor of any * * * person of color, who shall have been unlawfully seized, taken, inveigled or kidnapped from this State to any other State, * * * shall be punished * * *."

[6] "Sect. 20. Whoever, without lawful authority, shall confine or imprison any person in this state against his will, or shall forcibly transport or carry any person out of the state, or from one place to another place within the state, without his consent, or shall forcibly seize, inveigle, convey or kidnap any person, with intent to cause such person to be so confined or imprisoned, or so transported or carried against his will and consent, or shall sell as a slave, etc. * * * shall be punished * * *."

[7] "Sec. 19. Whoever unlawfully confines or imprisons another, or forcibly transports or carries him out of the state, or from place to place within it, or so seizes, conveys, inveigles, or kidnaps any person with intent to cause him to be so dealt with; or sells as a slave, etc., * * * shall be punished * * *."

3. Forcible transportation of another from place to place within the State.

4. Seizure, etc., of another with intent to confine, or transport within or without the State.

5. Sale as a slave of any person of color who had been so seized, etc.

6. Transfer, for any term of time, the service of any person of color who had been so seized, etc.

> "Sometimes, the word 'or' is used in a statute preceding a phrase or clause which is inserted to define that which precedes the word. In its elementary sense, however, the word 'or' as used in a statute, is a disjunctive particle indicating an alternative. It often connects a series of words or propositions, presenting a choice of either. If the disjunctive conjunction 'or' is used, the various members of the sentence are to be taken separately." 50 Am. Jur., Statutes § 281.

To the same sense 82 C. J. S., Statutes § 335 including the principle that: "*In penal statutes,* the word 'or' is seldom used other than as a disjunctive, * * *." More specifically,

> "(w)here a statute prohibiting abduction or kidnapping sets forth several specific purposes in the disjunctive, any one of them is sufficient to taint the act with criminality, and the "ejusdem generis' rule of statutory construction is not generally applied so as to narrow the criminality of abduction or kidnapping." 1 Am. Jur., Abduction and Kidnapping § 21.

In *State* v. *Dumais,* 137 Me. 95, 15 A. (2nd) 289, where the interpretation of a statute prohibiting any named officer from accepting a bribe in connection with "any matter pending, or that may come legally before him in his official capacity" was before the court, the disjunctive phrasing was in issue and the court said:

> "The word 'or' in this connection is disjunctive. The corrupt act may occur when a matter is pending, or instead, it may be with reference to a matter that may come legally before him. The State is not limited to proof that the matter is then pending. It may allege and prove the alternative, * * *." (p. 98)

As to this element of statutory construction, see also *Commonwealth ex rel Shumaker* v. *New York and Pennsylvania Co.*, 79 A. (2nd) 439 [15, 16] 448 (Pa. 1951); *State ex rel Normile* v. *Cooney*, 47 P. (2nd) 637 [3-5] 641 (Mont. 1935); and *Chicago Catholic Workers Credit Union* v. *Rosenberg*, 104 N. E. (2nd) 568 [1-3] 571 (Ill. 1952).

Our statutory rules of construction (Chapter 10, Section 22 subparagraph I) leads us to no different conclusion and *State* v. *Michaud*, 150 Me. 479, 114 A. (2nd) 352, cited by petitioner as supporting his contention that the word "or" in the present statute should be read as "and," whereby the "ransom or reward" element applies to the several courses of conduct prohibited by the statute, is not on point.

The statute in *Michaud*[8] "was evidently taken," says the court, from a Federal statute which read " * * * conceals *and* does not * * * disclose." Our court reasoned that inasmuch as "concealment" and "non-disclosure" are not synonymous, and the Maine statute was patterned after the reference Federal act, the word "or" could not be read as "preceding a phrase which is inserted to define that which precedes the word" (see quote ante from 50 Am. Jur., Statutes § 281) and must be read in the conjunctive. That reasoning is not here applicable. Maine statutorily defined kidnapping over one hundred years before the Congress spoke on the subject. (See post)

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[8] "Whoever, having knowledge of the actual commission of a felony * * * conceals or does not as soon as possible disclose and make known the same * * * shall be punished * * *."

The law of 1857 remained without change until 1935. In the meantime the kidnapping of the Lindbergh child had occurred on March 1, 1932, an indictment in that case had been returned on October 8, 1934 and with trial underway in January 1935 (*State* v. *Hauptmann* (N. J. 1935) 180 A. 809), it is fair to infer that our 87th Legislature, convening at that time, shared concern with other legislative bodies[9] whereby "kidnapping laws were generally revised, and more severe penalties, including that of death in a number of states, were imposed, particularly in cases where the kidnapping is committed for the purpose of holding one for ransom or extortion." Burdick, *supra,* § 388 and citations. Of this historical and notorious case we take notice. Answers of the Justices, 70 Me. 600, 609.

In 1935 (P. L. 1935, Chapter 39) our statute on kidnapping was amended in the respects now indicated:

> "Whoever unlawfully confines or imprisons another or forcibly transports or carries him out of the state, or from place to place within it, or so seizes, conveys, inveigles, or kidnaps any person, ~~with intent to cause him to be so dealt with~~; **by any means whatever and holds him for ransom or reward,** ~~or sells as a slave, or transfers, for any term of time, the service of any person of color, who has been so seized, inveigled, or kidnapped,~~ shall be punished ~~by a fine of not more than one thousand dollars, or by imprisonment for not more than twenty years~~ **by imprisonment for life.** * * * "[10]

In the light of the contention now made, it is to be noted that the element of "ransom or reward" until 1935 was never a part of the offense in Maine.

With this amendment "acts" 1), 2) and 3) listed above are unchanged; "acts" 4), 5) and 6), listed above, no longer

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[9] The Congress in 1932 enacted for the first time a kidnapping statute, now appearing in U. S. Code, Title 18, Chapter 55, §§ 1201, 1202.

[10] Words stricken, deleted; words underlined, added.

support a charge of kidnapping and new "acts," — the seizure, conveyance, inveiglement or kidnapping of another by any means whatever and holding for ransom or reward, became proscribed by the law. The maximum penalty was increased from $1000 fine to 20 years, to imprisonment for life, and conspiracy to kidnap, with maximum punishment for any term of years, was added to the statute. The purpose was not to narrow but to broaden the scope of the law, and emphasize by penalty its intentional and vicious encroachment upon personal liberty.

The construction which petition urges would make unlawful imprisonment or forcible transport without the state or forcible transport from place to place within the state, — all pre-1935 acts of kidnapping, the crime of kidnapping only if each were done for the purpose of ransom or reward. The legislature had no such intent. The 1935 amendment did not make "ransom or reward" an element of all courses of conduct characterized as kidnapping.

Counts 1, 2, and 3 of indictment No. 1106 adequately and completely charged the petitioner with distinct and separate acts of kidnapping on which, severally, the jury found guilt. Upon such conviction the trial court had no discretion on sentence. If there be categories of conduct prohibited within the letter of the statute and for which the sentence of imprisonment for life manifestly be inordinate, the remedy is legislative and not judicial. See *People* v. *Tanner*, 44 P. (2nd) 324 [9-12] 333 (Cal. 1935).

Writ of error dismissed.

Conviction and sentence affirmed.

STATE OF MAINE
vs.
GEORGE WILLIAM MCLEOD

Kennebec. August 20, 1964.

Sodomy. Evidence.

It is of the highest importance in the administration of justice that no man be convicted upon inadmissible and prejudicial evidence.

A suicide note written by defendant relating to an event six years past was not relevant to present charges against defendant.

ON EXCEPTIONS.

This case is on exceptions to the admission in evidence of defendant's suicide note. Defendant claims irrelevancy and prejudice. Exceptions sustained.

Jon A. Lund, County Attorney, for State.

Robert A. Marden, for Respondent.

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

WILLIAMSON, C. J. The defendant was convicted on two indictments charging sodomy. R. S., c. 134, § 3. The State's evidence was directed in each indictment to an act of fellatio with the defendant's adopted son, aged 17, on a given date in June 1963.

The case is before us on exceptions to the admission in evidence of the defendant's letter set forth below on the ground of irrelevancy and prejudice. The letter, or what we may call the "suicide note," written by the defendant at the time of an attempt to commit suicide in 1957, and addressed to his wife and children including the adopted son, reads:

"Dear Alice, Good by.

"This is my last good by — Blotted like I'm blotted myself. I love you and I am doing this to save you pain. I am evil. Not the kind of person you should love. Billie can tell you why. Ask him. I love you I love you I love you and I always will.

All my love, Geo."

"Laurie Baby

"What daddy is doing now is going to hurt you. But there is nothing left for him to do except to live and hurt you more. I wish I could kiss you good night But if I did I would no be able to do what I am going to do. I love with all my heart and soul. And if there is such a thing as another life then I am sure I'll meet you there some day Because God will understand what I am doing. I love you all.

Daddy."

"Bruce & Aileen

"I love you both and I hope you will remember that."

The witnesses for the State were the adopted son and the defendant's wife who is the boy's mother by a prior marriage.

The son testified in substance: that the defendant committed the acts in question; that from 1960 the defendant committed other acts of sodomy and perversion upon him; that he submitted through fear; that a few days after the last act he refused to submit again, and complained to his mother in spite of the defendant's threats to kill him should he do so.

The defendant's wife, testifying for the State, told in substance of the complaint made by her son, of certain

circumstances tending to bear on the likelihood of acts of perversion in the past, but not relating to the acts of which the defendant was found guilty. She also testified of her husband's acts of violence directed against her, of his drinking habits, of their sorry and stormy married life, and in particular of an attempt by the defendant to commit suicide in 1957 with (on cross-examination) the receipt of the suicide note.

On objection on the ground of irrelevancy, the suicide note was excluded. As the State in its brief says, "The exclusion was undoubtedly correct in view of the posture of the case at that time." In short, both the State and the court were of the view that the suicide note relating to an event six years in the past was not relevant to the charges against the defendant.

The wife was then cross-examined closely about her married life and her relationship with the defendant. The record reads:

"Q Since this happened have you made arrangements to have George McLeod [the defendant] taken off your Blue Cross policy?

"A No, he was automatically taken off when the mill suspended it and he stopped working.

"Q Did you have any communication with the Blue Cross regarding this policy?

"A Regarding my policy, yes.

"MR. LUND: May I inquire as to what issue this relates?

"MR. MARDEN: The issue it is offered for, Your Honor, is to indicate the relationship existing between the witness and her husband consistent with a desire to have him out of her life.

"THE COURT: If offered for that purpose the jury may hear it. At this point I think I should say — and I am interrupting you now so you will

> have it in mind throughout your cross-examination, the remainder of it, if you should want to refer to it, I excluded State's Exhibit 1 [the suicide note] a few moments ago and I think now I will admit State's Exhibit 1 and it is admitted."

The defendant categorically denied the accusations made by the son. He offered evidence designed to show hostility on the part of the son and the wife, and to sustain his good character.

The credibility of the son was of course crucial to the case. The credibility of the wife, giving evidence adverse to her defendant husband, was also of critical importance to both State and defendant.

What possible relevance had the suicide note of 1957 to the proof of acts of perversion charged in June 1963? The suicide note was admitted, the record makes clear, for its bearing on the relationship between the witness wife and her husband.

We find nothing in the record to restore vitality to the suicide note as a proper item of evidence between its exclusion and later admission.

Here is a note written it would appear by the defendant in a state of intoxication, expressing guilt and love. Surely such a pathetic confession has no relevancy in establishing the relationship of a husband and wife six long years after the incident. The suicide note, it is to be noted, was written by the husband three years before the adopted son says that his father first committed acts of perversion.

The suicide note has no bearing either on the existing relationship of the husband and wife, or upon the alleged criminal conduct of the father with the adopted son. The presiding justice in the heat of the trial failed to notice the irrelevancy of the suicide note and the prejudice which would flow from its introduction in evidence.

The irrelevancy and the prejudice of the suicide note may be shown from two phrases. "Billy can tell you why" refers, it was agreed, to X. The State in its brief says, "If it be concluded that the note suggests a homosexual relationship with [X], it should be noted that the respondent himself testified on direct that his wife had accused him of infidelity 'with all of my friends, male and women, both.' "

Here then is evidence designed by the State to establish the relationship of the husband and the wife, now said to be capable of suggesting perversion six years in the past. That the jury placed importance on it is shown by their inquiry of the court to "Further clarify who Billy is if possible."

"I am evil. Not the kind of person you should love," wrote the defendant. The State would equate this confession of evil and of inadequacy with an admission of unlawful acts touching the offense in issue. The words do not admit in particular any crime of the nature of perversion.

Lastly, the State contends that since the defendant told of his "good works," the State may utilize the words "I am evil" as in the nature of an admission or a prior contradicting statement.

In our view when the defendant cried to his wife, "I am evil," he did not thereby place a weapon in the hands of those who would seek to destroy his credibility. We are satisfied that the "suicide note" was irrelevant in the proof of the charges against the defendant and was clearly prejudicial to him.

In sustaining the exceptions and thus setting aside the convictions, we bear in mind that it is of the highest importance in the administration of justice that no man be convicted upon inadmissible and prejudicial evidence. The defendant is entitled to a new trial on each indictment.

The entry will be

Exceptions sustained.

SIMON FRANCIS
vs.
H. SACKS AND SONS, ET AL.

Aroostook. August 20, 1964.

Workmen's Compensation.

When there is a mistake of fact by the employee as to the cause and nature of the injury, it follows that the claim was timely filed and the Commission was in error in dismissing petition on such a ground.

ON APPEAL.

Workmen's compensation case on appeal from the *pro forma* decree of Superior Court sustaining the dismissal of the employee's petition for compensation by the Industrial Accident Commission. Appeal sustained. Remanded to Industrial Accident Commission for further proceedings not inconsistent herewith. Ordered that an allowance of $350.00 to cover fees and expenses of counsel plus cost of the record be paid by the employer to the employee.

James A. Bishop, Esq., for Plaintiff.

Edward T. Richardson, Jr., for Defendant.

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

WILLIAMSON, C. J. This Workmen's Compensation case is before us on appeal from the *pro forma* decree of the Superior Court sustaining the dismissal of the employee's petition for compensation by the Industrial Accident Commission.

The decisive issue is whether the Commission erred in finding that there was not a "mistake of fact as to the cause

and nature of the injury," excusing late filing of the petition.

Workmen's Compensation Act, R. S., c. 31, § 33, reads in part:

> "**Sec. 33.—Time limitations for filing petitions.** An employee's claim for compensation under the provisions of this Act shall be barred unless an agreement or a petition as provided in section 32 shall be filed within one year after the date of the accident. Any time during which the employee is unable by reason of physical or mental incapacity to file said petition shall not be included in the period aforesaid. **If the employee fails to file said petition within said year because of mistake of fact as to the cause and nature of the injury, he may file said petition within a reasonable time not to exceed 2 years from the date of the accident.**"

The sentence underscored was inserted in the section by P. L., 1957, c. 325.

On November 22, 1960, the employer filed a petition for "further compensation" alleging an injury "as follows: Hernia and ruptured intervertebral disk." The petition was subsequently dismissed without prejudice and on March 1, 1961 the present petition stating the injury to be "ruptured intervertebral disk" was filed. The employer's answer denying the allegations of the petition and setting up specifically that "said petition was not filed within a year following the date of the alleged accident and that said petition is, therefore, barred by the provisions of Sec. 33" was, to quote from the Commission's decree, "not filed within the statutory time for filing answers, but by the terms of Sec. 35 of the Act, we have granted further time for the filing of said answer."

In March 1963 the Commission, in dismissing the petition, said:

> "We find this petitioner did not file his petition within the one year period following his accident of April 17, 1959. He may not be excused because of physical or mental incapacity to file a petition and we further find that the petitioner's failure to file said petition within one year after the date of accident was not due to a mistake of fact as to the cause and nature of his injury. Petition Dismissed."

The facts in substance are as follows:

On April 17, 1959, the employee tripped over a plank while carrying a bag of potatoes. His injury was stated in the "Agreement Between Employer and Employee as to Payment of Compensation" to be an "indirect [right] inguinal hernia." He was operated upon for the hernia on April 20, 1959. Compensation under the agreement was discontinued with the agreement of the employee on June 21, 1959. Obviously at this time the employee and the employer were of the opinion that incapacity had ended.

Shortly after the hernia operation the plaintiff suffered back and leg pains associated by his doctors with the hernia. The difficulty with the leg continued and for much of the time during the remainder of 1959 and 1960 he was unable to work. Finally after seeking medical advice, his surgeon, on performing an exploratory operation, removed a ruptured spinal disc caused by the accident of April 17, 1959.

The precise question is: Is there any evidence to support the finding of the Commission that the late filing was not because of mistake of fact by the employee as to (1) the cause, and (2) the nature of the injury, i.e., the ruptured disc? If so, the finding cannot be set aside. *Arndt* v. *Trustees Gould Academy, et al.*, 151 Me. 424, 120 A. (2nd) 218.

In the case at bar, we have one accident with two separate and distinct injuries: first, the hernia requiring sur-

gery, with apparently complete recovery, and second, the ruptured disc discovered 19 months after the accident upon exploratory surgery.

We are satisfied that the employee had reason to believe that his condition following the recovery from the hernia was not caused by the accident and that his belief was properly based on the opinions of his doctors. Not until he was so informed by his then doctor after the exploratory operation did the employee have reason to believe that the nature of hs injury was a ruptured disc caused by the accident. Surely the doctors were mistaken from the accident in April 1959 to the operation in November 1960. Simon Francis, the employee, an uneducated laborer, did not lose his right of compensation under the Act through failure to anticipate the findings of the doctors. He was mistaken, and so were the doctors. See *Great American Indemnity Co.* v. *Britton,* 179 F. (2nd) 60 (C. A.-D. C.); 2 Larson, Workmen's Compensation Law §§ 78.40, 41, 42, 44.

Crawford's Case, 127 Me. 374, 143 A. 464, held the Commission was in error in excusing the failure to give notice to the employer on the ground of mistake. The court said, at p. 376:

> "The term 'mistake,' as used in the Act, has recently been construed by this Court in Brackett's Case, 126 Maine, 365. Relying on the fundamental principles that the 'mistake' must be one of fact and not of law, and that a mistake of fact takes place either when some fact which really exists is unknown, or some nonexistent fact is supposed to exist, this rule is laid down: 'When an accident results in an injury which remains latent for more than thirty days, the only immediate and perceptible result of the accident being so trivial that the injured person does not regard it as of material consequence and is reasonably justified in reaching that conclusion, he may be excused, on the ground of mistake, within the meaning of the word as used in Sec. 20, for failure to give notice of the

> accident as required in Section 17, provided that notice is given within a reasonable time after the latent injury becomes apparent.' "
>
> "The nature and results of his injuries were [2 days after the accident] clearly apparent and fully diagnosed, and there was no time thereafter, within the thirty days following January 29, that the claimant could be 'reasonably justified' in questioning the nature, extent, or result of his injuries."

In *Burpee* v. *Town of Houlton, et al.*, 156 Me. 487, 166 A. (2nd) 473, we held that the employee was not excused for late filing of a claim under Section 33 when with knowledge of his injury he acted on the advice of his physician to sign no papers until his back was well. The case is at once distinguishable from the case at bar in that the cause and nature of the injury were not in issue.

The record points only to the conclusion that within the meaning of Section 33 there was mistake of fact by the employee as to the cause and nature of the injury. It follows that the claim was timely filed and the Commission was in error in dismissing the petition on this ground.

The employee is entitled to a decree based in part upon the finding that the employee "did sustain a personal injury by accident on April 17, 1959, resulting in a ruptured spinal disc."

The employee also contends that the Commission was in error first, in permitting the late filing of an answer raising the statute of limitations in violation of Section 35 and of Rule 9 of the Commission, and second, in not proceeding with the employee's claim on the original agreement for compensation duly made and approved by the Commission under Section 32.

In light of our decision on the merits, it is unnecessary that we consider the issues so raised.

The entry will be:

Appeal sustained. Remanded to Industrial Accident Commission for further proceedings not inconsistent herewith.

Ordered that an allowance of $350 to cover fees and expenses of counsel plus cost of the record be paid by the employer to the employee.

FRANK A. HOURIHAN, PETITIONER

vs.

GEORGE F. MAHONEY, INSURANCE COMMISSIONER

Cumberland. September 23, 1964.

MEMORANDUM DECISION

Mandamus

Mandamus is an extraordinary measure and a remedy to be employed only where there is no other legal resource and where the process will be effective.

ON APPEAL.

This is an appeal from the dismissal of petition for writ of mandamus against the Insurance Commissioner. Appeal denied.

Appellant appeared pro se.

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

Appeal from dismissal of petition for writ of mandamus against the Insurance Commissioner certified to the Law Court under R. S., c. 129, § 17, *et seq.*

The single justice in substance concluded (1) that the petitioner asserted an alleged claim against the Life Insurance Company; (2) that R. S., c. 60, § 62, provided a right of action on such a claim; (3) that the Insurance Commissioner was under no duty to entertain or to hold a hearing upon the claim; and (4) that if the petition was to be considered not as a mandamus petition but as an appeal from a decision of the Insurance Commissioner, it was filed after the expiration of the thirty-day period. R. S., c. 60, § 350.

As the single justice said, in dismissing the petition, "Mandamus is an extraordinary measure and a remedy to be employed only where there is no other legal resource and where the process will be effective. *Dorcourt Co.* v. *Great Northern Paper Co.*, 146 Me. 344; *Steves* v. *Robie*, 139 Me. 359."

The entry will be

Appeal denied.

THEODORE S. CURTIS
vs.
MAINE STATE HIGHWAY COMMISSION

Penobscot. September 28, 1964.

Eminent Domain.

A landowner is entitled to just compensation for the taking of his property by the process of eminent domain.

Test for just compensation is the market value of the land for its best and highest use at the time of the taking or in the foreseeable future.

The owner of land taken by the process of eminent domain is entitled to an exact equivalent for the injury and must be made whole in so far as money can compensate.

Where the best and highest use to which unimproved wooded land taken in eminent domain proceedings could be adapted was that of a subdivision for the construction of high grade dwellings, its market value to be determined as of the day of the taking was not based upon market value of the property as it was then used but rather its market value based on its potential use as a subdivision.

In order to base market value of unimproved wooded land taken in eminent domain proceedings on its potential use as a subdivision, it had to be shown that the possibility for building purposes was not too remote and speculative, that it was to be put to such use within foreseeable future and that its market value would be enhanced by its adaptable use as a subdivision.

Testimony by water company supervisor that before taking of unimproved land, which could be used as a subdivision for the construction of high grade dwellings, installation of water mains would be less expensive than after the taking by reason of fact that taking bisected property was too remote and speculative to be permitted to enter into deliberations of the jury.

ON APPEAL.

This is an appeal by the State from a Superior Court judgment in favor of the landowner in an eminent domain case. Appeal sustained.

Needham & Needham,
by *John H. Needham,* for Plaintiff.

Orman G. Twitchell, for Defendant.

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

RESCRIPT

TAPLEY, J. On appeal. The defendant, on August 9, 1961, took by the process of eminent domain 2.80 acres of the land of Theodore S. Curtis, the plaintiff in this action. In also took the right to maintain slopes on .09 acres of plaintiff's land. Plaintiff's land is located in Orono, Maine at the junction of Kelley Road and U. S. Route 2. The total land area owned by the plaintiff and affected by the condemnation proceedings comprised 17.07 acres. After the taking there remained 14.27 acres subject to the slope easement. The land had a frontage of 328 feet on U. S. Route 2 and a frontage on the Kelley Road of 736 feet. The land was unimproved and the major portion of it heavily wooded. The amount of just compensation was decided by the Land Damage Board. The instant plaintiff and defendant each appealed from the decision of the Board. The case was tried before a drawn jury at the April Term, 1963 of the Superior Court, within and for the County of Penobscot. The jury verdict favored the plaintiff in the sum of $4500.00. The case is before this court on appeal by the defendant. Defendant's points of appeal are as follows:

"1. The Court erred in allowing the witness Lawrence Perkins to testify as to the cost of construction of water lines on land of Theodore Curtis before the date of taking, August 9, 1961, as such testimony is speculative, immaterial and prejudicial.

"2. The Court erred in allowing the witness Lawrence Perkins to testify as to the cost of con-

structing water lines on the land of Theodore Curtis after the date of taking, August 9, 1961, and the completion of construction of the improvement, according to the proposals as such testimony is speculative, immaterial and prejudicial.

"3. The Court erred in refusing to strike the testimony of witness Lawrence Perkins.

"4. The Court erred in refusing to give the additional requested instruction of the defendant-appellant, State of Maine, in the form as requested without adding exceptions thereto.

"5. The Court erred in allowing in evidence plaintiff's Exhibit #2 as the same is prejudicial, immaterial and speculative."

The parties, by agreement, entered an exhibit (plaintiff's Exhibit #1) which purports to be a plan of the land involved, bearing the following words of identification: "Survey Plan of Archibald Bennoch Lot Orono, Maine." This plan is based on a survey by one F. M. Taylor, C. E., dated July, 1955.

On the question of just compensation, the plaintiff takes the position that the best and highest use of the property is that of subdivision for the purpose of the construction of high-grade dwellings; that the area is best adapted for that purpose and because of the taking, the necessary installation of a water supply for the benefit of a part of the subdivision would be more expensive and sought, by testimony, to prove it. The major objection on appeal by the defendant is to the court's allowance of this testimony for jury consideration. The defendant objected for the reasons that the nature of the testimony was speculative, prejudicial and immaterial.

The controversy centers around the market value as determinative of just compensation.

The property before the taking consisted of 17.07 acres. The State took by the process of eminent domain 2.808 acres which left remaining 14.27 acres. The taking of the property was for the purpose of the construction of an access road to State Highway #95. The road is so constructed that it bisects property of the plaintiff, thus dividing the proposed subdivision.

The focal point of the case is the admission of the testimony of one Lawrence Perkins which was objected to by the defendant on the grounds that it was too speculative in its nature, immaterial and prejudicial. Mr. Perkins is a supervisor of the Penobscot County Water Company, having to do with the installation of water mains. He testified that before the taking, the pipe, the trenching and the installation of the pipe would cost approximately $2500.00 and that because of the taking, the cost would be increased over the original figure of $2500.00. There is much explanatory testimony as to why the increase would be occasioned by the taking. The principal reason for the increased cost is the necessity of crossing and recrossing the access road by water lines in order to service the lots planned to be created on a portion of the subdivision.

The plaintiff is entitled to just compensation for the taking of his property by the process of eminent domain.

Bangor & Piscataquis Railroad Company v. *McComb*, 60 Me. 290, 296, 297, speaks of the words "just compensation" in the following language:

> "The words selected are significant, — 'just compensation.' These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property, — as far as compensation in money can go, — under the rules of law applicable to such cases.

> "The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property.
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> - - - - -
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> "There must be, however, a limit, which will exclude remote, indefinite, or possible damages."

The owner of the land taken by the process of eminent domain is entitled to an exact equivalent for the injury; he is to be made whole insofar as money can compensate. His right is to receive no more or no less. *Chase, et al.* v. *City of Portland,* 86 Me. 367.

Just compensation, as the term is used in eminent domain proceedings, is determined by a fair market value. The test is the market value of the land for its best and highest use at the time of the taking or in the foreseeable future. *United States* v. *3,544 Acres of Land,* 147 F. (2nd) 596.

> "- - - a distinction is to be observed between what land may be worth in the future and what it is now worth in view of the future. And as no man can foresee the future with any certainty we are allowed to base calculations to some extent on the reasonable probabilities of the future.
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> - - - - -
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> "- - - it is a general principle — that if the future use of land will in all probability be greater and more valuable than its present use, such probability may be an element to be received into the calculation to establish present value.
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> - - - - -
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> "It is the near, immediate future that may influence; the uncertain, indefinite, doubtful future can not. The doctrine is to be carefully applied." *Portland and Rochester Railroad Company* v. *Inhabitants of Deering,* 78 Me. 61, 66, 67.

See also *Gilmore* v. *Central Maine Power Company,* 127 Me. 522.

For techniques of measuring just compensation in eminent domain proceedings, see note in *Boston University Law Review*, Volume 42, Page 326.

> "When a portion of a tract of land is taken, the rule of establishing the damages - - - in the absence of unusual circumstances, is thoroughly settled; it is 'the difference between the market value of the whole tract as it lay before the taking, and the market value of what remained of it thereafter and after the completion of the public improvement - - - . Generally speaking, market value is 'the price that would in all probability — the probability being based upon the evidence in the case — result from fair negotiations, where the seller is willing and the buyer desires to buy.'" *Andrews* v. *Cox Highway Com'r.*, 17 A. (2nd) 507, 509 (Conn.).

> "The land is to be valued according to its highest and best use as shown by the evidence even though the owner may not at the time of the filing of the petition be putting it to such use." *Dept. of Pub. Works & Buildings* v. *Lambert, et al.*, 103 N. E. (2nd) 356, 359 (Ill.).

The land at the time of the taking was unimproved, with a substantial portion of it wooded. According to the testimony the best and highest use to which the property could be adapted was that of a subdivision for the construction of high-grade dwellings. It therefore develops that the market value to be determined as of the day of the taking is not based upon the market value of the property as it was then used but rather its market value based on its potential use as a subdivision.

> "In determining the market value of a piece of real property for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration. The possibility of its use for all purposes, present

> and prospective, for which it is adapted and to which it might in reason be applied, must be considered. Its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test. On the other hand, possible uses which are so remote and speculative and which would require the concurrence of so many extrinsic conditions and happenings as to have no perceptible effect upon present market value must be excluded from consideration. To warrant admission of testimony as to the value for purposes other than that to which the land is being put, or to which its use is limited by ordinance at the time of the taking, the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, (3) that the market value of the land has been enhanced by the other use for which it is adaptable." *Nichols on Eminent Domain,* Vol. 4, Page 140, Sec. 12.314.

Under the circumstances of this case, where the potential use of the land is that of a subdivision, or a housing development, and market value is based on its potential use, it must be shown (1) that the possibility for building purposes must not be remote and speculative; (2) that it is to be put to such use within the foreseeable future and (3) that its market value has been enhanced by its adaptable use as a subdivision.

The plaintiff contends that the bisecting of the property by the access road would make it more expensive to construct water mains for the purpose of serving the proposed lots situated on the easterly side of the access road. The testimony of Mr. Perkins is presented to show the additional or increased costs made necessary by the taking — not the cost of water service installation as would apply had not the property been affected by the condemnation of a part of the land.

> "- - - it is not necessary that the extrinsic improvement which will make the land specially available for a particular purpose be in existence when the land is taken, if the probability of its being constructed in the immediate future is so strong as to have an effect upon present market value." *Nichols on Eminent Domain,* Vol. 4, Page 158, Sec. 12.314.

The testimony of Mr. Perkins pertains to market value on basis of extra requirement of pipe lines and their installation occasioned by the taking.

The plaintiff's position is (1) that his property has for its highest and best use (potential use) that of a subdivision or development area for the construction of high-grade dwelling houses; (2) that the market value should be determined at the time of taking on the basis of its potential use; (3) that a necessary adjunct to a subdivision is water mains for the servicing of house lots; and (4) that by the taking of a strip of land bisecting the property and defendant has caused additional expense in servicing those proposed lots lying easterly of the land taken.

In presenting testimony offered to show additional expense, the plaintiff met with objection on the part of the defendant. The defendant argues that such testimony should not be admitted because it is speculative, immaterial and prejudicial. Mr. Perkins testified, in substance, that the original cost of the laying of water lines would be $2500.00 and that because of the taking and the resultant bisecting of the property by the access road there would be additional costs for installing water mains and lateral service lines. He presented three proposals as to the manner in which the laying of the mains could be accomplished and the cost as to each proposal. The first proposal would increase the cost over the original amount by $4090.00; the second proposal would increase it in the amount of $3080.00; and should the third proposal be accepted, the

amount of increase would be $5200.00. The defendant, in argument, urges that in admitting these costs there could be created an influence on the minds of the jury to the end they would completely ignore the before and after value rules as they relate to just compensation. Counsel for defendant lays great stress on his position that Mr. Perkins' testimony as to costs is highly speculative and with no reasonable expectation that they will apply to installations to be done in the foreseeable future.

The allowance of the type and character of Mr. Perkins' testimony would be for the purpose of affecting market value — not to show damages in dollars and cents. A water supply is necessary to a housing development and with the taking the condemner has created a condition which affects the value of a portion of the property in its adaptation to its best and most highest use — that of a development for the construction of dwellings. This testimony, in order to be admissible for the purpose of being considered as an element in determining market value, must meet the test of relevancy.

The justice below was obviously aware that evidence of the estimated increase in the future cost of utilities (required in connection with the highest and best use of the property remaining after severance) can be received, if at all, only as a factor in the determination of the fair market value after taking. In his charge to the jury he gave the instruction requested by the defendant: "Evidence bearing upon the costs of installing water pipes on the land of the landowner to service a proposed subdivision of said land into lots for residential type dwellings, is not to be considered by you in determining the just compensation to be paid this landowner by the State of Maine for taking a portion of his land for highway purposes" - - - but then continued by saying, "except, as I am now going on to explain. Mr. Perkins testified that the location of this road and the

nature of its banks or slopes, you will recall what his testimony was as to that, the nature of the location and construction of the road, he said, increased the potential cost of putting water into the area, and he quoted some figures as to what it would cost if anyone of three plans were followed to get water into the area. Again I caution you we must not be speculative. We cannot conclude that Mr. Curtis will now divide the land into 6 or 8 or 10 lots and that those lots would be sold and would require water, each of them require water. We don't know how many lots will ever be sold or how many connections will ever be made. You may consider this testimony that I speak of only in this manner: A willing buyer and a willing seller, although they would probably realize the future sales of the lots were still uncertain and speculative, would take into consideration that getting water into this property is now more or less difficult and expensive than before. If it is more difficult and would be more expensive than before, if that is true they would take that into consideration, and that might or might not affect the fair market value of the property. It is for you to say whether it would or would not, but the law does not permit juries to say, we think 6 or 8 or 10 lots would be divided from this remaining property and sold and therefore we will add exactly a certain number of dollars to our verdict for the plaintiff because the plaintiff will now have to get water to this 6 or 8 or 10 lots and cost x number of dollars. That would be too speculative. You may consider that only as the willing buyer and willing seller might at the time of the taking looking into the foreseeable future decide, if they would, that water would be required upon the property to be used for its highest and best use and that the construction of the highway would make more difficult and more expensive the potential distribution of water if such is the case, and only to that extent may you consider Mr. Perkins' testimony in that respect."

The difficulty in this instant case is that the evidence was too prejudicial to be submitted to the jury even under carefully limiting instructions as to the use the jury might make of it. This is not merely a matter of estimating the costs of restoring the use which the owner had before the taking. *Cf. Arkansas State Highway Commission v. Speck* (1959), 324 S. W. (2nd) (Ark.) 796. In the case before us the land before the taking was unused and undeveloped. It was not served by any water facility. There was no suggestion as to whether the owner would ever bring water to his property or how or where he might do so. The witness was compelled to assume that if water were brought to the land, it would be done at such a location and in such a manner that it would cost, absent the new highway, $2500. To establish the excess in cost of water installation attributable to the public improvement, he was further compelled to assume that the land would be subdivided in a particular manner and in accordance with a certain plan and that water would be brought by a route which would necessarily cross the new highway. Such testimony given in connection with a wholly undeveloped tract of land is too remote and too speculative to be permitted to enter into the deliberations of the jury. The prejudice which might result could only be eliminated by an instruction to disregard, as the defendant requested. We do not suggest or imply that an expert witness is precluded from testifying that his estimate of the fair market value of the property remaining after severance took into account, among other factors, the probability of increased difficulty and expense in getting water to the property. But except when being tested on cross examination, his specific estimate of the cost of such a remote and indefinite undertaking would not ordinarily be received. The witness Perkins was not called to give an opinion as to fair market value, but only as to the specific costs of bringing to the property a service which it never had and might never need.

In the present case, where the jury verdict may have been influenced by the inadmissible and prejudicial testimony of Perkins, the entry must be,

Appeal sustained.

BENEFICIAL FINANCE CO.
(MAINE)
vs.
JOHN C. FUSCO
GERALD COPE

Cumberland. September 29, 1964.

Compound Interest. Finance Companies.

Interest which had accrued and was payable under first contract of loan legally became part of principal under new contract between borrower and lender, a licensee under Maine Small Loan Law, and there was no violation of statute prohibiting compounding of interest.

When Maine Legislature enacted Small Loan Law amendment identical in terms with that by which New York Legislature had evidenced its approval of judicial construction of New York law similar to Maine law, Maine Legislature showed that it not only approved New York amendment but that it likewise approved construction given New York law.

ON REPORT.

This is reported on an agreed statement of facts upon the issue of compound interest in violation of Section 218, Chapter 59, R. S., 1954, as amended. Judgment for the Plaintiff.

Berman, Berman, Wernick & Flaherty,
by *Sidney W. Wernick,* for Plaintiff.

Dana W. Childs,
Gerald S. Cope, pro se, for Defendants.

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

RESCRIPT

TAPLEY, J. On report. This action comes to us on report on an agreed statement of facts. Gerald S. Cope, upon motion addressed to the court below, was allowed to intervene as a party defendant.

The plaintiff, Beneficial Finance Co. (Maine), (hereinafter referred to as Beneficial) is a corporation qualified to do business in the State of Maine. It is a licensee under the Maine Small Loan Law, R. S., 1954, Chap. 59, Secs. 210-227, as amended. Beneficial, by this action, is seeking to collect the total sum of $408.66 from the defendant Fusco. This amount is alleged to be due as the result of the default by the defendant of payment of a note payable to Beneficial, the note bearing date of February 1, 1961. The defendant pleads, in defense, that the note which forms the basis of the action is in violation of Sec. 218, Chap. 59, R. S., 1954, as amended, and therefore the note dated February 1, 1961 is void and uncollectible.

Section 218 is couched in the following language:

> "Interest payable under the provisions of sections 210 to 227, inclusive, shall not be payable in advance or compounded, and shall be computed on unpaid balances. In addition to the interest herein provided for, no further or other charge or amount whatsoever for any examination, service, brokerage, commission or other thing, or otherwise, shall be directly or indirectly charged, contracted for or received, except lawful fees, if any, actually and necessarily paid out by the licensee to any public officer for filing or recording in any public office any instrument securing the loan, which fees may be collected when the loan is made, or at any time thereafter. If interest or charges in excess of those permitted by sections 217 and

218 shall be charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever."

The facts of the case are supplied by agreed statement reading as follows:

"In addition to the allegations of fact admitted by the pleadings on file, the parties stipulate the following facts:

"1. When the defendant came to the office of the plaintiff on February 1, 1961, for the purpose of borrowing additional money, defendant was in default under the terms of the promissory note, described in the complaint, for the loan made on July 25, 1960, and there was then due and owing the entire unpaid balance of principal in the amount of $355.15 and accrued interest thereon in the amount of $8.17, a total of $363.32.

"2. On February 1, 1961 the defendant's request for an additional loan from the plaintiff was approved and the plaintiff and defendant entered into the following transaction: The defendant executed and delivered to the plaintiff a new promissory note in the face amount of $499.45, photographic copy of which is hereto annexed and incorporated as a part hereof, identified as 'Exhibit A.' Said note was secured by a chattel mortgage on various items of personal property. The face amount of the new note was computed as follows:

"(1) The unpaid principal balance due on the prior note, in the amount of $355.15;

"(2) Interest due on the prior note, in the amount of $8.17;

"(3) Recording fee of $1.00;

"(4) $135.13 new and additional money being borrowed by the defendant, and being slightly in excess of the amount defendant had re-

quested to borrow in order to allow the new note to provide for 24 monthly installments in amounts of $28, plus a final installment covering unpaid principal and accrued interest thereon.

"The aforesaid borrowing transaction was completed by plaintiff's delivering to the defendant the sum of $136.13 in cash and taking back from the defendant $1 to cover recording fee for the chattel mortgage. The prior note was thereupon stamped 'Paid' and was delivered by plaintiff to defendant together with the chattel mortgage securing it, the mortgage being discharged.

"3. At the time of the filing of the complaint and of service of the complaint on the defendant, defendant was, and for a long time prior thereto had been, in default on the note executed by defendant, as described in the complaint, on February 1, 1961. Pursuant to the option provided to plaintiff as the holder of said note by the terms of said note, plaintiff has declared the entire unpaid balance of the principal on said note and the accrued interest thereon due and payable at once, said amount being the sum of $408.66.

"4. Annexed hereto and identified as 'Exhibit B' is a copy of plaintiff's ledger card containing only plaintiff's entries of all payments made on the loan dated July 25, 1960 by plaintiff to defendant referred to in paragraphs 3 and 4 of the complaint and in paragraph 1 of this stipulation."

The issue is whether the promissory note which includes $8.17, past interest due and unpaid under a previous note, is "interest - - - compounded" in violation of Sec. 218, Chap. 59, R. S., 1954, as amended. Determination of the issue requires construction of Sec. 218 in order to decide whether or not the interest bearing note executed under the factual circumstances as presented by the agreed statement represents in part the sum of $8.17 as "interest - - - compounded" as the term has meaning within the concept of Sec. 218.

The positions of the respective parties are clear and well defined. Beneficial claims that when the parties executed the note of February 1, 1961 for the purposes of the defendant borrowing additional money and paying off the original note, the $8.17 as accrued interest and unpaid under the first note became transformed into principal in the note of February 1, 1961. In opposition to this contention defendant says that when the amount of interest of the first note ($8.17) became a part of the indebtedness evidenced by the second note it was "interest compounded" within the intent of Sec. 218.

The Legislature in 1917 enacted a statute regulating the business of making small loans (Chap. 98, R. S., 1917). Sec. 9 of Chap. 98, to all intent and purposes, is like that of Sec. 218. Since 1917 this court has had no occasion to consider the question presented here.

The legislative enactment of 1917 took place against the background of some Maine case law concerning compound interest. In *Doe* v. *Warren, et al.*, 7 Me. 48 (1830), the court had occasion to consider the question of the legality of compound interest. On page 49 the court said:

> "What is interest? It is an accessary or incident to principal. The principal is a fixed sum; the accessary is a constantly accruing one. The former is the basis or substratum from which the latter arises, and upon which it rests. It can never, by implication of law, sustain the double character of principal and accessary. Whatever the plaintiff recovers beyond the face of the notes, the sum originally due, he recovers as interest. No part of it then has yet become principal, nor can it be so regarded. After interest however has accrued, the parties may, by settling an account, or by a new contract, turn it into principal. It is then in the nature of a new loan; but it does not become principal, by operation of law, merely because it is due; - - -."

In *Otis* v. *Lindsey,* 10 Me. 315 (1833), a note was given by the defendant to the plaintiff in payment of two smaller notes and for a sum of new or additional money loaned. The sum claimed due on the old notes included compound interest. The court stated, on pages 316-317:

> "- - - such interest upon interest is not recoverable on the ground that by *operation of law* it becomes principal and bears interest. Yet, after interest has accrued, the parties may, by settling an account, or by a new contract, turn it into principal." (Emphasis supplied.)

In light of these judicial pronouncements, where interest compounded by operation of law is illegal but when accrued and payable it becomes part of the principal of a new loan, the 1917 Statute was enacted. In these early cases Maine recognized a distinction between interest upon interest occurring by operation of law, and when interest was transformed into principal by agreement under a new loan contract. At the time of the enactment of the Statute of 1917 the case law of Maine determined that interest cannot, by operation of law, be compounded, but when it accrues and becomes due, then, by agreement of parties, it may legally be made a part of a new principal and thereby lose its identity as interest.

Counsel for defendant urges that *Madison Personal Loan* v. *Parker,* 124 F. (2nd) 143 (2nd Cir. 1941) is the leading authority on the question involved here and is decisive of this case. The case involves the construction of a section of the Small Loan Act of New York which is similar to the Maine Statute. On June 23, 1939 Parker executed a promissory note in the amount of $287.00, bearing interest at the maximum rate permitted under the Small Loan Act. The note was secured by chattel mortgage. $159.29 of the amount of $287.00 was paid to Madison Personal Loan in satisfaction of a prior loan representing $158.19 principal and $1.10 interest. The remaining $127.71 was paid to

Parker. The court held that it was immaterial whether the $287.00 loan was a "renewal" or a "new" loan. It does not recognize the principle of transforming *interest* to *principal* as approved by *Otis* v. *Lindsey, supra.* The decision in Madison Personal Loan supports the contention of the defendant.

Counsel for Beneficial argues that *Household Finance Corporation* v. *Goldring, et al.,* 33 N. Y. S. (2nd) 514 (1942), affirmed in 289 N. Y. 574, 43 N. E. (2nd) 715, is controlling and determinative of the question now before us. The case interprets "compound interest" as used in a section of the Small Loans Act similar to the Maine Statute. It is the same section involved in Madison Personal Loan. The facts are substantially these: The defendants borrowed $120.00 from the Household Finance Corporation on December 21, 1939, with interest at the rate of 2½% on unpaid principal balances. On November 9, 1940, after having paid 10 installments of $10.70 each, defendants requested the plaintiff to grant a new loan of $125.00. There was a balance due on the old note of $68.42 to which was added the sum of 46c for interest from November 1 to November 9, 1940, making a total of $68.88. The plaintiff retained $68.88 and paid the balance of $56.12 to the defendants. Defendants failed to make any payments on the new note, whereupon suit was instituted. In defense the defendants contended that when the plaintiff deducted 46c from the proceeds of the new loan of $125.00 there was a compounding of interest, in violation of the statute and therefore the loan was void. In its opinion the court said, on pages 517-518:

> "It is not disputed and was, indeed, conceded on the argument, that if the defendants had paid their earlier note together with the accrued interest of forty-six cents, and had thereupon borrowed from the plaintiff the full amount thus paid or any other sum, no question of compounding interest would

arise. It is contended, however, that because the balance of the earlier note together with the interest of forty-six cents was not paid in cash to the lender but was deducted from the proceeds of the new loan, interest has been compounded and the note is void. The realist must at once suspect that there is something wrong in such a paradox and that, both in theory and in practice, the transactions are identical. When the lender deducts the accrued interest from the proceeds of a new loan, the transaction differs in no respect from a payment of the interest in cash. Compare, Mills v. Equitable Life Assurance Society of United States, 262 App. Div. 907, 28 N. Y. S. 2d 1013. The lender merely pays to himself the amount which is due for interest out of the sum which otherwise would be paid to the borrower and immediately repaid by the borrower to the lender. The interest thus incorporated as a part of the principal of the new loan is as truly an 'unpaid principal balance' within the meaning of the statute as if the borrower had paid the interest in cash and received the full proceeds of the loan. It is obvious, also, that a different rule would serve only to require the lender to exact payment of the note with the interest in cash before making the new loan, thereby benefiting neither the lender nor the borrower.

"We think the term 'compound interest', as it is commonly understood, applies to an agreement whereby interest thereafter to accrue automatically bears interest. Such agreements the law has refused to countenance principally for the reason that an improvident debtor is not likely to realize the extent to which the interest will accumulate. Though the term 'compound interest' may apply in certain other circumstances, we think it does not apply where interest has already fallen due and has become a debt which, like any other debt, may either be paid in cash or reloaned to the debtor under a new agreement that it shall bear interest. Such an agreement is not a snare which is likely to entrap the unwary, for the borrower

cannot fail to realize the exact extent of his obligation. He may pay that interest in cash or, if the parties agree, he may arrange a new loan which will bear interest and, as here occurred, allow the interest to be deducted from the proceeds. In neither event does it seem to us that interest is compounded within the ordinary meaning of that term.

"We think the true principle to be applied is that upon maturity of the note either by expiration of its terms or by agreement of the parties, the interest when deducted from the proceeds is to be regarded as a part of the principal of the new loan and, accordingly, that the interest charged on the total debt does not constitute 'compound interest.' "

The definition of the term "compound interest" as used and defined in *Household Finance Corporation* v. *Goldring, et al., supra* was accepted and approved in *Barutio* v. *New York Life Ins. Co.*, 177 S. W. (2nd) 685 (Mo.) (1944).

"- - - - No licensee shall induce or permit any borrower to split up or divide any loan, and all sums owed by any person at any 1 time shall be considered as 1 contract of loan for the purpose of computing the interest payable thereon. No licensee shall induce or permit any person, nor any husband and wife, jointly or severally, to become obligated, directly or contingently or both, under more than 1 contract of loan at the same time, for the purpose or with the result of obtaining a higher rate of interest than would otherwise be permitted by this section." Chap. 59, Sec. 217, R. S., 1954.

"Interest payable under the provisions of Sections 210 to 227, inclusive, shall not be - - - compounded - - - - -." Chap. 59, Sec. 218, R. S., 1954.

The quoted portions of these two sections were designed to prohibit the obtaining of a higher rate of interest than is permitted on any one contract of loan. It is clear that

should compound interest be charged on any loan, that loan would be void and legally uncollectible. Insofar as the interest portion of the Small Loan Act is concerned, it operates in its prohibitory manner against the lender. It protects the desperate borrower from the requirement of paying the lender a high and unjust profit on his money, thereby curing the evils of the small loans business which existed prior to statutory regulation.

Defendant contends that although the interest was not compounded on the original loan it held its character as interest when it became a part of the new contract of loan and therefore became "interest - - - compounded."

The defendant was in default of the original note of July 25, 1960 and sought the second loan for the purposes of paying the defaulted note and borrowing new and additional money. The Beneficial agreed to the request for a loan and from the proceeds of this loan the defendant paid Beneficial $363.32, including accrued and payable interest of $8.17 and received as *new money* $135.13. The new and distinct contract of loan was secured by a chattel mortgage. The parties to this action are competent to contract. The defendant was not forced to borrow from the Beneficial more money to satisfy his obligation. He could have borrowed elsewhere and paid the note or remained defaulted and forced action for collection. He chose, however, to return to the original lender, the Beneficial, to request another loan. He was motivated by two reasons, one to borrow sufficient money to pay off his indebtedess to the Beneficial and the other to obtain *new money*. The principal amount due under the first note, the accrued interest of $8.17 plus the *new money*, became the principal of the new note. According to the position of counsel for the defendant, had the defendant obtained the $8.17 from a source other than from the proceeds of the new contract of loan and paid the Beneficial the amount of $8.17, the new contract of loan evi-

denced by the note would not have been void and uncollectible. Common sense does not support the reasoning that the Legislature intended that the prohibition of compounding interest on a loan would apply to the factual circumstances which obtain in this case.

The force of *Household Finance Corporation* v. *Goldring, supra,* is persuasive in its influence on the issues of this case. It construes the New York Statute which in all pertinent respects is like the Maine Statute. It is based on factual circumstances which are practically identical with those of the instant case. The reasoning and result in *Household Finance Corporation* were in manner approved by the New York Legislature when in May, 1942 it enacted a revision of Sec. 352 of the Banking Law of New York.

> "Interest, consideration, or charges for the use of money, shall not be deducted or received in advance and shall be computed on unpaid principal balances. Such interest, consideration or charges shall not be compounded; provided that, if part or all of the principal amount of any loan contract is the principal balance of a prior loan, the unpaid interest, consideration or charges for the use of money on such prior loan which have accrued within sixty days before the making of such loan contract may be incorporated as interest bearing principal in the principal amount of the loan contract, and for the purposes of this paragraph any such new loan shall be deemed a separate loan transaction." Chap. 605, New York Laws, 1942.

In 1963 the Maine Legislature amended Sec. 218 (Chap. 141, Sec. 4, P. L., 1963) with an amendment identical in terms with the New York amendment of 1942. This action on the part of the Maine Legislature is evidence that it not only approved the New York amendment but also indicated by implication that the construction given the New York Statute in *Household Finance Corporation* is equally applicable to the Maine Statute.

Section 218 provides that the interest rates under Sec. 217 shall not be compounded. By statute there can be only one contract of loan and on that one contract of loan there shall be no compounding of interest. When Secs. 217 and 218 are read and construed together it is obvious that the Legislature intended to prevent the lender from obtaining high and unconscionable interest by prohibiting any loan which would result in increasing the prescribed rates of interest on any *one contract of loan.* When the obligations of an existing loan are satisfied then a new contract of loan may be entered into between the same parties under the same limitations and restrictions as are provided under Secs. 217 and 218. In this case, under the first loan, there was no compound interest charged or collected. The interest which *had accrued and was payable* under the first contract of loan legally became part of the principal under the new contract and upon this principal the interest was not compounded but was charged in accordance with the rates prescribed under Sec. 217.

We perceive in the contract of loan no violation of the statutes nor anything unconscionable, against public policy or injuriously oppressive to the defendant debtor.

We are of the opinion, and so determine, that the note of February 1, 1961 is a legally effective and enforceable document.

The entry shall be:

Judgment for the plaintiff for $408.66, with interest from date of complaint, and costs.

RAMIE MICHAUD AND DELIA R. MICHAUD
vs.
CITY OF BANGOR

Penobscot. Opinion, October 12, 1964.

Damages. Trespass. Statutes. Municipal Corporations.

Punitive or exemplary damages are not recoverable against municipality unless expressly authorized by statute.

Statute authorizing double damages for willfully or knowingly destroying property on lands of another and statute authorizing treble damages for destroying or taking fruit or ornamental tree or shrub without permission of owner are remedial and not penal.

That double damages may be recoverable under statute does not of itself determine statute to be penal.

When city, illegally and without authority, directed its public officers to destroy plaintiffs' property, including building, personalty and raspberry bushes, act of destruction on part of public officers was not one within scope of authority of their office but was committed by them as agents of municipality, creation of agency carried with it legal responsibility for tort liability and city was liable for double and treble damages for such destruction.

ON APPEAL.

This is an appeal by a municipality from the assessment of damages for the illegal burning of plaintiffs' real and personal property. Appeal denied.

Albert C. Blanchard, for Plaintiffs.

Abraham J. Stern, for Defendant.

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

TAPLEY, J. On appeal. The action is for damages only. The basis of the action was the intentional destruction, by

fire, of the plaintiffs' building by order of the City Council of the City of Bangor. In burning the building certain personalty, as well as some raspberry bushes, were destroyed. At the original trial between the same parties judgment was entered upon a verdict directed for the defendant, to which judgment the plaintiffs filed an appeal. *Michaud, et al.* v. *City of Bangor,* 159 Me. 491. In sustaining the appeal the court said, on pages 494, 498:

> "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."
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> "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 case was remanded to the Superior Court for assessment of damages and this appeal is the result of the trial on damages.

Trial was had before a jury in the Superior Court for the County of Penobscot on February 7, 1964.

The jury in rendering its verdict did so by returning the following special findings:

1. The sum of $2775.00 as damages for the loss of value of the real estate as a result of the fire;

2. The sum of $25.00 as damages for the loss of the value of the personalty as a result of the fire;

3. The sum of $50.00 as damages for the loss of value of the raspberry bushes as a result of the fire.

Following the finding of damages by the jury the presiding justice, in a written decision, doubled the amount of actual damages as found by the jury in the case of the build-

ing and personalty and tripled the amount of actual damages found by the jury as to the raspberry bushes. He ordered judgment to be entered for the plaintiffs in the total sum of $5700.00, without interest, plus costs.

The defendant appealed from the judgment, claiming error for the reason that a municipality is not subject to the assessment of double and treble damages under provisions of Secs. 9 and 11 of Chap. 124, R. S., 1954, as amended, because they are in the nature of exemplary and punitive damages which are not legally assessable against a municipal corporation.

The plaintiffs contend that double and treble damages under Secs. 9 and 11 are not within the category of punitive damages but are remedial and are legally proper to be charged against the defendant.

The statutory provisions upon which this action is based are couched in the following language:

> "**Sec. 9. Trespass on lands of another.**—Whoever cuts down, destroys, injures or carries away any ornamental or fruit tree, timber, wood, underwood, stones, gravel, ore, goods or property of any kind from land not his own, without license of the owner, or injures or throws down any fences, bars or gates, or leaves such gates open, or breaks glass in any building is liable in damages to the owner in an action of trespass. If said acts are committed willfully or knowingly, the defendant is liable to the owner in double damages."

> "**Sec. 11. Trespass on improved or ornamental grounds.**—Whoever enters on any grass land, dooryard, ornamental grounds, orchard or garden and cuts down, defaces, destroys or takes therefrom, without permission of the owner, any grass, hay, fruit, vegetable or ornamental tree or shrub is liable in an action of trespass to the party injured in treble damages."

The Law Court determined in *Michaud, et al.* v. *City of Bangor, supra,* that the act of burning plaintiffs' property was performed by "subordinates acting not as public officers, but as special agents for whose acts it (the City of Bangor) is responsible." If Secs. 9 and 11 are determined to be "penal" double and treble damages cannot stand against the defendant. If, however, the sections of the statute concerned here are deemed remedial then the double and treble damages as ordered by the presiding justice shall stand.

The original complaint alleged that the defendant "willfully or knowingly entered upon the aforesaid lot or parcel of land belonging to the Plaintiffs and willfully or knowingly set fire to and destroyed by burning certain of the property owned by the Plaintiffs - - -." The determination of liability carries with it the finding that the defendant committed the acts willfully or knowingly and thus satisfies the statutory provision of Sec. 9 in these respects. In Sec. 11 there is no requirement that the acts be committed willfully or knowingly in order that treble damages be assessed.

Punitive or exemplary damages, according to the weight of authority, are not recoverable against a municipality unless expressly authorized by statute. For a comprehensive treatment of the subject, see 19 A. L. R. (2nd) with annotations beginning on page 903.

Secs. 9 and 11 of Chap. 124 are remedial and not penal. *Black* v. *Mace,* 66 Me. 49; *Reed, et al.* v. *Central Maine Power Company,* 132 Me. 476.

> "Whether statute is 'penal' or 'remedial' depends on whether purpose is to punish offense against public justice of State, or to afford private remedy to person injured by wrongful act." *Vol. 36-A, Words and Phrases, "Remedial Statute," p. 544.*
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> "- - - 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.'

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> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes and misdemeanors.*'"
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> *Huntington* v. *Attrill,* 146 U. S. 657, 668, 669.

> "If the right of action be given to the injured party, and the increased damages are only incidental to the general right to recover, the statute and action are remedial." *Hall* v. *Hall,* 112 Me. 234, 236.

The fact that double damages may be recoverable does not of itself determine the statute to be penal. *Quimby* v. *Carter,* 20 Me. 218. See also *Titus* v. *Inhabitants of Frankfort,* 15 Me. 89.

Upon the establishment of liability under Sec. 9, the owner is entitled, by statutory right, to double damages if it is proved that "said acts are committed willfully or knowingly."

Under the provisions of Sec. 11, the owner is given the right to recover three times the actual value of the property upon proof of liability. *Black* v. *Mace, supra.*

When the City of Bangor, illegally and without authority, directed its public officers to destroy the property of the plaintiffs, the act of destruction on the part of the public officers was not one within the scope of the authority of their office but as agents of the municipality. The creation

of the agency by the City carried with it the legal responsibility for the tort liability and the double and treble damages which flowed therefrom as provided in the remedial statute (Secs. 9 and 11).

The justice below was not in error when he assessed double and treble damages against the defendant.

Appeal denied.

FRANCIS CARTER
vs.
AUSTIN WILKINS, STATE FOREST COMMISSIONER
AND
STATE PERSONNEL BOARD

Kennebec. Opinion, October 12, 1964.

Certiorari. Officers. Evidence.

A writ of certiorari may operate only upon the record of a tribunal, the correction of which is sought.

Minutes of State Personnel Board were the record of its proceeding on an employee's appeal from separation from the classified service, and record of the board should be reviewed by a petition for writ of certiorari, although such review was a limited review.

Review by writ of certiorari can present only the record of proceedings of the tribunal, and the error must appear in the record of the inferior court.

When the record is certified to a reviewing court in response to a writ of certiorari, the record is conclusive in all matters of fact within its jurisdiction, and the writ does not deal with the evidence unless some question of law is raised in relation thereto.

Evidence, in proceeding for review of plaintiff's separation from the classified state service, sustained finding of personnel board that although department in question waived requirement that an absent

employee be specifically granted a leave up until a certain date, the department was justified in considering that plaintiff who was not granted a leave of absence was absent without leave after date in question and was therefore subject to separation from the classified service.

ON APPEAL.

This is an appeal from the dismissal of the plaintiff's complaint for review of the decision of the State Personnel Board affirming plaintiff's separation from employment. Appeal dismissed.

Jerome G. Daviau, Esq., for Plaintiff.

Leon V. Walker, Asst. Atty. General, for Defendant.

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

MARDEN, J. On appeal from a dismissal by the Superior Court of a complaint seeking review of a decision of the State Personnel Board, or, in terms of the law of certiorari, on appeal from the refusal of the Superior Court to correct a decision of the State Personnel Board.

Plaintiff, prior to the events out of which this controversy arises, held a position in the state service, classified as Forester, under the State Personnel Law (Chapter 63, R. S., 1954, as amended). Following an injury sustained in an automobile accident, and in line of duty, on June 22, 1961, and a period of disability lasting until March of 1963, plaintiff sought to return to work for the State, was not permitted to do so by ruling of the "appointing authority" (Sec. 1, Subsection I, same) of the State Forestry Department. Plaintiff appealed from the ruling of the appointing authority to the Personnel Board (Board).

The legal issue before the Board involved plaintiff's status and rights under the Personnel Law and rules having the effect and force of law promulgated thereunder (Sec. 4, Subsection II, same), governing absence from duty. The factual issue involved interpretation of correspondence between the plaintiff, or others on his behalf, and the Forestry Department through its Commissioner (the appointing authority) and its Deputy Commissioner, and evaluation of the nature and extent of plaintiff's disability as bearing upon his employment status. Plaintiff contends that in the light of the facts, including such facts as to compel a finding of waiver of, or estoppel to apply, certain conditions imposed by the rules, he must be considered to have been on leave of absence and refusal by the Forestry Department to restore him to duty violated his employment rights. The Department contends that plaintiff's absence, after the expiration of earned vacation and sick leave, without specific grant as required by the rules, and no facts to justify finding of waiver by the Department and no law to permit estoppel of the Department, was absence without leave which ripened into a resignation, which was recorded, and plaintiff became thus separated from the service.

The Board sustained the ruling of separation from the service, and from this Board decision plaintiff sought review in the Superior Court by complaint under the provisions of Rule 80B M. R. C. P. The Board urges that its decision is not subject to review.

The Superior Court correctly treated the complaint as a petition for writ of certiorari, in its discretion granted leave for an order (writ) of certiorari to issue (*Rogers* v. *Brown*, 134 Me. 88, 90, 181 A. 667), the Board, in response to the order, certified to the court the record of its action, consisting of stenographic report of the plaintiff's hearing before it, exhibits, and the minutes of the pertinent Board meetings. The Superior Court dismissed the complaint (refused to revise or correct the Board's decision).

The present issues, broadly stated, are two:

1) Does the plaintiff have the right to have the decision of the Board reviewed?

2) If so, is there reversible error?

A right of appeal is not inherent in our legal system. 4 Am. Jur. (2nd), Appeal and Error § 1. It is conferred only by statute or provisions allowing review by extraordinary writ.

Rule 80B of our Rules of Civil Procedure provides:

> "When a statute provides for review * * * of any action by a governmental * * *, board, * * *, whether by appeal or otherwise or when any judicial review of such action was heretofore available by extraordinary writ, proceedings for such review shall be instituted by filing a complaint with the court. * * *."

There is no statutory right of appeal from a ruling of the Personnel Board.

There being no statutory right of appeal, the right to have the decision of this administrative board reviewed rests upon its theretofore availability by extraordinary writ. Such writ was that of certiorari, known to the common law, but provided by Sections 13-16 of Chapter 129, R. S., 1954, as amended (*Chavarie* v. *Robie,* 135 Me. 244, 194 A. 404) whereby the Supreme Judicial Court or the Superior Court may command an inferior court "to certify up its record of some proceeding, not according to the course of the common law, that it may be seen and determined whether there is any error * * *." *Inh. of Nobleboro* v. *County Commissioners of Lincoln County,* 68 Me. 548, 551; *Toulouse et al.* v. *Board of Zoning Adjustment, City of Waterville,* 147 Me. 387, 392, 87 A. (2nd) 670. This method of review reaches only proceedings of bodies and officers acting in a judicial

or quasi-judicial capacity. *Rogers, supra,* at 90. It has been applied to review the proceedings of Justices of the Peace and of the Quorum, *Emery* v. *Brann,* 67 Me. 39; Boards of County Commissioners of which *Inh. of Nobleboro, supra,* and *Levant* v. *County Commissioners of Penobscot County,* 67 Me. 429 are representative; Municipal Officers in *Andrews* v. *King,* 77 Me. 224; Board of Engineers in *Nelson* v. *Board of Engineers of Portland Fire Department,* 105 Me. 551, 75 A. 64; Board of Police in *Jellerson* v. *Board of Police of the City of Biddeford,* 134 Me. 443, 187 A. 713; and Board of Zoning Adjustment in *Toulouse, supra.* See also 14 C. J. S., Certiorari § 46.

> "Whether an act is judicial or quasi-judicial so as to be reviewable by certiorari depends on the nature of the act performed, rather than on the character of the officer or body performing it. Judicial action is an adjudication on the rights of parties who, in general, appear or are brought before the tribunal by notice or process, and on whose claims some decision or judgment is rendered." 14 Am. Jur., Certiorari § 17. Reiterated in 14 C. J. S., Certiorari § 17 b.

If, then, the Personnel Board, acted in this case as a judicial or quasi-judicial body, its decision in that respect is subject to review by way of Rule 80B M. R. C. P.

The Personnel Law and its powers and duties to prescribe rules relative to eligibility, classification, compensation, promotion, demotion, suspension, layoff, dismissal, and leave of absence, among others, create rights in and obligations of the employee and any decision by the Board affecting those rights is quasi-judicial. See *Smith* v. *Highway Board et al.,* 91 A. (2nd) 805, [9-11] 809, and [20, 21] 812 (Vt. 1952).

It is urged that "(a)nother test (of the judicial character of an act) is whether the parties at interest had a right under the law to demand a trial in accordance with judicial

procedure, not whether they were in fact given opportunity to be heard" (14 Am. Jur., Certiorari § 17); that the Personnel Law does not provide for a hearing in accordance with judicial procedure and it follows, therefore, that its action is not of that judicial category as to permit review.

In this connection emphasis is placed by the State upon the use in the statute of the word "investigate" and "investigation" in lieu of "hearing" as it pertains to Board action upon certain controversies arising under the Personnel Law.[1]

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[1] It must be conceded that there may be a difference between "investigation" and a "hearing." *Genecov et al.* v. *Federal Petroleum Board,* 146 F. (2nd) 596, [7] 598 (5th C. C. A. 1944), cert. denied 65 S. Ct. 913 (1945); *Jordan* v. *American Eagle Fire Insurance Company,* 169 F. (2nd) 281, [1, 2] 285 (C. A., D. C. 1948); and *Bowles Admr. of Office of Price Administration* v. *Baer et al.,* 142 F. (2nd) 787, [1] 788 (7th C. C. A. 1944). A difference has been emphasized in *In Re Securities & Exchange Commission,* 14 F. Supp. 417 (D. C., N. Y. 1936) affirmed 84 F. (2nd) 316 and *Seatrain Lines, Inc.* v. *United States of America and Interstate Commerce Commission,* 168 F. Supp. 819 (U. S. D. C., N. Y. 1958). Under other statutes or regulations it has been held that the meaning of the words may be synonymous. *American Employers' Ins. Co.* v. *Commissioner of Insurance,* 10 N. E. (2nd) 76, [6] 81 (Mass. 1937); *Steen* v. *Board of Civil Service Commissioners, et al.,* 160 P. (2nd) 816, 818, [8, 9] 820 (Cal. 1945); and followed in *Ratliff* v. *Lampton, et al.,* 195 P. (2nd) 792, [4] 795 (Cal. 1948). It is implicit in all such cases that though the meeting from which a ruling emanates be labelled an investigation, if rights and obligations of adversaries are fixed, due process of law requires a "hearing" in its judicial sense. *United States* v. *Appalachian Electric Power Co.,* 107 F. (2nd) 769, [26, 27] 792 (4th C. C. A. 1939); and *Steen, supra.*

The "investigation" required at the request of the employee who contends that he has been deprived of rights established by the personnel law, the power of the Board to summons witnesses and records, and its mandate to reinstate an employee upon finding that the action of the deprivation of rights is contrary to the personnel law, under the principles of "due process" contemplates and demands a "hearing." The words in the statute directing reinstatement of such employee, if the action of the appointing authority be found "to be contrary" to the personnel law is but another way of saying that the employee may be deprived of rights only "for cause," which phrase appears in line 1 of Section 21,--as applied to certain changes in employment status. See *Steen, supra,* where a city charter provided that, as applied to the City Civil Service Commission, the Commission was re-

The personnel law grants the power and imposes the duty upon the Personnel Board in Sec. 4, Subsection III:

> "To make investigations and report its findings and recommendations in cases of dismissal from the classified service as is provided in Section 21."

Section 21 provides that an appointing authority may dismiss an employee for cause, but at the request of the employee the Board *shall investigate* the circumstances relating to the action and if the charges for dismissal are found unwarranted, the Board shall order reinstatement of the employee. We are not here concerned with a "dismissal." The section also provides that, at the request of the employee, the Board *shall investigate* the circumstances relating to an action of an appointing authority which deprives an employee of rights established by the personnel law or by rules promulgated thereunder and that if the action of the appointing authority be contrary to the law and rules, that the Board shall order immediate reinstatement of the employee.

In Section 4, Subsection VIII, the Board has the power to administer oaths, issue subpoenae to witnesses and for documents and seek to employ contempt process through the court for failure of a summonsed witness to appear and comply.

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quired to investigate the grounds for discharge for cause of an employee, and the court says:

"The rule is firmly established that if by statute * * * (a) civil service employee may not be * * * discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement * * *."

In the *rules* the word "hearing" is used. Rule 13.1 c.[2] provides an appeal to and hearing before the Board by dismissed, demoted, pay-cut and suspended employees.

If the employee does not fall into one of those categories, but claims aggrievement through error in applying the personnel law and the rules, Rule 13.1 d.[3] provides for "investigation and hearing or either of them." Rule 13.2[4] makes it clear that all *hearings* under the personnel law are intended to comply with the requirements of due process, though more casually observing the law of evidence.

Whether plaintiff were dismissed or was subject of automatic resignation under a "leave of absence" rule he was entitled to,— and did in fact receive a "hearing" in its judicial sense.

Section 4, Subsection VII, grants the power and imposes the duty "to keep full and complete minutes of its proceedings, which shall, subject to reasonable regulations, be open to public inspection."

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[2] **13.1 c. Appeals from Dismissal, Reduction in Pay, Demotion, or Suspension**

"Any permanent employee who is dismissed, demoted, reduced in pay or suspended without pay may appeal to the board within thirty calendar days after such action is taken. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence."

[3] 13.1 d. Other appeals and Investigations

"* * * The board shall receive and consider any protest by an employee or appointing authority in any matter concerned with the administration of the personnel law and these rules, and after such investigation and hearing or either of them as the board may deem desirable in any case, shall indicate to the director such remedial action as it may deem warranted. * * *."

[4] 13.2 Hearings

"All hearings held under the provisions of the personnel law and these rules shall provide an opportunity for interested persons to be heard and shall not be subject to technical rules of evidence. The board shall determine the time and place of hearing."

It has been pointed out that a writ of certiorari may operate only upon the record of the tribunal, the correction of which is sought and our attention is addressed to the question of whether the "Minutes of the Board" required under Section 4, Subparagraph VII, constitute a record which a writ of certiorari can reach.

While it has been held that to "minute" is "to make a brief summary of" *Hinshaw* v. *State,* 47 N. E. 157, 171 (Ind. 1897) and that the "minutes" of a presiding judge or clerk of court form the basis of a subsequently made court record, *Kreisel* v. *Snavely, et al.,* 115 S. W. 1059, 1060 (Mo. 1909), in instances where the "minutes" and the record are not in agreement, the minutes control, *Kansas City Pump Co.* v. *Jones, et al.,* 104 S. W. 1136 (Mo. 1907) and, where, under practice in which no judgment roll is made up, the clerk's minutes are considered as part of the sentence, *Ex Parte Lamar,* 274 F. 160, [5] 172-174 (2nd C. C. 1921) affirmed in 260 U. S. 711, and if the "minutes" are put into the record they constitute sufficient formal entries of record, *Warden of United States Penitentiary Annex at Ft. Leavenworth, Kansas* v. *De Londi,* 62 F. (2nd) 981, 982 (10th C. C. A. 1933).

In its action herein the Board acted as a quasi-judicial body. The minutes of the Board are the record of its proceedings and the record may be reviewed via petition for Writ of Certiorari under the procedure prescribed by Rule 80B M. R. C. P. It is, however, a limited review.

"The writ (of certiorari) prayed for can present only the record of the proceedings of the tribunal." *Ross* v. *Ellsworth, et al.,* 49 Me. 417.

"The error must appear in the record of the inferior Court." *Nobleboro, supra,* at 551, *Chavarie, supra,* at 245.

It "lies only to correct errors in law." *Lapan* v. *County Commissioners of Cumberland County,* 65 Me. 160; *Levant,*

supra, at 434; *Nelson, supra,* at 555; and *Toulouse, supra,* at 392.

When the record is certified to the reviewing court in response to the writ of certiorari it "is conclusive in all matters of fact within its jurisdiction." *Levant, supra,* at 435. The writ does not deal "with the evidence unless some question of law is raised in relation thereto." *Levant supra,* at 434.

"It lies only to correct errors in law, and not to review and revise the decision of a subordinate tribunal of a question of fact submitted to its judgment." *Nelson, supra,* at 555.

See *Stevens* v. *County Commissioners,* 97 Me. 121, 53 A. 985.

Under certiorari the scope of review, as to finding of fact, is the same as that applicable to the decisions of other administrative agencies, and will permit a correction only when the finding is not supported by credible evidence *(Chequinn Corporation* v. *Mullen, et al.),* 159 Me. 375, 383, 193 A. (2nd) 432; substantial evidence *(Bangor & Aroostook Railroad Co. Re. Application, Etc.),* 157 Me. 213, 222, 170 A. (2nd) 699; such evidence as taken alone will justify the conclusion *(Bangor & Aroostook Railroad, Re: P. U. C. Certificate J #44),* 159 Me. 86, 89, 188 A. (2nd) 485, which standards are synonymous in meaning. Whether this standard is met is a question of law. *Public Utilities Commission* v. *Cole's Express,* 153 Me. 487, 492, 138 A. (2nd) 466.

Here the Board, in response to the order in certiorari, elected to support its certified record (minutes) by submitting to the Superior Court the stenographic report and the exhibits entered in the Board hearing. With this material before it, the issue there was whether there appeared error of law, — in the record (minutes), or conclusions of fact not warranted by the evidence.

The gist of plaintiff's claim rests in the controversial issue of whether the Department, by its conduct during the period of his absence from duty, legally could and did waive conditions imposed by the rules governing an employee's leave of absence, or was estopped to apply them.

The Superior Court held that the Board would be compelled to conclude that the Department had waived (expressed in terms of estoppel) until December 5, 1961 the requirement that the absent employee be specifically granted a leave, — which in fact he was never granted, but that thereafter it was legally justified in considering that plaintiff was absent without leave and subject to separation from the service. Commenting correctly that it could not substitute its judgment for that of the Board, the court held that there was substantial evidence to support the Board's findings and concluded that there was no error of law.

We do not pass upon the question whether the Forestry Department and the Board could be estopped by conduct of the appointing authority or his representative. Error, if any, by the Superior Court in that respect favored the plaintiff and does not alter the result.

The transcript of the testimony before the Board is not before us. From the portions of the record designated on appeal we are urged that error of law must be found. We find none.

Appeal dismissed.

ROGER CLOUGH, EX'R OF ESTATE OF
JEANETTE G. CLOUGH

vs.

BERTON L. NEWTON
AND
IDA C. NEWTON

Oxford. Opinion, October 12, 1965.

Executors & Administrators. Commissioners of Insolvency. Judgment. Appeal & Error. Probate Courts.

Probate Court erred in accepting legally insufficient report from Commissioners of insolvency who could not by their own motion allow entire indebtedness of claimant and thereby work waiver of his mortgage security which had been mentioned by claimant who failed to state amount of credit to be given according to his best knowledge and belief.

Commissioners of insolvency, with whom claimant had stated his claim in full and recited his mortgage surety but who failed to state amount of credit to be given according to his best knowledge and belief, had responsibility to determine the value of security and allow claimant difference between value of security and claim if security were of less value than claim, and give claimant certificate thereof.

Direct attack of a void decree may be made by conventional appeal or by petition to annul presented directly to court of origin, even though time for direct attack by appeal has expired.

Probate decrees within authority conferred by law on probate courts but not in accordance with admonition of statute are open only to direct attack by appeal and by petition to annul.

Probate court decree, accepting legally insufficient report of commissioners of insolvency, was within authority conferred on court by law and was not subject to collateral attack, but was reachable only by direct attack, that is by appeal or petition to annul.

ON APPEAL.

Proceeding collaterally attacking judgment of probate court. The Superior Court, Oxford County, entered decree from which an appeal was taken. The Supreme Judicial Court, Marden, J., held that collateral attack upon probate decree accepting report of commissioners of insolvency and thereby relegating claimant to status of unsecured creditor could not be sustained, but appeal would be continued to enable direct attack to be prosecuted in probate court to annul erroneous decree of acceptance of report whereby status of claim as a secured claim may be determined. Order accordingly.

Gerry Brooks, for Appellant.

Henry H. Hastings, for Appellees.

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

MARDEN, J. On appeal. The late Jeanette G. Clough executed a note April 10, 1959 for $1,000.00 secured by mortgage on real estate, to Berton L. and Ida C. Newton (Newton), which had not been paid upon the death of said Clough. Appellee Roger Clough is the Executor of the will of said Jeanette G. Clough.

The Jeanette G. Clough Estate having been declared insolvent, commissioners of insolvency, under the provisions of Section 3, Chapter 157, R. S., were appointed on August 28, 1962 by the Probate Court of Oxford County by warrant in usual form and in conformity with the statute, including the mandate reflecting Section 7 of the same Chapter, which directed that "if any claimant holds security for his claim of less value than its amount, you will state the amount allowed on the claim and the value of the security, but you will

allow only the difference between such amount and the value of said security, giving the claimant a certificate of your value of said security."

The warrant also directed that "6 months from the date hereof is allowed for the presentation of claims, at the end of which time you will return this warrant into our said court with your report thereon * * *," this also reflecting the provision of the statute.

Newton in October, 1962, seasonably, filed under oath a proof of claim against the Clough Estate with an annexed account showing a balance due on the principal of the mortgage of $565.23 plus interest computed to October 1, 1962 and in the proof of claim declared "that there is no security for said claim except a note * * * and a mortgage securing the same, which is recorded * * *."

Newton instituted foreclosure of his mortgage May 16, 1963.

The date of hearing by the Commissioners on the Newton claim does not appear, but the Commissioners rendered their report over date of June 10, 1963 alleging that having given the required notice they had received and decided upon all claims and included the Newton claim in the amount of $599.14 as an unsecured claim, with no mention, or determination of the value, of the security behind the claim. The Commissioners' report was accepted by the Probate Court June 11, 1963 and fees and charges allowed. No appeal was claimed.

It is to be noted that:

a) The report of the Commissioners was due February 27, 1963 and was tardy by a period in excess of 3 months.

b) That foreclosure of the mortgage was not instituted until after the Commissioners' report was more than 2 months overdue, and

c) That Section 9 of Chapter 157, R. S., declares a forfeiture of compensation for Commissioners who neglect to render their report for 3 months after the expiration of the time allowed them for receiving claims.

Appellant, as executor of the Estate of Jeanette G. Clough, filed a complaint August 28, 1963 alleging that Newton had by his process in the Probate Court waived his security and prayed an injunction against the foreclosure of the mortgage. The Superior Court at its February 1964 Term held, citing *Nickerson* v. *Chase,* 90 Me. 296, 38 A. 175, as its authority, that Newton had waived his security and that the mortgage and its attempted foreclosure was void. Newton appealed.

This proceeding is a collateral attack upon the judgment of the Probate Court which, by accepting the Commissioners of Insolvency report, has held that the Newton appearance before the Probate Court through his proof of claim waived his security theretofore supplied by the mortgage and, as against the Clough Estate, he stands as an unsecured creditor.

It must first be declared that there is error in permitting *Nickerson, supra,* to govern the case. In the press of trial court business the factual difference between *Nickerson* and the present case was overlooked. In *Nickerson* the claimant "presented his whole claim to the commissioners on oath, declaring that it was justly due him, and that he had no security therefor. The commissioners allowed and reported his whole claim to the probate court and their report was there accepted. By this procedure all security was waived and surrendered, for the creditor could not receive a dividend on his whole claim and hold his security as well. * * * If he voluntarily proves his whole debt, he thereby necessarily waives his security; but waiver arises from the voluntary act of the creditor." *Nickerson, supra,* at 297.

> "Waiver is a voluntary, intentional relinquishment of a known right. * * * A waiver may be express or implied. In the absence of an express agreement it will not be implied contrary to the intention of the party whose rights would be injuriously affected thereby unless by his conduct the opposition party has been misled to his prejudice into the honest belief that such waiver was intended or consented to. To make a case of waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part. * * * There must appear, not mere negligence to claim the right, but a voluntary choice not to claim it." *Medomak Canning Company* v. *York,* 143 Me. 190, 195, 57 A. (2nd) 745.

Here the claimant, though stating his claim in full, and reciting his mortgage, failed to state "the amount of credit to be given according to his best knowledge and belief." (Section 5, Chapter 157, R. S.) Such indifferent pleading may well have raised a question in the minds of the Commissioners as to his intent, but under the statute (Section 5, same) the Commissioners are required to "adjudicate upon all claims so filed" and under Section 7, same, and the warrant to them directed, it became the responsibility of the Commissioners to determine the value of the security, — and to allow claimant the difference between the value of the security and the claim, if the security were of less value than the claim, and give claimant a certificate thereof.

From the report of the Commissioners it may be inferred that claimant failed to appear at the assigned time and place to prosecute his claim as a secured claim, but the report does not so state as a basis for considering that he had voluntarily and deliberately chosen to waive his security. Of significance is the fact that Newton began foreclosure of his mortgage only after the time had expired for the report of the Commissioners to have been returned and before the

report was returned. As of the date of the Commissioners report it was obvious that Newton relied on his security. On the record before us the mandate to the Commissioners was not executed.

> "The commissioners, of their own motion, could not allow the whole debt and thereby work a waiver of the security in favor of all the creditors." *Nickerson, supra,* at 297.

The action of the Probate Court in accepting a legally insufficient report from the Commissioners was error. It had the power and duty to recommit the report for correction of error. (Section 8, same).

Upon these premises, is the Probate Court decree open to this collateral attack? The answer to this question depends upon whether the now challenged decree is *void* or, over simply expressed, *voidable.*

Acknowledging the well established principle that "decrees of probate courts in matters of probate, *within the authority conferred upon them by law,* are conclusive."[1] (Against collateral attack) *Snow* v. *Russell,* 93 Me. 362, 376, 45 A. 305, (*Waters* v. *Stickney,* 12 Allen (94 Mass.) 1, 1866)); *In Re Estate Roy H. Neely,* 136 Me. 79, 81, 1 A. (2nd) 772, a void decree is open to either direct or collateral attack. *Snow, supra,* at 377; *Taber* v. *Douglass,* 101 Me. 363, 370, 64 A. 653.

> In *Snow* an attempt was made by bill in equity to attack collaterally an executors deed based upon a license to sell real estate, granted, contrary to statute, without requiring a bond. The license and sale were declared void and open to collateral attack, but not in equity, there being remedy at law (real action).

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[1] See comment in *Snow* at Page 376 relative the use of the word "jurisdiction" as distinct from "authority conferred by law."

In *Taber* an action on the case attacked collaterally an adoption which was declared void.

Direct attack of a void decree may be made by the conventional appeal, *Waitt, Appellant,* 140 Me. 109, 34 A. (2nd) 476, or by petition to annul presented directly to the court of origin, even though the time for direct attack by appeal has expired.

> "It is well settled that a probate court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, * * * clearly shown to be without foundation in law or fact, and in derogation of legal right." *Merrill Trust Company v. Hartford,* 104 Me. 566, 572, 72 A. 745.

See also *Tripp* v. *Clapp,* 126 Me. 534, 537, 140 A. 199; *Roukos, Appellant, Etc. In Re Estate of Roukos,* 141 Me. 83, 89, 39 A. (2nd) 663; *Knapp, Appellant, Etc. In Re Estate of Fred E. Knapp,* 149 Me. 130, 138, 99 A. (2nd) 331.

As to probate decrees "within the authority conferred by law" upon probate courts but not "in accordance with the admonition of the statute" *Roukos, supra* (141 Me.) at 87, such are open only to direct attack. Obviously, by appeal, and also by petition to annul, as established by cases cited above. The distinction is illustrated, coincidentally, by *Roukos, supra* (direct attack) in 141 Me. and *Roukos, Appellant, Etc.* (collateral attack) in 140 Me. 183, 188, 35 A. (2nd) 861.

Here the power to deal with estates determined to be insolvent, the appointment of commissioners, the supervision of their function and action upon their report were statutorily placed in the Probate Court. (Chapter 157, R. S., *supra*). The court's action in the premises was correctly within the authority conferred upon it by law, was not void and thereby open to collateral attack, but as an erroneous

acceptance of an incomplete and insufficient report was reachable only by direct attack, — appeal or petition to annul. No appeal was taken.

This collateral attack upon the probate decree accepting the Commissioners report and thereby relegating Newton to the status of an unsecured creditor of the Clough Estate cannot be sustained.

To sustain this appeal will result in affirming the validity of the mortgage, with the intolerable result that Newton will have the Clough real estate under foreclosure and at the same time have a subsisting award against the Clough Estate for the full amount of his claim, to the detriment of other creditors.

To deny this appeal will result in affirming indirectly the erroneous probate decree depriving Newton of the security which the record before us does not establish that he has surrendered.

We, therefore, continue the appeal to enable a direct attack to be prosecuted in the Probate Court to annul the erroneous decree of the acceptance of the Commissioners report, whereby the status of the Newton claim as a secured claim may be determined in accordance with the statute and to enable the parties thereafter to dispose of the claim within the Probate Court in accordance with usual practice.

Upon being advised of the conclusion reached in the Probate Court appropriate entry will be here made.

So Ordered.

CANAL NATIONAL BANK, ET AL.
vs.
SCHOOL ADMINISTRATIVE DISTRICT NO. 3, ET AL.

Waldo. Opinion, October 14, 1964.

Declaratory Judgment. Schools & School Districts. Statutes.

Validity of school administrative district bond and rights of holders to proceed for declaratory judgment holding that statute providing for reorganization of school administrative districts by which three towns were removed from district impaired obligation of bonds were not negatived by inconsequential error of bond counsel in their legal opinion incorrectly stating that each bond should bear authenticating certificate of one bank when in fact another bank had authenticated bonds.

Holder of bond issued by school administrative district has right on judgment against district to levy on all personal property of residents of and on all real estate within district.

Act reorganizing School Administrative District No. 3 resulting in removal of three towns from District did not result in dissolution of old District and creation of new District but caused reorganization of District without loss of its corporate body.

Purpose of act reorganizing School Administrative District No. 3, was to detach residents of and territory within three withdrawn towns from District to restore responsibility for education to the three towns and to adjust property and contract rights and obligations equitably among district and departing towns.

"Assets" within statute providing for reorganization of School Administrative District No. 3 and providing that, if payment in full of district's bonds is not made after levy on all of assets of towns remaining in district after reorganization, three towns withdrawn shall be contingently liable are personal property of residents and real estate within boundaries of eight towns remaining after reorganization.

School Administrative district was not entitled to declaratory judgment as to rights, duties and liabilities of district and towns withdrawn from it pursuant to statute where there was no genuine controversy over act in respects for which judgment was sought.

ON APPEAL.

Action by holders of bond issued by School Administrative District No. 3 against District and others for judgment declaring statute providing for reorganization of District by removal from District of three towns unconstitutional. On appeal, the Supreme Judicial Court, Williamson, C. J., held that act impaired obligation of bonds and was unconstitutional in that it destroyed power of district to tax within withdrawn towns and virtually destroyed right of bondholder to levy on property within those towns and inasmuch as intent of legislature could not be carried out if offending section were severed from act, entire act was a nullity. Appeal denied.

Roger A. Putnam, Esq., for Plaintiff.

George A. Wathen, Esq.,
Judson Jude, Esq.,
David A. Nichols, Esq.,
Richard J. Dubord, Esq.,
John W. Benoit, Esq., for Defendants.

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

DISSENT: TAPLEY, SULLIVAN, JJ.

WILLIAMSON, C. J. On appeal. The plaintiff banks are holders of bonds issued by School Administrative District No. 3 (SAD No. 3). The defendants are SAD No. 3, its officers and directors, the inhabitants of the eleven constituent towns, the State Board of Education and its members, the Commissioner of Education and the Attorney General. The plaintiffs sought and obtained a declaratory judgment holding P. & S. L., 1963, c. 175, "An Act to Provide for the Reorganization of School Administrative District

No. 3" (the 1963 Act) by which Liberty, Brooks and Monroe (the "three towns" or "the withdrawn towns") the appellants, were removed from SAD No. 3, unconstitutional and void in that it impaired the obligation of the bonds, and also injunctive relief to prevent action under the 1963 Act.

The bonds in question were part of a $730,000 issue duly authorized under the statutes relating to school administrative districts. R. S., c. 41, § 111-K. References to sections are to R. S., c. 41 unless otherwise indicated. The residents of and the territory within the eleven towns of Brooks, Freedom, Jackson, Knox, Liberty, Monroe, Montville, Thorndike, Troy, Unity and Waldo comprised "the body politic and corporate" (Sec. 111-F) known as SAD No. 3 when the bonds were issued and there has been no change in this respect apart from the 1963 Act.

The decisive issues are: (1) Does the 1963 Act impair the obligation of the bonds, and (2) if so, may the provisions relating to operation of schools be severed from the offending provisions and given effect?

The position of the three withdrawn towns that the plaintiff banks were neither holders in due course of the bonds nor creditors of the district entitled to a declaratory judgment is without merit. The record shows the bonds were duly authorized and issued under the laws then existing. Bond counsel in their legal opinion incorrectly stated that each bond should bear the authenticating certificate of Bank A, when in fact Bank B, duly authorized, authenticated the bonds. The validity of the bonds, and the rights of the plaintiffs to proceed with their complaint do not turn, as the three withdrawn towns suggest, on such an inconsequential error.

We turn to the constitutionality of the 1963 Act. (1) What was the obligation of bonds, i.e., the contract?

(2) What changes in the bonds were made by the 1963 Act?
(3) Did the changes impair the obligation of the bonds?
(4) If so, may the bad be severed from the 1963 Act and the remainder be given effect?

I. *The Bonds*

The bonds in question, $730,000 in amount, payable $35,000 each year from 1964 through 1983, and $30,000 in 1984, were authorized and issued under Sec. 111-K. They were issued "to procure funds for capital outlay purposes," were within the applicable debt limit, and were "in such form subject to sections 111-A to 111-U-1 . . .," that is to say, the sections relating specifically to school administrative districts. "Said . . . bonds . . . shall be legal obligations of said district, which is declared to be a quasi-municipal corporation within the meaning of Chap. 90-A, § 23, and all the provisions of said section shall be applicable thereto." The bondholder is thus given the right on judgment against the district to levy on all personal property of the residents of and on all real estate within the district. For convenience we may sometimes refer to this right as the right to direct levy. R. S., c. 90-A, § 23, as amended, reads:

> "The personal property of the residents and the real estate within the boundaries of a municipality, village corporation or other quasi-municipal corporation may be taken to pay any debt due from the body corporate. The owner of the property so taken may recover from the municipality or quasi-municipal corporation under section 32 of chapter 118."

See also R. S., c. 118, §§ 30, 31 and 32, as amended.

Section 111-L provides for the financing of school administrative districts. It is not necessary that we review the steps in preparation and approval of the annual budget. For our purposes it is sufficient to note that by mandate of the Legislature the amount required for payment of bonds

falling due and interest shall be included in the total assessment for all purposes, including operational expenses and debt service.

The assessors of each participating municipality are required annually by warrant of the directors of the district "to assess upon the taxable polls and estates within said municipality an amount in proportion to the total sum required each year as that municipality's state valuation bears to the total state valuation of all the participating municipalities," and to commit the assessment to the tax collector. Available gifts and trust funds may be used to reduce the assessment in any municipality. The town treasurer "shall pay the amount of the tax" within stated times to the district. On failure to pay there is a mandatory provision for "levy by distress and sale on the real and personal property of any of the residents of said administrative district living in the municipality where such default takes place."

We have discussed the statutory provisions relating specifically to capital outlay bonds, such as the bonds held by the plaintiff, in some detail that we may see the insistence of the Legislature on the payment of the bonds and interest through taxation.

In brief, the bonds when issued were the legal obligation of SAD No. 3, a quasi-municipal corporation, comprising the residents of and territory within eleven participating municipalities, with payment by SAD No. 3 secured through taxation within each municipality on a proportional basis and with payment further secured by the right of the bondholder ultimately to levy on the personal property of the residents and the real estate within the entire district.

II. *The 1963 Act*

The Act may be summarized as follows:

SAD No. 3 is reorganized to comprise eight towns. The Towns of Liberty, Brooks and Monroe "are removed and

withdrawn" from SAD No. 3 and "from the effective date of this act shall revert to their prior status as independent municipalities for all school and educational purposes . . ." Sec. 1. The towns comprising SAD No. 3 as reorganized are constituted SAD No. 3 and all proceedings in the eight towns relating to the eleven town SAD No. 3 are validated under Sec. 2.

We do not concur with the view of the single justice that SAD No. 3 was dissolved and a new SAD No. 3 created. The intent of the Legislature in our opinion is that SAD No. 3 should be reorganized without loss of its corporate body. The purpose of the Act is to detach the residents of and the territory within the three withdrawn towns from SAD No. 3, to restore responsibility for education to the three towns, and to adjust property and contract rights and obligations equitably among SAD No. 3 and the departing towns. See for example Sec. 4 — responsibility for education; Sec. 5 — payments by towns removed; Sec. 6 — distribution of property to towns removed; Sec. 7 — teachers' contracts; Sec. 11 — arbitration between SAD No. 3 and school committees of withdrawn towns.

Sec. 10 of the Act quoted below specifically affects and alters the statutes touching the bonds. It must be considered of course with other sections of the Act and in particular with Sec. 1 and Sec. 2 whereby SAD No. 3 was reduced from eleven to eight towns.

> "**Sec. 10. School Administrative District No. 3, as reorganized, bond issue validated.** The prior action relative to school construction and the issuance of $730,000 in bonds or notes is hereby declared to be valid and effective, any provisions of the law to the contrary notwithstanding, and any bonds or notes issued thereunder are hereby deemed to be a valid and binding indebtedness of School Administrative District No. 3 as herein reorganized, provided however that said bonds or

> notes shall in no way be construed as an indebtedness or liability of any of the Towns of Liberty, Brooks or Monroe, except as a contingent liability in the event of default on said bonds or notes if payment in full of the same is not made after levy on all of the assets of said School Administrative District No. 3, as hereby reconstituted, in accordance with the terms and conditions of said notes and bond indenture, and said contingent liability shall be in the same proportion as it would have been had the Towns of Liberty, Brooks and Monroe remained within School Administrative District No. 3 prior to its reorganization."

Under the proviso a contingent liability "if payment in full of the same [meaning the bonds] is not made after levy on all of the assets of . . . [the eight town SAD No. 3]," is placed upon the three withdrawn towns. This liability, in our view, is in full substitution (1) for the power and duty of SAD No. 3 hitherto to raise by taxation within the three towns a proportionate share of the bonds falling due and interest, and (2) for the unlimited right of the bondholder on judgment against SAD No. 3 to levy directly on property within the towns. Thus the bondholder under Sec. 10 with reference to the three withdrawn towns retains only the right of direct levy after exhaustion of all of the assets of the eight town SAD No. 3. "Assets" in this context we construe to mean the personal property of the residents and the real estate within the boundaries of the eight town SAD No. 3. The Legislature did not refer simply to property owned by SAD No. 3 and not used for public purposes.

The argument that Sec. 10 strengthens the position of the bondholders by creating liability against the three towns where none existed before is not convincing. From issuance, the bonds were obligations of a school administrative district, not of the participating municipalities. The Legislature did not intend to create town debts upon the bonds

and so use the borrowing power of the town within the town's debt limit to meet district obligations.

With the exhaustion of all of the property within the reorganized SAD No. 3, before levy within the three withdrawn towns, the right to levy — that is, the "contingent liability" — becomes without value. As a practical matter, how could a bondholder levy on all of the personal property of the residents and all of the real estate within the eight town district? Or, as a practical matter, how could he prove that he had so levied? The purpose of the direct levy is to provide a certain and effective method of obtaining payment of a debt against, as here SAD No. 3, a quasi-municipal corporation.

On issuance of the bonds, the bonds were secured (1) by the power to tax eleven towns, and (2) by the right of the bondholder to levy on property within eleven towns. Under the 1963 Act, the bonds are secured (1) by the power to tax only the eight towns of the reorganized district, and (2) by the right of the bondholder to levy on property within the eight towns. The contingent liability against the three withdrawn towns is hemmed with such conditions as to be without practical benefit to the bondholder.

III. *Constitutionality*

We turn to the question whether the 1963 Act impaired the obligation of the bonds.

> "The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts, . . "
>
> Constitution of Maine, Article I, Section 11.
>
> "No State shall, . . pass any . . . law impairing the obligations of contracts . . . "
>
> United States Constitution, Article I, Section 10.

The governing principle was stated by Chief Justice Fellows in *Baxter* v. *Waterville Sewerage District*, 146 Me. 211, 79 A. (2nd) 585. The court said, at p. 214:

> "In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional and this is 'a presumption of great strength.' *State v. Pooler,* 105 Me. 224, 228; *Laughlin v. City of Portland,* 111 Me. 486; *Village Corporation v. Libby,* 126 Me. 537, 549. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *Warren v. Norwood,* 138 Me. 180. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. *Kelley v. School District,* 134 Me. 414; *Hamilton v. District,* 120 Me. 15, 20."

The laws existing at the making of a contract form part of the contract. Sec. 111-K on borrowing and Sec. 111-L on financing the payment of the bonds and interest by taxation were part of the contract of the bonds.

> ". . . the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement . . ."
> *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550.

> "[The remedies for the enforcement of contractual] obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power, and leaves no adequate means

for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void."

Mobile v. *Watson,* 116 U. S. 289, 305, 6 S. Ct. 398, 405.

"Is there an impairment? In *Phinney v. Phinney,* 81 Me., 450, 17 A., 405, 407, while recognizing 'that a state to a certain extent and within proper bounds may regulate the remedy,' the court holds that 'if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it.' Cited in the Phinney case is *Louisiana v. New Orleans,* 102 U.S., 206, with this quotation: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.'

"Our Court then said, 81 Me., on page 462; 17 A., on page 407:

'The result arrived at in all the decisions, bearing upon this question, seems to be that the legislature may alter or vary existing remedies, provided that in so doing, their nature and extent is not so changed as materially to impair the rights and interests of parties to existing contracts.'

"In *Richmond Mortgage & Loan Corporation, Appellant v. Wachovia Bank & Trust Company et al.,* 300 U. S., 124, 57 S. Ct., 338, 81 Law Ed., 552, decided February 1, 1937, the Supreme Court stated

> the applicable principle pertaining to impairment of a contract by modification, limitation, or alteration of the remedy as follows:
>
> 'The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.' "
>
> *Waterville Realty Corp.* v. *City of Eastport,* 136 Me. 309, 313, 8 A. (2nd) 898.

We set aside cases illustrating the extent of change in remedy permissible in an emergency. See *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, the leading case upholding a mortgage foreclosure moratorium. In *Waterville Realty Corp., supra,* our court, in recognizing the principle of *Home Building & Loan Assn.,* held unconstitutional a municipal financial relief statute suspending, among other remedies, action on debts not limited to the period of emergency. In the instant case we find no suggestion of emergency — financial or otherwise — from which we may draw an analogy to the *Home Building & Loan Assn.* and *Waterville Realty* cases.

The high duty and wide authority of the Legislature to promote education has been the policy of our State since 1820. Constitution of Maine, Article VIII. Our court has said with approval in *Shaw* v. *Small,* 124 Me. 36, 40, 125 A. 496:

> "Eminent courts hold that statutes relating to public schools should receive a liberal construction in aid of their dominant purpose which is universal elementary education."

It does not follow, however, that a law impairing the obligation of a contract for money borrowed or for capital outlay bonds as here, or for a teacher's salary, or for any other

valid contract within the field of education should escape more readily the bar of the Constitution.

The bondholders have no standing in matters of education. Their only rights relate to the bonds. They may not be heard, nor do they seek to be heard, on the redistribution of responsibility for education between SAD No. 3 and the three withdrawn towns.

In applying the law to the facts, we conclude that the 1963 Act impairs the obligation of the bonds and hence is unconstitutional under both the State and Federal Constitutions.

We base our holding on two grounds: first, in the destruction of the power of SAD No. 3 to tax within Liberty, Brooks and Monroe; second, in the virtual destruction of the right of the bondholder to levy on property within the three towns.

It is strongly urged that the detachment of three towns from SAD No. 3 with the loss of the power to tax is a change in remedy or means of enforcement of no substantial significance. The valuation of the remaining eight towns is said to be ample protection to the bondholders.

We are satisfied nevertheless that the loss by SAD No. 3 of the power to tax in any one of the eleven towns comprising SAD No. 3 when the bonds were issued impaired the obligation of the bonds. Each participating municipality in a school administrative district is of importance in determining the ability of a district to borrow and support its operations. See Sections 111-K and 111-L.

Towns grow and towns decline. Town A with the highest valuation in the district today may lose valuation both in fact and also in relation to the other towns over the years. The purchasers of the bonds of SAD No. 3 necessarily accept the risk of change within the towns and dis-

trict. They had the right by virtue of their contract to consider that certain conditions established by law would remain constant. Among these rights was the power of the district to tax within the eleven towns to raise money to meet its obligations.

The destruction of the power to tax as here on its face and without more, in our view, substantially reduces the security of the bonds and does not leave the bondholder with substantially equivalent remedies.

There will be on the one hand cases wherein town lines are redrawn, with the detachment of some taxable property, which no fair-minded man will consider more than a negligible change in remedy on, for example, school bonds. On the other hand, if a Legislature should take away from an entire district the power to tax to pay the bonds, thus destroying the ability of the district to meet the bonds, the law would clearly violate the contract clause.

The vital importance of the ability to tax is emphatically stated in *Paul* v. *Huse,* 112 Me. 449, 92 A. 520, by the court in holding that a village corporation had the right to levy necessary taxes by implication. The court said, at p. 450:

> "The right to borrow carries with it the obligation to pay, and as a municipality has no means of paying its indebtedness except by taxation it necessarily has this power. *State v. Bristol,* 109 Tenn., 315; *Wilson v. Florence,* 40 S. C., 426; *Charlotte v. Shepard,* 122 N. C. 602; *Slocomb v. Fayetteville,* 125 N. C., 362; *Lowell v. Boston,* 111 Mass., 454, 460; *U. S. v. New Orleans,* 98 U. S., 381. Any other interpretation would work a fraud upon the public who in good faith purchase the authorized bonds. A bond is itself evidence of indebtedness and an obligation to pay, and yet it is argued that while the legislature has authorized the issue and thereby permitted the corporation not only to borrow the money but to become legally indebted

> therefor, it has failed to open the only avenue by which that indebtedness can be met. Such a position is untenable."

We are not prepared to accept the right of the bondholder to direct levy after judgment against SAD No. 3 as an adequate and sufficient remedy in absence of the taxing power. In the Opinion of the Justices of the Massachusetts Court, 9 N. E. (2nd) 189 (1937), the opinion was given that a constitutional limitation on the rate of municipal taxation would not impair the obligation of municipal contracts in light of the remedy available to the claimant to obtain judgment and levy on property. The opinion does not reach the present case in which the power to tax within a municipality is totally destroyed.

Second — The right of the bondholder to satisfy his judgment against the district by levy on personal and real property, as described, is security of the highest value for the bonds.

> "It does not follow that every statute is the 'law of the land,' nor that every process authorized by a legislature is 'due process of law.' It must not offend against 'the established principles of private rights and distributive justice.' This statute does not. It does not transfer A's property to B. It only makes A's property liable to be taken for a debt, he in common with others, owes to B. A can save his property by paying the judgment against his town, which judgment binds him and all the other inhabitants, and is a judgment he, and each of the others ought to pay. Whether he pay or let his property be sold, he can recover full damages of the town, and have the same final process for the collection of his debt. In the end he only pays his rateable share of the common debt. The statute is general, and is uniform in its application, to every town, and every inhabitant. It may not be in theoretical harmony with other methods of procedure, but it accomplishes its laud-

> able purpose, of compelling towns to pay their debts, without doing any injustice. Towns readily obtain credit at low rates of interest upon the strength of it, and to now pronounce it void, would destroy their credit and work wide spread disaster among those who have so confidently invested their savings in loans to towns."
> *Eames* v. *Savage*, 77 Me. 212, 222.

Again as in the discussion of taxation, we are satisfied that the destruction (for the change by the 1963 Act amounts to this) of the right to levy in any one of the participating municipalities is sufficient on its face to establish that the remedy retained is not the substantial equivalent of the remedy lost.

The 1963 Act is intended by the Legislature to be a complete scheme for the distribution of educational and financial responsibilities among SAD No. 3 with eight towns and the three withdrawn towns. If the offending Sec. 10 is severed from the Act, the intent of the Legislature will not be carried out. Further provision to adjust in particular the impact of the bonds within the district without impairing the obligation of the bonds is required to satisfy the Constitution.

IV. *SAD No. 3 Cross Claim*

SAD No. 3 filed a cross claim seeking a declaratory judgment as to the rights, duties and liabilities of SAD No. 3 and the three withdrawn towns. The provisions of the 1963 Act relating to arbitration on failure to reach agreement on distribution of property among SAD No. 3 and the withdrawn towns (Sec. 11), and to the compulsory assignment of teachers' contracts (Sec. 7), are the particular subjects of attack.

We are not satisfied there is a genuine controversy over the 1963 Act in these respects. For the broad authority of the State over quasi-municipal corporations such as SAD

No. 3 and the transfer of their property for similar public purposes see *Kelley* v. *School District,* 134 Me. 414, 420, 187 A. 703.

No teacher has questioned Sec. 7. The thrust of this case is the obligation on the bonds. In our opinion justice will not be served by the consideration of questions which are unlikely to arise.

V. Summary

By the 1963 Act an eleven town SAD No. 3 was reorganized as an eight town SAD No. 3. The power of the district to tax for payment of bonds and interest and the right of bondholders to satisfy a judgment against SAD No. 3 by levy on property throughout the eleven town district formed part of the contract on the bonds. The destruction of the power of the district to tax, or of the right of the bondholder to levy, in any one town of SAD No. 3 is an impairment of the obligation of the bond in violation of the contract clauses of the State and Federal Constitutions.

The substitute benefit to the bondholders under Sec. 10 of the 1963 Act falls far short of a remedy substantially equivalent to the remedies available on issuance of the bonds. Without suitable provisions for adjustment of liability on the bonds, the plan of reorganization of SAD No. 3 is incomplete and so the entire Act must be considered a nullity.

The entry will be

Appeal denied.

TAPLEY AND SULLIVAN, JJ., DISSENT:

The plaintiffs are two national banks. The defendants are School Administrative District No. 3, a quasi-municipal corporation, its constituent members who are the inhabi-

tants of eleven towns, its Superintendent, Secretary, Treasurer and directors, the State Board of Education and its Commissioner and the Attorney General.

In 1958 the School District became incorporated through compliance with the provisions of R. S., c. 41, §§ 111-A through 111-U and comprised the residents and the territories of nine municipalities, those of the towns of Freedom, Knox, Liberty, Monroe, Montville, Thorndike, Troy, Unity and Waldo. In 1959 by conformance with the permissive provisions of P. & S. L., chapters 1 and 2 the residents and the territory of the towns of Brooks and Jackson became assimilated into the School District. By P. & S. L., 1959, c. 221 the Legislature retroactively confirmed the School District with its eleven groups of residents and its eleven territories.

On April 8, 1963 the directors of the District competently voted and on June 10, 1963 issued, sold and delivered to underwriters $730,000 face value, capital outlay, debenture bonds of the District.

On June 13, 1963 the Legislature enacted P. & S. L., 1963, c. 175 to become effective September 21, 1963 and operative within the School District on October 1, 1963. That law disjoined the residents and territories of the towns of Liberty, Brooks and Monroe from the School District, reorganized the District to retain the other, eight groups of residents and territories and prescribed detailed directions for reconciling the resultant consequences of the rupture.

The plaintiffs on June 10, 1963 by purchase had acquired some of the District bonds. As owners of the bonds and pursuant to the provisions of R. S., c. 107, §§ 38 to 50, inc., the Uniform Declaratory Judgments Act, the plaintiffs on September 3, 1963 instituted a complaint asserting that P. & S. L., 1963, c. 175 is violative of the impairment of contract prohibitions of the Maine and United States Con-

stitutions and requesting an affirmative judgment to that effect with concomitant injunctive relief.

The cause was heard by a justice who sustained the complaint and enjoined the implementation of P. & S. L., 1963, c. 175.

Some defendants appeal to this court from such judgment.

The presiding justice in his decision ruled that the bonds issued by the School District are valid, that the plaintiffs are holders in due course of some of the bonds and that the plaintiffs in this action are rightfully in court.

We quote further findings and rulings of the justice:

> "The Legislature in 1963 enacted Ch. 175 of the Private and Special Laws of Maine, which Act became effective on September 21, 1963. This Act entitled 'An Act to Provide for the Reorganization of School Administrative District No. 3' in effect dissolves School Administrative District No. 3 as originally constituted, removes and withdraws the Towns of Liberty, Brooks and Monroe therefrom, and constitutes and establishes a new School Administrative District No. 3 comprising territorially only the eight remaining towns. The Act provides that as of October 1, 1963 the entire responsibility for the education of pupils in the three removed towns will vest in those towns and in each town a newly elected Superintending School Committee will perform all of the necessary duties. The property of School Administrative District No. 3 as originally constituted which is located in any of the three removed towns will on that date by operation of law pass to the town in which the real estate is situated. The new School Administrative District No. 3 is directed to assign the contracts of certain teachers to the three removed towns under certain conditions and in the manner set forth in Section 7 of the Act. Under Section 10 of the Act the bonds here in issue are in effect declared to be

the primary obligation of the new School Administrative District No. 3 but not of the three removed towns. Their liability upon these bonds is declared to be a contingent liability arising only in event of a default on said bonds and in the further event that a levy on all assets found in the new School Administrative District No. 3 is insufficient to pay said bonds in full. There are other and further provisions of the Act which need not here be recited or specifically referred to.

"It is at once obvious that if the Act goes into effect and is fully implemented, the exact contract which was entered into between School Administrative District No. 3 as originally constituted and the holders of these bonds will no longer exist. As one reasonable test of the accuracy of this statement it is interesting to note that the legal opinion which was issued in support of the validity and marketability of these bonds could no longer be given under the circumstances created by the Act. The certifying counsel made the following statements to which the following parenthetical comment may be made: 'Said bonds executed and certified as above indicated are valid and binding general obligations of School Administrative District No. 3 in the State of Maine.' (The reference here was to School Administrative District No. 3 as originally constituted which comprised the eleven named member towns. This would no longer be true). 'School Administrative District No. 3 is a body corporate and politic composed of the residents of and the territory within the Towns of Brooks, Freedom, Jackson, Knox, Liberty, Monroe, Montville, Thorndike, Troy, Unity and Waldo, in the County of Waldo, Maine, organized and existing under and pursuant to Ch. 221 of the Private and Special Laws of Maine, 1959, and to Sections 111-F to 111-U of Ch. 41 of the Revised Statutes of Maine, 1954, as amended.' (Same comment as above). 'The sums necessary to pay the interest on and the principal of said bonds are directed to be included in the budgeted expenses of

said School Administrative District, which expenses are annually apportioned among and assessed on the taxable polls and estate within said municipalities in accordance with Sec. 111-L of said Ch. 41, as amended, and the sums so apportioned and assessed are payable from ad valorem taxes which may be levied without limit as to rate or amount upon all the taxable property within the respective municipalities.' (The reference to 'said School Administrative District' is a reference to School Administrative District No. 3 as originally constituted. The reference to 'said municipalities' is a reference to the eleven towns which were then members of said district. The reference to 'all the taxable property within the respective municipalities' is a reference to the taxable property within the eleven member towns. If the Act becomes effective, this opinion would no longer be valid). 'The personal property of the residents of said School Administrative District and the real estate within its boundaries are ultimately liable to seizure on execution to satisfy the obligation of said District represented by said bonds.' (Here again the reference is to the residents of the eleven member towns and the real estate within their boundaries. This unconditional opinion would not be appropriate if the Act became effective since competent counsel would feel an obligation to set forth the clarifying condition stemming from the contingent liability imposed upon the three removed towns). I conclude that the implementation of Ch. 175 of P. & S. L. 1963 would substantially impair and in effect destroy the original contract legally entered into between School Administrative District No. 3 as originally constituted and the bond holders and would seek to substitute therefor a new and different contract between the new School Administrative District No. 3 created by the Act and the bond holders which would be substantially different as to terms and liability.

"It is interesting to note further that the very nature of School Administrative District No. 3 as

originally constituted itself rests upon contract — a contract entered into pursuant to the provisions of R. S. 1954, Ch. 41, as amended, by and between the eleven member towns. This contract itself is impaired by the implementation of the Act. It may be further noted that there are outstanding contracts entered into by School Administrative District No. 3 as originally constituted with teachers, persons furnishing transportation and other services, all of which would be changed, altered and impaired by the implementation of the Act."

- - - - - - - - - - "I have no difficulty in concluding that the presumption of the constitutionality of Ch. 175 of P. & S. L. 1963 is overcome beyond any reasonable doubt and that the Act must be deemed unconstitutional."

- - - - - - - - - - "I find - - - - - Chapter 175 of the Private and Special Laws of Maine, 1963, to be violative of the provisions of the Constitution of Maine and the Constitution of the United States and to be null and void and of no force and effect."

- - - - - "It is contended that the Act is severable and that at most only part of the implementation of the Act should be enjoined. I find that the Legislature provided and intended to provide one single plan for the removal and withdrawal of three towns from the District and neither the plan nor the Act is severable." - - - - -

Defendant-appellants by their statement of points on appeal contest the court's rulings and findings:

that P. & S. L., 1963, c. 175 is violative of the Maine and of the United States Constitutions and therefore a nullity;

that the bonds of the School District are valid or that the plaintiffs are bondholders in due course;

that an implementation of such c. 175 would destroy the preexisting contract of the School District with its bond-

holders, would substantially impair the contract or would substitute a new contract;

that an implementation of such c. 175 would impair preexisting contracts of the School District with teachers and persons furnishing transportation;

that amongst the School District and its 11 member groups and territories there was a preexisting contract which an implementation of such c. 175 would impair;

that such c. 175 dissolved the School District and created a new District of 8 member groups and territories;

that an implementation of such c. 175 would undermine and virtually destroy the credit and borrowing capacity of the School District and adversely affect such capacity of other Districts;

that such c. 175 is not severable.

That exclusion by the presiding justice of certain evidence submitted by defendants was also controverted by the appeal.

School Administrative Districts may be organized under the provisions of general law. R. S., c. 41, §§ 111-F to 111-U-1 inc.

A school administrative district is "a body corporate and politic" formed by the "residents of and the territory within 2 or more municipalities." R. S., c. 41, § 111-F. Such a district is "a quasi-municipal corporation within the meaning of chapter 90-A, section 23 and all the provisions of said section shall be applicable thereto." R. S., c. 41, § 111-K.

> "The personal property of the residents and the real estate within the boundaries of a municipality, village corporation or other quasi-municipal corporation may be taken to pay any debt due from the body corporate. The owner of the property so

> taken may recover from the municipality or quasi-municipal corporation."
> R. S., c. 90-A, § 23, as amended.

Once established a school district assumes the management and control of the public schools within its administrative district and becomes invested with title to all public school property necessary for its functions and located within its district. R. S., c. 41, § 111-H.

> "All schools operated by school administrative districts when established shall be considered the official schools of the participating municipalities and all provisions of the general law relating to public education shall apply to said schools" - - -
> R. S., c. 41, § 111-M.

A school district for capital outlay purpose may issue bonds. R. S., c. 41, § 111-K. To procure money for the payment of principal and interest commitments of such bonds:

> "- - - - - The directors (of the school district) shall thereupon issue their warrants, in substantially the same form as the warrant of the treasurer of state for taxes, to the assessors of each participating municipality, requiring them to assess upon the taxable polls and estates within said municipality an amount in proportion to the total sum required each year as that municipality's state valuation bears to the total state valuation of all the participating municipalities; and to commit the assessment to the constable or collector of said municipality who shall have all the authority and power to collect said taxes as is in him vested by law to collect state, county and municipal taxes."
> - - - - - - - - -
> R. S., c. 41, § 111-L.

The general law makes provision for a new group and territory to join an existing school district and by vote of the groups for the dissolution of a school district which has no outstanding bonds or notes issued for capital outlay

purposes or debts of other specified natures. R. S., c. 41, § 111-P.

The general law ordains regular State grants to school districts in partial payment for the cost of construction of schools, for the support of schools and toward the satisfaction of principal and interest charges for capital outlay expenses. R. S., c. 41, §§ 237-D, E, G, H.

In 1958 the defendant, School Administrative District No. 3, became established under the general statutory law with 9 groups of residents of 9 municipal territories. In 1959 the Legislature by special emergency enactments provided a method for the addition to that School District of the residents and territories of the towns of Brooks and Jackson. P. & S. L., 1959, cc. 1, 2. By P. & S. L., 1959, c. 221 School Administrative District No. 3 with its elevenfold membership was specifically constituted retroactively and currently to subsist and function according to the provisions of R. S., c. 41, §§ 111-A through 111-U.

On June 10, 1963 School Administrative District No. 3 issued, sold and delivered its bonds. On June 13, 1963, to have effect September 21, 1963, the Legislature enacted P. & S. L., 1963, c. 175.

P. & S. L., 1963, CHAPTER 175

This act contains several provisions of notability and moment in the case at bar.

S. A. D. #3 is "reorganized to comprise the Towns of Unity, Troy, Knox, Waldo, Thorndike, Montville, Freedom and Jackson. The Towns of Liberty, Brooks and Monroe are removed and withdrawn from School Administrative District No. 3 as previously constituted and from the effective date of this act shall revert to their prior status as independent municipalities for all school and educational purposes, with all rights and powers and subject to all the

duties and liabilities of municipalities pertaining to education." (Sec. 1)

The towns comprising S. A. D. #3 as "reorganized" are constituted "to be a School Administrative District, known as School Administrative District No. 3, with all the powers, privileges and franchises granted" according to R. S., c. 41, §§ 111-A to 111-U, as amended. "The proceedings taken in town meetings of the towns comprising said district as reorganized, including the election of the present directors of said towns," are "validated, confirmed and made effective as if said proceedings had been taken in connection with said district as herein reorganized - - - - -" (Sec. 2)

Responsibility for the education of pupils in Liberty, Brooks and Monroe was returned to those municipalities. (Sec. 4)

Title to school properties of S. A. D. #3 located in the 3 municipalities of Liberty, Brooks and Monroe is conferred upon those 3 towns and certain distributions and adjustments are prescribed to consummate a fair severance. (Sec. 6)

The school committees of Liberty, Brooks and Monroe are to determine the number of teachers required for the ensuing year. Thereupon S. A. D. #3 is to assign to those 3 disjoined towns the contracts of teachers who presently are under contract with S. A. D. #3 in teaching positions in the 3 towns but whose services will no longer be required by S. A. D. #3. The 3 towns are to honor the assigned contracts. A teacher so transferred may decline the continuation of the contract which shall thereupon terminate. (Sec. 7)

Section 10 of P. & S. L., 1963, c. 175, we quote verbatim:

> "The prior action relative to school construction and the issuance of $730,000 in bonds or notes is

> hereby declared to be valid and effective, any provisions of the law to the contrary notwithstanding, and any bonds or notes issued thereunder are hereby deemed to be a valid and binding indebtedness of School Administrative District No. 3 as herein reorganized, provided however that said bonds or notes shall in no way be construed as an indebtedness or liability of any of the Towns of Liberty, Brooks or Monroe, except as a contingent liability in the event of default on said bonds or notes in payment in full of the same is not made after levy on all of the assets of said School Administrative District No. 3, as hereby reconstituted, in accordance with the terms and conditions of said notes and bond indenture, and said contingent liability shall be in the same proportion as it would have been had the Towns of Liberty, Brooks and Monroe remained within School Administrative District No. 3 prior to its reorganization."

If S. A. D. #3 and the 3 separated towns cannot agree as to the redistribution of properties, the assignment of teaching contracts or other matters of severance provision is made for arbitration to be heard upon commission of the Chief Justice by a Justice of the Supreme or Superior Court who shall determine the matters finally in an equitable and just manner in keeping with the intents and purposes of P. & S. L., 1963, c. 175. The Maine Rules of Civil Procedure will not be applicable to the arbitration but the presiding justice may avail himself of appropriate rules and may effect the attendance of witnesses and the production of evidence. (Sec. 11)

The burden of establishing the unconstitutionality of a legislative act is full-laden.

> "- - - - Certain canons of construction are so well established that they need only be referred to without prolonged discussion:—
>
> "- - - - The wisdom, reasonableness and expediency of statutes and whether they are required by

the public welfare are subject to exclusive and final determination by the law making power. As to these matters the courts have no duty and no responsibility. - - - -

"- - - - Legislative power is measured not by grant, but by limitation. It is absolute and all-embracing, except as expressly or by necessary implication limited by the constitution. - - - -

"- - - - The court will pronounce invalid only those 'statutes that are clearly and conclusively shown to be in conflict with the organic law.'

State v. *Rogers,* 95 Me. 98.

"- - - - 'If a statute is susceptible or (of) two interpretations, and one of the interpretations will render the statute unconstitutional, and the other will not, the latter should be adopted.' *State* v. *Intoxicating Liquors,* 80 Me. 62.

Hamilton v. *District,* 120 Me. 15, 20.

"In passing upon the constitutionality of any act of the Legislature the court assumes that the Legislature acted with knowledge of constitutional restrictions, and that the Legislature honestly believed that it was acting within its rights, duties and powers. All acts of the Legislature are presumed to be constitutional, and this is 'a presumption of great strength' - - - - The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality - - - -. Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. - - - -"

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

See, *Eames* v. *Savage,* 77 Me. 212, 216.

"- - - - But it may be the duty of the court to pronounce invalid an act which violates an express mandate of the constitution, even if the act is expedient and has been determined by the Legislature to be necessary."

Randall v. *Patch,* 118 Me. 303, 306.

The Legislature retains the prerogative of amending, altering or repealing the charters of corporations created by special act or by general statute. R. S., c. 53, §§ 1, 2.

> "Acts of incorporation passed since March 17, 1831 may be amended, altered or repealed by the legislature, as if express provision therefor were made in them unless they contain an express limitation; but this section shall not deprive the courts of any power which they have at common law over a corporation or its officers."
> R. S., c. 53, § 2.

The *Maine Constitution, Article VIII,* has vested in the Legislature the general control of public schools.

> "The Constitution of Maine, Art. VIII imposes the duty upon the Legislature to promote the cause of education. This, in effect, is in the nature of a constitutional mandate. In 1876 the then members of the Law Court of Maine had occasion to give their opinion relating to the authority and responsibility of the Legislature on the subject matter of schools and education, The *Opinion of the Justices* is recorded in 68 Me. 582. A pertinent quotation from the opinion is in the following language:
>
> 'In the constitution, it is declared that a general diffusion of education is essential to the preservation of the liberties of the people. By its very language, it would seem that the 'general diffusion of education' was to be regarded as especially a 'benefit' to the people. If so, then the legislature has *'full power'* over the subject matter of schools and of education to make all reasonable laws in reference thereto for the 'benefit of the people of this state.' (Emphasis ours.)
>
> 'In further support of the fact that the sovereign has maintained control of schools and education through the years is the following statement by the justices in their opinion:
>
> "Accordingly, from the first institution of the government to the present day, *the general control of*

schools, and the determination of what shall be a suitable provision by the towns for their support, has been fixed by legislative enactment.' (Emphasis ours.)"

Squires v. *Augusta,* 155 Me. 151, 155.

This court in *Shaw* v. *Small,* 124 Me. 36, 40, said:

"Eminent courts hold that statutes relating to public schools should receive a liberal construction in aid of their dominant purpose which is universal elementary education. - - - -"

The public school district is in a very true sense a contingent creature of the legislative will.

"A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The Legislature may change such agencies, and control and direct what shall be done with school property. - - - - A municipal corporation owes its existence to the legislative will - - - The Legislature may, in its discretion, abolish or dissolve such a corporation at any time - - - - Municipal corporations, organized for different purposes may include the same territory, as a city and a county, or a school district. - - - -

"The property held by such school districts for public use is subject to such disposition in the promotion of the objects for which it is held, as the supreme legislative power may see fit to make.

Rawson v. *Spencer,* 113 Mass. 40.

"Over property acquired and held exclusively by an agency of State government for purposes deemed public, the Legislature may exercise control to the extent of requiring the agency, without receiving compensation, to transfer such property to some other governmental agency, to be used for similar purposes, or perhaps for other purposes strictly public in their character.

Mount Hope Cemetery v. *Boston,* 158 Mass. 509, 33 N. E. 695.

"School property is public property, the property of the incorporated district and not of the taxpayers residing within it. - - - -

"The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power. - - - -

Kelley v. *School District,* 134 Me. 414.

"The Legislature, as we have indicated, has the authority to create School Administrative Districts directly by its own act without the intervening services of an administrative body. There is no requirement under the Constitution of Maine for the submission of the question of formation of a School Administrative District to popular vote in the municipalities within the proposed District. There is no constitutional obligation to give this measure of home rule to the people of the communities involved. - - - -

"We have seen that the Legislature could have created this or any other School Administrative District by special act. - - - -

"The controlling principle is stated as follows:

'A school district, being an auxiliary of the state for purposes of education, the legislature may provide for its creation, control, and regulation, without violating the due process guaranty, with respect to the property rights of the district or of property owners therein.'

16 A C. J. S., Constitutional Law, § 604 (b).

"The interest of the taxpaying inhabitants in the creation and establishment of a school district is not a property interest - - - -"

McGary v. *Barrows,* 156 Me. 250.

"The law is now well settled that 'in respect to public corporations which exist only for public purposes, as counties, cities and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge or restrain them, securing,

> however, the property for the uses of those for whom it was purchased.' - - - - And the reason why this power exists, is, because the Acts by which such corporations are created are not contracts within the meaning of the constitution of the United States, or of the constitution of this State. The public good evidently requires that such corporations should be subject to legislative control. The Legislature, therefore, as the trustee of the public interests, is properly invested with unrestrained power over the existence of all public corporations."
>
> *North Yarmouth* v. *Skillings*, 45 Me. 133, 141.

In the case at bar the presiding justice ruled that P. & S. L., 1963, c. 175 "in effect dissolves School Administrative District No. 3 as originally constituted, removes and withdraws the Towns of Liberty, Brooks and Monroe therefrom, and constitutes and establishes a new School Administrative District No. 3 comprising territorially only the eight remaining towns."

In this ruling we do not concur. The 1963 private act employs the words, "reorganized," "hereby constitute," reorganization," "reconstituted," "redistribution of property." Those terms when read in the full statutory context do not connote a dissolution of an existent corporate entity and the creation of one new and distinct. The act in its contemplated and projected effect undertakes no more than to partition 3 of the 11 groups into a school supervisory union and to conserve the residual 8 groups in the extant corporate District. To rule otherwise is to multiply difficulties without sufficient reason. The act discloses a purpose to assure the outstanding and abiding bond issue by protective expedients. Such an objective becomes unnecessarily complicated if we are to conclude that the Legislature purposed to establish a novel District and interpose it in replacement for the original obligor of the bonds. The act, to the contrary, manifests an intent to preserve the status

of the bond issue as an abiding and adequately secured obligation of the original obligor District while, in the same operation, neutralizing such resultants of the membership fracture as diminution of population and territory, affected teacher relations, State subsidies and reinvestiture of property previously contributed by the 3 severed groups.

It is quite significant that P. & S. L., 1963, c. 175, § 2 "validates, confirms and makes effective" the proceedings previously taken in town meetings of the 8 groups and territories remaining in the reorganized District" as if said proceedings had been taken in connection with said district as herein reorganized." The 1963 act also retains the same directors for such 8 groups without necessity of reelection.

Certain established principles of law appertain here to interpretation of P. & S. L., 1963, c. 175 conjointly with P. & S. L., 1959, c. 221.

In *Eden* v. *Southwest Harbor,* 108 Me. 489, 494 we find quoted with approval:

> " 'As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable.' "

The following extracts from *Mobile* v. *Watson,* 116 U. S. 289, 300, quite palliate the significance of reflection as to whether P. & S. L., 1963, c. 175 creates a new or continues an existing quasi-municipal District.

> "Whether the legislature of a State has given a local community, living within designated boundaries, a municipal corporation, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name

for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new - - - - - -

"So in *Broughton* v. *Pensacola,* 93 U. S., 266, 270 it was said by Mr. Justice Field, in delivering judgment, that when 'a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization.'

"In *O'Connor* v. *Memphis,* 6 Lea, 730, the Supreme Court of Tennessee went so far as to say that — 'Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in the mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolished - - - - - The corporators and the territory are the essential

> constituents of the corporation, and its rights and liabilities naturally adhere to them.' "
>
> See, also, *Shapleigh* v. *San Angelo*, 167 U. S. 646, 654.

The defense impugns the validity of the School District bonds and the status of the plaintiffs as holders in due course of such of those bonds as they own. The presiding justice with ample evidence to sustain him has ruled that the bonds are valid and that the plaintiffs are holders in due course of their bonds. An obvious minor and clerical error inadvertently included in the opinion of the counsel who approved the legality of the bond issue is innocuous and irrelevant.

Plaintiffs' gravamen, in their accusation of unconstitutionality against P. & S. L., 1963, c. 175, is that the Legislature by that act would invalidly debase the security and resources for payment of the obligations of the preexisting bonds of School Administrative District No. 3.

R. S., c. 41, § 111-L prescribed that funds "for payment of bonds falling due and interest thereon" be procured by taxation of the polls and estates within the member groups and municipal territories. Such a prime sanction together with the summary access to the "personal property of the residents and the real estate within the boundaries of a - - - quasi-municipal corporation" granted by R. S., c. 90-A, § 23, as amended, produced sound security for a bond issue of judicious magnitude.

P. & S. L., 1963, c. 175 subsequent in time of passage and in effect to the School District bond issue would alienate 3 of the member groups and territories with a resultant loss to the District in property valuation and support to the extent of an indicated one third. The outstanding bonds would be validated but would cease to be an indebtedness or liability to the residents and territory of the 3 disjoined

members "except as a contingent liability in the event of default on said bonds or notes in (if) payment in full of the same is not made after levy on all of the assets of said School Administrative District No. 3 - - - - and said contingent liability shall be in the same proportion as it would have been had" the 3 released members remained in the School District.

It is noteworthy that the liability of the 8 remaining District members will continue to be primary as to the bonds but the responsibility of the 3 partitioned members will become insulated as a stand — by obligation enforcible only in the event of an unsatisfied balance of the bond indebtedness yet unpaid in the wake of levy by the bond creditors upon all the assets of the reconstituted School District.

Plaintiffs protest that implemented P. & S. L., 1963, c. 175, therefore, would substantially and unconstitutionally impair the obligation of the contract made by School Administrative District No. 3 with its bondholders.

> "The result arrived at in all the decisions, bearing upon this question, seems to be that the legislature may alter or vary existing remedies, provided that in so doing, their nature and extent is not so changed as materially to impair the rights and interests of parties to existing contracts."
> *Phinney* v. *Phinney*, 81 Me. 450, 462.

The constitutional prohibitions are as follows:

> "The legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts, - - - -"
> *Constitution of Maine*, Article 1, Section 11.

> "No state shall - - - pass any - - - law impairing the obligation of contracts, - - - -"
> *Constitution of the United States*, Article 1, Section 10.

> "- - - - By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement - - - -"
> *Nelson* v. *St. Martin's Parish,* 111 U. S. 716, 720.

The obligation of a contract is:

> "- - - - the law which binds the parties to perform their agreement."
> *Ogden* v. *Saunders,* 12 Wheat. 213, 257.

> "- - - - the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement - - - -"
> *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550.

When in 1963 the School District issued its bonds the State Constitution, decided cases and enacted statutes authenticated as unquestionable law the broad authority of the Legislature both as to public school education and as to the creation, modification and dissolution of quasi-municipal corporations and the full availability of the personal property of all residents and the real estate in the District for the payment of unsatisfied obligations of such public corporations.

The scope of the constitutional prohibition against the impairment of the obligation of contracts has in several respects been the subject of evolved and organic construction.

> "- - - - we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."
> *Home Bldg. & L. Ass'n.* v. *Blaisdell,* 290 U. S. 398, 428.

Early court pronouncements were quite absolute:

> "The objection to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation - - - -
> *Green* v. *Biddle,* 8 Wheat. 1, 84.

> "One of the tests that a contract has been impaired is, that its value has by legislation, been diminished. It is not, by the Constitution, to be impaired at all - - - -"
> *Planters' Bank* v. *Sharp,* 6 Howard, 301, 327.

"Unescapable problems" of construction arose and one of them was:

> "- - - - What residuum of power is still in the States in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, 'of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation' Story on the Constitution, § 1375."

> "- - - - Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. - - - - Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations

are worth while, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

"- - - - Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other - - - -

"- - - - Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."

Home Bldg. & L. Ass'n. v. *Blaisdell,* 290 U. S. 398, 429, 434, 439, 447.

"- - - - And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."

Bronson v. *Kinzie,* 1 How 311, 316. (1843)

"If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired. - - - -

"The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions

as seriously to impair the value of the right - - - -"

Tennessee v. *Sneed* (1877), 96 U. S. 69, 74.

In 1886 the United States Supreme Court said in *Mobile* v. *Watson,* 116 U. S. 289, 305:

"Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. When the resources for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, *any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void - - - -"* (Italics supplied.)

The highest court in *Hubert* v. *New Orleans* (1909), 215 U. S. 170, 178 observed:

"- - - - The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, *leaving the creditors without adequate means of satisfaction,* impaired the obligation of their contracts within the meaning of the Constitution - - - -" (Emphasis added.)

In *Richmond Mortg. & L. Corp.* v. *Wachovia Bk. & T. Co.* (1937), 300 U. S. 124, 128, we find:

"- - - - The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away. The matter in dispute is whether the questioned enactment falls beyond the boundary of permissible regulation of the remedy for enforcement of appellant's contract."

This court commented in *Phinney* v. *Phinney,* 81 Me. 450, 462:

> "The rule, while somewhat vague and unsatisfactory, is the most certain general one of which the nature of the subject admits. The difficulty arises in its application to particular cases, and distinguishing between what are legitimate changes of remedy and those which impair the obligation of contract. Every case must be determined, in a great degree, by its own circumstances."

Mr. Justice Holmes supplies a caveat in reverse order in *Hudson Water Co.* v *McCarter,* 209 U. S. 349, 347:

> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

R. S., c. 90-A, § 23, the statute subjecting the personal property of residents and the real estate situated in a quasi-municipal corporation to payment of unsatisfied corporate debts, has a root in antiquity and is indigenous both to England and to New England. *Eames* v. *Savage* (1885), 77 Me. 212, declared the statute in essential principle to be constitutional. The opinion contains impressive erudition of the historical statutory remedy. We quote selectively:
P. 216.

> "The statute itself, in this case, has existed for half a century, since February 27, 1833, (See P. L. 1833, Chap. DLXXXVI, Sec. 3), but it introduced no new principle or rule in the jurisprudence of this state. It merely affirmed a well known custom or law that had long before existed. The practice of bringing suits against a political division, or municipal organization, and collecting the judgment from the individuals comprising it, is believed to have existed in England, and to have been brought thence to New England. Actions against 'the hundred', were known as far back as Edw. 1.

> Stat. 13, Edw. 1, c. 2; 3 Comyn's Dig. Hundred, c. 2. As 'the hundred' had no property, except that of individuals, the judgments must have been collected from the individuals. In *Russell* v. *Men of Devon,* 2 T. R. 667, Lord Kenyon said, that indictments against counties were sanctioned by the common law, though they would be levied on the men of the county - - - - In New England, the practice obtained from the earliest times, without any statute - - - - The practice has been regarded as settled law in Massachusetts, and has been repeatedly alluded to in the opinions of the courts, as sanctioned by immemorial usage. (cases cited) - - - - The people of Maine, while a part of Massachusetts, were familiar with the law and the practice. The Maine courts have repeatedly recognized it as long established, and as in harmony with the state constitution - - - - In Connecticut also, the antiquity and constitutionality of the law have been repeatedly affirmed.

P. 218.

> " - - - - Towns, however, are not full corporations. They have no capital stock, and no shares. They are only quasi corporations — created solely for political and municipal purposes, and given a quasi corporate character for convenience only. They remain still an aggregation of individuals dwelling within certain territorial limits, and under the direct jurisdiction of the legislature."

In 1937 a proposed amendment to the Constitution of Massachusetts was worded as follows:

> "No taxes on real estate shall in any year be levied, assessed or collected in an amount greater than two and one-half per cent of the fair cash value."

The legislature of Massachusetts sought the opinion of the Massachusetts Supreme Judicial Court to determine whether the amendment if adopted would constitute a law impairing the obligation of contracts in violation of the contractual rights of bondholders of Massachusetts municipal

bonds issued prior to the adoption as law of the proposed amendment. *Opinion of the Justices,* 297 Mass. 582, 9 N. E. (2nd) 189 contains the determination of the individual justices who cited *Mobile* v. *Watson, supra,* 305, *Louisiana* v. *New Orleans,* 102 U. S. 105, 113 and *Thompson* v. *Auditor General,* 261 Mich. 624, 640 and concluded as follows:

> "If the sole remedy of the creditors holding evidences of indebtedness issued by cities and towns within this Commonwealth were the revenue to be derived from taxation, there would be grave doubt about the constitutionality of the proposed amendment. It is not inconceivable that the financial condition of some cities and towns in the Commonwealth may be such as to require drastic legislation for their regulation and protection - - - But the remedy of creditors of municipalities in Massachusetts is not restricted to revenue derived from taxation. 'By the common law of Massachusetts and of other New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish or school district, is liable to be taken on execution on a judgment against the corporation.' *Hill v. Boston,* 122 Mass. 344, 349 - 350 - - - - - We assume that this remedy is also available to creditors of cities as well as of towns. *Nichols v Ansonia,* 81 Conn. 229, 235, 236. Therefore the remedy of a creditor of a municipality in Massachusetts is reinforced by the right to levy an execution issued on a judgment in his favor on the real estate of any person within such city or town. The right to sell such real estate on execution may not be in all respects so convenient as collection from a town or city treasurer. It cannot, however, be regarded as the impairment of the obligation of a contract to reduce the amount assessable upon real estate for purposes of taxation to a point where it may be necessary to resort to the remedy."

(See, also, Notes and Comments, *18 Boston University Law Review,* 185.)

We are mindful that opinions of the Justices of the Supreme Judicial Court of Massachusetts (Constitution of Massachusetts, Art. 11, Chap. 111) are advisory, are not binding adjudications (*Boston* v. *Treasurer,* 237 Mass. 403, 130 N. E. 390) and state individual views. (*Lynn* v. *Commissioner,* 269 Mass. 410, 169 N. E. 502, 503.) But such an opinion rendered after judicial investigation and deliberation by the members of a court always so greatly esteemed is very ponderable and especially so because of the grave social and financial consequences attendant upon an answer to such a serious question as that propounded to the justices in 1937.

In the case at bar there can be no doubt that the plaintiff bondholders have an available and very substantial remedy in any default, against the goods and chattels of the residents of and against the real estate in, 8 remaining and 3 removed territories of School District No. 3. R. S., c. 90-A, § 23, c. 118, §§ 30, 31, 32, as amended; *Crafts* v. *Elliottsville,* 47 Me. 141; *Spencer* v. *Brighton,* 49 Me. 326, 329; *Hayford* v. *Everett,* 68 Me. 505, 507; *Littlefield* v. *Greenfield,* 69 Me. 86, 89; *Caldwell* v. *Blake,* 69 Me. 458, 467; *Paul* v. *Huse,* 112 Me. 449, 451.

To the extent of more than $600,000 the proceeds of the School District bond sale will be applied in the construction of a new high school at Thorndike a group and territory remaining in the District after the legislative partition.

For the 11 towns hitherto encompassing the inhabitants and the territories of the School District the State valuation of 1963-64 is an aggregate $6,640,000. R. S., c. 16, § 67, as amended. The State valuation for the 3 removed towns inclusively is $2,250,000 or approximately 1/3rd of the composite State valuation for the District. The valuation for the 8 retained towns totals $4,390,000. Despite the provisions of P. & S. L., 1963, c. 175, therefore, against a bonded indebtedness of $730,000, there will remain in the 8

towns a primary security of $4,390,000 and in the 3 released towns a contingently additive security of $2,250,000 more. P. & S. L., 1963, c. 175, § 10.

In 1963 the 3 removed members of the School District were obligated to pay some 34% of the total of the operational budget. However, those members coincidentally with their separation from the District will relieve the latter from the operational cost of educating some 480 pupils, save for bond and other fixed charges.

In the bond repayment schedule the 3 disjoined units, after State subsidy, would be chargeable with the responsibility for 34% of the remaining annual cost of the 11 unit District. In the 8 unit District such expense will be reapportioned for each member. After State contribution the first year's bond charge to be borne by the combined 3 retiring units is $8,722.48. That amount and the progressively diminishing sums for succeeding years would be equitably assimilated amongst the 8 abiding units. For the 11 unit District the State aid is presently calculated at 58% of the bond repayment. That percentage will be subject to some variation by formula for the 8 unit District. R. S., c. 41, § 237-H, as amended.

Because of the circumstances of the instant case plaintiffs' protest of impairment of the obligation of contract can not generate a merely abstract issue or insist upon the benefits of an absolute. On the other hand there are to be seen here "the unescapable problems of construction." *Home Bldg. & L. Ass'n.* v. *Blaisdell, supra,* 429. There are the constitutional prohibitions against impairment. But they may be qualified by the authority retained by a State for the safeguarding of the vital interests of the people. We are charged here with judging whether the legislative act P. & S. L., 1963, c. 175 yielded a legitimate change of remedy or an invalid impairment of a contract. In 1963 in Maine the possession and reservation of sovereign au-

thority in the promotion of public school education and in the creation, alteration and dissolution of public, quasi-municipal corporations were "essential attributes of sovereign power" to be read into contracts "as a postulate of the legal order" *Id., supra,* 434. So to be read, also, was the existing law of access for unpaid creditors of defaulting public quasi-municipal corporations to levy upon the personal property of residents and the territorial real estate of such public corporations.

> "- - - - The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society - - - -"
> *Home Bldg. & L. Ass'n.* v. *Blaisdell, supra,* 434.

The Legislature by its act of 1963 partially curtailed the reach of the property taxation device which it had previously made adaptable for School District bond repayment but continued unaffected the limitless rate and amount of such taxation.

Although the District no longer may initiate and direct a tax upon the assessable properties within the 3 eliminated territories, nevertheless it may still put in requisition through its directors an ad valorem tax without limit as to rate or amount and upon a tax base of $4,390,000 of property, state appraised and accessible, in the 8 retained towns of the School District R. S., c. 41, § 111-L. With this power of taxation are all the collection and forfeiture processes of R. S., c. 91-A, as amended. And such plenary taxing potential preserved in the 1963 Act by the Legislature for the satisfaction of the bonded debt of the District is not by any means an exclusive resource but coexisting with it is continued the both complementary and auxiliary right of levy by execution after default in payment. R. S., c. 90-A, § 23. The right of levy is modified into primary and secondary orders but is otherwise legally persistent.

It is true that the initial bond, principal debt is $730,000 with annual interest of 3.6%. Yet the annual bond payments of interest and principal through the 20 years range downward from $61,250 to a last annual payment of $31,-080. Of these annual payments the State will supply a large portion. The State would pay 58% of these annual charges for the 11 member district. The record in this case, after State subsidy contribution, lists the annual principal and interest costs to the 8 member districts as ranging downward through the 20 years from $24,512, the first year to a sum of $12,432 the twentieth year. The largest payment for any of the 8 districts the first year is $8,655; the smallest payment for any of the 8 districts the first year is $1,563; an average per district of $3,064.

The largest payment for any of the 8 districts the 20th year is $4,389; the smallest payment, that year is $793; an average per district of $1,554.

Under such circumstances future travail and delay for unpaid bondholders are possible but not demonstrably probable and surely not of sufficient gravity to arrest and suspend the State's police and welfare power and to justify the invalidation of the legislative act. *Mobile* v. *Watson, supra.*

The presiding justice in his decision incidentally ruled that:

> "- - - - the very nature of School Administrative District No. 3 as originally constituted itself rests upon contract — a contract entered into pursuant to the provisions of R. S. 1954, Ch. 41, as amended, by and between the eleven member towns. This contract itself is impaired by the implementation of the Act. - - -"

In *North Yarmouth* v. *Skillings,* 45 Me. 133, 141, this court said:

> "The law is now well settled that, 'in respect to public corporations which exist only for public pur-

> poses, as counties, cities, and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom it was purchased.' - - - - ; and such has been the uniform practice of the Legislature of this State, from its earliest existence. And the reason why this power exists, is, because the Acts by which such corporations are created are not contracts within the meaning of the constitution of the United States, or of the constitution of this State. The public good evidently requires that such corporations should be subject to legislative control. The Legislature, therefore, as the trustee of the public interests, is properly invested with unrestrained power over the existence of all public corporations."

The effect of the implementation of P. & S. L., 1963, c. 175 upon the value and marketability of the bonds issued and upon the credit and borrowing capacity of School District No. 3 and those of other School Districts in Maine, if susceptible of dependable demonstration, has not been established in the record of this case.

The presiding justice properly refused to admit evidence of an injunction previously issued by the Superior Court in an action tried prior to the instant case. The presiding justice for sufficient reason ruled that the defendants-appellants had waived their right to present such evidence. Intervening events between the imposition of the injunction and the trial in this case had patently rendered the injunction of no probative effect in this action.

School Administrative District No. 3 as defendant in the case at bar filed a cross claim challenging the constitutionality of P. & S. L., 1963, c. 175, § 11 in so far as that statutory section provided a mode of arbitration and special rules governing it in the event of a failure of the members of the School District to agree upon certain adjustments oc-

casioned by the severance from the School District of the 3 removed members. Because of the broad authority of the Legislature over public, quasi-municipal corporations and the transfer of their property for similar public purposes there can be no doubt that the legislative body may competently and validly ordain becoming rules of arbitration to effectuate the subsidiary details of its exercise of its authority. *Kelley* v. *School District,* 134 Me. 414, 420. Nor need the Legislature accord any right of appeal or review from the arbitration decision. *Sears, Roebuck & Co.* v. *Portland,* 144 Me. 250, 254.

P. & S. L., 1963, c. 175, § 7 in outline makes the following provisions. The School committees of the 3 removed towns are to determine the number of teachers they shall require for the ensuing year. School Administrative District No. 3 will thereupon assign to those 3 towns its contracts with teachers who are already teaching in the territory of the 3 towns but whose services will no longer be required by School Administrative District No. 3. Those 3 towns are to honor such assigned contracts. Any teacher so transferred may decline to continue his or her contract "whereupon said contract shall be deemed terminated and all rights, duties and liabilities of the parties shall cease."

In so far as such section 7 denies just damages to the teacher who declines to continue her compulsorily assigned contract under substituted employers that section impairs the obligation of any teacher contract entered into prior to June 13, 1963. The invalidity is severable. R. S., c. 10, § 22, XXVIIID; *Cole* v. *County Commissioners,* 78 Me. 532, 538.

With the exception of the specified invalidity occurring in Section 7 the evidence in the instant case does not sustain a ruling that P. & S. L., 1963, c. 175 is "clearly and conclusively - - - - in conflict with the organic law." *Hamilton* v. *District,* 120 Me. 15, 20.

STATE OF MAINE
vs.
MYRON A. MILLETT, JR.

Cumberland. Opinion, October 16, 1964.

Weapons. Statutes. Criminal Law.

Where defendant had not been convicted of penal offense within five years after his release from prison, statute which made it unlawful for felon to conceal firearm on his person but which excepted from its application persons not so convicted was not applicable.

Statute declaring act to be felony calls for stricter construction than one declaring act to be misdemeanor.

Though deficiency in indictment and proof was seemingly belatedly protested and pressed in Supreme Judicial Court, error in that defendant was convicted under statute which did not apply to him required setting aside verdict and judgment.

ON APPEAL.

Prosecution for possession of a firearm by a felon. Defendant was adjudged guilty. From denial by the Supreme Judicial Court, Cumberland County, of his motion for new trial, he appealed. The Supreme Judicial Court, Sullivan, J., held that where defendant had not been convicted of a penal offense within five years after his release from prison, the statute which made it unlawful for a felon to conceal a firearm on his person but which excepted from its application persons not so convicted was not applicable. Appeal sustained; verdict and judgment set aside.

Franklin F. Stearns, Jr., County Attorney, for State.

Robert A. Wilson,
Henry Steinfield, for Defendant.

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

SULLIVAN, J. Defendant was by indictment accused of having been a felon possessed of a firearm. R. S., c. 144, §§ 12-A through 12-C; P. L., 1955, c. 310. He pleaded not guilty, was tried by a jury and was adjudged guilty. He filed a motion for a new trial. R. S., c. 106, § 14, as amended, § 15. His motion was denied and he appeals. R. S., c. 148, § 30.

The statutory offense is stated as follows:

> **Sec. 12-A.** "It shall be unlawful for any person who has been convicted of a felony under the laws of the United States or of the State of Maine, or of any other state, to have in his possession any pistol, revolver or any other firearm capable of being concealed upon the person. Anyone violating any of the provisions of sections 12-A to 12-C, inclusive, shall be guilty of a felony, and upon conviction thereof, shall be punished - - - -
>
> **Sec. 12-B.** "The following words and phrases when used in sections 12-A to 12-C, inclusive, are defined as follows:
>
> 'Pistol,' 'revolver' and 'firearm' mean a weapon capable of being concealed upon the person and shall include all firearms having a barrel of less than 12 inches in length.
>
> **Sec. 12-C.** "The penal provisions of section 12-A shall not apply to any person commissioned as a peace officer, employed as a guard or watchman nor to any person who has not been convicted of a penal offense during the 5-year period next immediately following his discharge or release from prison." R. S., c. 144; P. L., 1955, c. 310.

The indictment is worded as follows:

> "- - - - that Myron A. Millett, Jr., - - - - on the twenty-fifth day of October in the year of our Lord one thousand nine hundred and sixty three, at Portland, - - - - did have in his possession, a certain Colt Buntline 22 Magnum Revolver, said Colt

> Buntline 22 Magnum Revolver being concealed about his person and said Colt Buntline 22 Magnum revolver having a barrel of less than twelve inches in length; said Myron A. Millett, Jr. having been convicted of a felony, to wit, Breaking, Entering and Larceny in the Night Time; to which said charge the said Myron A. Millett, Jr. entered a plea of Guilty and was sentenced on said charge under date of October 30, 1962 to the Maine State Prison at Thomaston, - - - - - by the Honorable - - - - Justice of the Superior Court for the county of Cumberland - - - - sitting at Portland - - - - and said criminal offense having been committed within a five year period following his release, upon parole, under date of August 7, 1963; - - - -"

Defendant's motion for a new trial asserts that the adverse verdict was against the law, unmindful of the judicial instruction to the jury and contrary to the evidence.

Defendant challenges the validity of the indictment with the contention that a conviction under R. S., c. 144, §§ 12-A, B, C necessitates allegation and requisite proof of 4 elements:

> "(a) prior conviction for a felony
>
> (b) date of discharge or release of the convict from prison after serving time for felony.
>
> (c) conviction for a penal offense during 5 year term following that discharge or release from prison and
>
> (d) conscious possession of the type of firearm prohibited by the Statute."

R. S., c. 144, §§ 12-A, B, C cause to be and render felonious the possession by any of a class of convicted felons, of a pistol, revolver or firearm capable of being concealed upon the person. Section 12-C demarcates that delimited class of felons as follows:

> "The penal provisions of section 12-A shall not apply - - - - to any person who has not been *convicted* of a penal offense during the 5 year period next immediately *following* his discharge or release from prison." (Italics ours.)

The indictment in the instant case does not allege that following and subsequent to his parole from prison on August 7, 1963 and prior to the indictment this defendant had been *"convicted"* of any penal offense. Therefore the provisions of section 12-A of R. S., c. 144 could not have applied to the defendant at the time of his indictment and trial. Obviously defendant had never been *"convicted"* of possession of the Colt pistol before his indictment and trial in this case.

No evidence was presented or received at the trial to prove that from his parole on August 7, 1963 to the time of indictment defendant had been convicted of any penal offense.

The defendant was unmistakably tried and convicted of a violation of a criminal statute which by its very terms did not apply to him but expressly immunized him.

We are ascertaining here not what the Legislature may have meant by what it said but rather are deciding what that which the Legislature said means.

> "In construing a statute the great purpose is to ascertain the intention of the legislature. That intention must be ascertained from the language used; for, if the legislature had in view a certain purpose to be accomplished, but failed to use language which, giving to it any recognized meaning, fails to express such purpose, the court cannot supply it."
> *State* v. *Howard,* 72 Me. 459, 464.

We construe in this case a penal statute declaring an act to be a felony. Such a law

> "- - - - calls for a more strict construction than one which declares an act to be a misdemeanor."
> *State* v. *Blaisdell,* 118 Me. 13, 14.
> *Smith* v. *State,* 145 Me. 313, 327.

As to the indictment in the case at bar it was said in *State* v. *Doran,* 99 Me. 329, 332:

> "- - - - Indeed it is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the indictment."

The deficiency in the indictment and in the evidentiary proof at trial was seemingly and belatedly protested and pressed in this court on appeal. Such a practice has not been regarded as conventional in support of a motion for a new trial. Nevertheless the errors disclosed here are so grave and vitiating as to enlist our corrective administration and to require the setting aside of the verdict and consequent judgment.

> "- - - - this Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions were not taken - - - -"
> *State* v. *Smith,* 140 Me. 255, 285.

> "- - - - We are here concerned with a verdict based on a misconception of the law and responsive only to a measure of criminal guilt foreign to the indictment and unknown to the law. Such a verdict is against the law, and to allow it to stand is not justice. - - - -"
> *State* v. *Wright,* 128 Me. 404, 407.

The mandate must be:

Appeal sustained:

Verdict and judgment set aside.

FRANK G. JAMES, PETR.

vs.

STATE OF MAINE

Somerset. Opinion, October 29, 1964.

Habeas Corpus.

Ample credible evidence sustained finding in hearing on petition for writ of habeas corpus that petitioner, who had a fourth grade education and who was represented by counsel, had sufficient capacity and comprehension to participate with personal committal in information proceedings, and had acted understandingly and willingly in entering pleas of guilty to charges of statutory rape and incest.

ON APPEAL.

Proceeding on petition for writ of habeas corpus. From a denial of the petition by a single justice of the Superior Court, Somerset County, the petitioner appealed. The Supreme Judicial Court, Sullivan, J., held that ample credible evidence sustained finding. Appeal denied.

Wallace A. Bilodeau, for Plaintiff.

John W. Benoit, Assistant Attorney General, for State.

SITTING: WEBBER, TAPLEY, SULLIVAN, SIDDALL, JJ.

WILLIAMSON, C. J., and MARDEN, J., did not sit.

SULLIVAN, J. In 1961 by the Superior Court the petitioner was adjudged guilty, sentenced and committed to State Prison where he continues to be an inmate, for the crimes of Statutory rape, R. S., c. 130, § 10, and of incest, R. S., c. 134, § 2. He has instituted a petition for a writ of habeas corpus to secure relief from such criminal convictions. R. S., c. 126, 1-A - 1-G, additional (P. L., 1963, c.

310). A single justice after hearing denied the petition. Petitioner appeals from that denial.

In 1961 subsequent to his arrest and whilst in confinement awaiting consideration by a grand jury the petitioner invoked the provisions of R. S., c. 147, § 33 (P. L., 1959, c. 209), the optional and voluntary procedure of waiver of indictment and of prompt arraignment upon information. *Tuttle* v. *State,* 158 Me. 150, 180 A. (2nd) 608. Upon legally observant arraignment by information as to each crime the petitioner informed the court that he the petitioner had been accorded the services of legal counsel who had advised the petitioner well and fully, that the petitioner was acting freely, without promise of reward or fear, with awareness of the quantum of punishment for each crime, with an acknowledgment of his personal guilt as to each imputed offense and with a declared determination to have done with the matters; that the petitioner was cognizant of his rights to require indictment and jury trial and that the petitioner had left unspoken nothing pertinent which he wished to say. Petitioner thereupon pleaded guilty to each felony, was judged, sentenced and committed.

The sitting justice at the hearing upon the petition in the case at bar accepted in evidence and reviewed the record and the testimony of the previous information proceedings in the Superior Court. The justice also heard and considered the testimony of the petitioner, his witnesses and those presented by the State.

In pertinent particulars the findings and rulings of the sitting justice were as follows:

> "The petitioner is below average intelligence. He did not go beyond the 4th grade and he reads only the simplest words. He does, and did at the time of the information proceedings, understand the nature of the offenses with which he was charged.

"Evidence of what took place prior to the hearing in open Court was admitted for its bearing on the question stated. - - - The petitioner was not induced by fear, threat, promise, or other improper action to proceed by the information route and to plead guilty by reason of what may have taken place prior to the hearing.

"Likewise at the hearing, the petitioner understood the nature of the proceedings. He had been advised by court-appointed counsel. He was not induced by fear, threat, promise or other improper action to waive indictment and to plead guilty.

"I accept the statements of the petitioner in the information hearing as the truth. It will serve no useful purpose to refer in detail to the record of the information hearing, which is included within the record in the present case.

"The presiding justice in his conduct of the information proceedings fully complied with the statute. The petitioner was deprived of no rights either under the statute or under the State or Federal Constitutions.

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

"The petitioner is not entitled to relief on any of the several issues."

Petitioner's statement of points on appeal is as follows:

"1. That the plea (s) of guilty was (were) a result of force and coercion on the part of the Officials of the State of Maine in violation of the Constitution of Maine and the Fourteenth Amendment to the Constitution of the United States.

"2. That the appellant lacked the intelligence to waive any constitutional right and proceed by information where such waiver was made in fear and ignorance.

"3. That the evidence adduced at the hearing on the issued Writ of Habeas Corpus as a matter of

law showed a violation of Appellant's constitutional rights."

Rule 52, Maine Rules of Civil Procedure, 155 Me. 550, provides in respect to review of findings in all actions tried upon the facts without a jury, as follows:

"- - - - Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses - - - -"

See *Maine Civil Practice, Field and McKusick,* p. 429, § 52.8.

The presiding justice at the hearing in the case at bar had a matchless advantage for the exercise of his observation, of his practised judgment and of his experienced faculties in the ascertainment and confirmation of facts. He was subserved by the aids and empirical correctives which tested and applied forensic science has long utilized in the determination of objective truth from the testimony of live, present witnesses. There exists in the case record ample credible evidence to corroborate his findings from which he has formulated rulings which are sound.

He found that this petitioner had been of sufficient capacity and comprehension to participate with personal committal in the information proceedings; that the petitioner had acted understandingly and willingly unconstrained by guile or fear and that the constitutional rights of the petitioner had been respected and fulfilled.

The record of the information arraignment contains an affirmation from the petitioner that he had been advised of his rights "to the fullest extent" by his dutiful and satisfactory counsel who with the petitioner was an attendant and participator before the arraigning justice. The petitioner as to each criminal charge affirmatively waived his rights to grand jury consideration and petit jury trial. Be-

fore pleading he informed the court of his guilt and expressed the wish to terminate matters then and there.

The petitioner has failed to support his burden of proof, that he is entitled to relief.

The mandate shall be:

Appeal denied.

MAINE MILK COMMISSION
vs.
CUMBERLAND FARMS NORTHERN, INC.

Cumberland County. Opinion, December 3, 1964.

Constitutional Law. Evidence. Milk. Coupons. Commerce.

All acts are presumed constitutional and the presumption is one of great strength.

Burden is upon him who claims that an act is unconstitutional to show its unconstitutionality.

In absence of evidence to contrary, court would take statements in preamble of legislative act to be true and would not substitute its judgment for that of Legislature.

In absence of legislative findings, existence of facts supporting legislative judgment is to be presumed.

Milk commission law providing that commission is vested with power to establish and change minimum prices to be paid to producers and to fix wholesale and retail prices does not wrongfully delegate legislative power to commission but establishes adequate standards and guides to be followed by commission.

Neither the milk commission law vesting power in commission to establish and change minimum wholesale and retail milk prices nor

order promulgated thereunder was arbitrary, capricious or unreasonable, but law related directly and appropriately to object sought to be attained, and the law was not violative of the due process clauses of the State and Federal Constitutions.

Milk commission law empowering commission to fix wholesale and retail milk prices but not attempting to control prices paid for milk purchased outside state was not violative of the commerce clause of the Federal Constitution.

ON APPEAL.

On appeal from a judgment of permanent injunction issued by a single justice enjoining a milk supplier from issuing and delivering certain coupons given on the sale of its milk and redeemable in cash in the event that price fixing by the commission be declared unconstitutional. The Supreme Judicial Court, Siddall, J., held that the milk commission law was not violative of the due process clauses of the State or Federal Constitutions nor of the commerce clause of the Federal Constitution. Appeal denied.

John W. Benoit, Esq., Asst. Atty. General, for Plaintiff.

Sidney W. Wernick, Esq., for Defendant.

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

SIDDALL, J. This is an appeal from a judgment of permanent injunction issued by a single justice enjoining Cumberland Farms Northern, Inc., hereafter called Cumberland, from issuing and delivering certain coupons given on the sale of Cumberland's milk and redeemable in cash in the event that price-fixing by the Maine Milk Commission, hereafter called the Commission, be declared unconstitutional. In the hearing below the single justice did not pass upon the constitutionality of the Maine Milk Commission Law. He felt obliged to presume that the law was consti-

tutional in accordance with the well-established principle that the trial court was bound by the presumption of constitutionality.

The constitutional issue is the dominant issue in the case before this court. Cumberland challenges the constitutionality of the Maine Milk Commission Law as a violation of the provisions of the due process clauses of both the State and Federal Constitutions, and of the interstate commerce clause of the Federal Constitution.

The first price-fixing milk control legislation in this state was passed in 1935 (P. L., 1935, Chap. 13).

The legislative declaration at the time of the enactment of Chap. 13, P. L., 1935, was as follows:

> "Whereas, the distribution and sale of milk and cream within this state is a business affecting the public health, welfare and general interest of all the people of the state, and
>
> Whereas, unfair, destructive and uneconomic practices in the business of said distribution and sale of milk and cream have developed which threaten the disruption of said business and great loss to all persons engaged in said business and which create a situation which cannot be adequately controlled and remedied by existing statutes, and
>
> Whereas, in the judgment of the legislature these facts create an emergency within the meaning of section 16 of Article XXXI of the constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety;"

This Act was designed to be permanent legislation, subject to repeal or amendment. With few exceptions the Act has been amended in some respects at all legislative sessions from 1935 to date, and has been incorporated, as amended, in the Revised Statutes of 1944 and 1954. At a

special session of the Legislature in 1961 the law was amended by granting power to the courts to issue injunctions to enforce the Milk Commission Law. (P. L., 1961, Chap. 410.) The legislative declaration was contained in the preamble to the legislation, as follows:

> "Whereas, the production and distribution of milk is an industry within the State affected with a public interest; and
>
> Whereas, the health of the public requires a continuous abundant supply of wholesome pure milk; and
>
> Whereas, certain unfair practices have been carried on and may be carried on which are detrimental to the production, sale and distribution of wholesome milk, thereby leading to a lowering of the health standards and impairing an adequate supply of wholesome milk to the public; 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;"

The Maine Milk Commission Law provides that the Commission is vested with the power to establish and change, after investigation and public hearing, minimum prices to be paid to producers, and that the commission shall fix and establish, after investigation and public hearing, the wholesale and retail prices to be charged for milk distributed for sale within the state.

> "Prices so fixed shall be just and reasonable taking into due consideration the public health and welfare and the insuring of an adequate supply of pure and wholesome milk to the inhabitants of this State under varying conditions in various marketing areas, seasonal production and other conditions affecting the costs of production, trans-

> portation and marketing in the milk industry, including a reasonable return to the producer and dealer."
>
> R. S., c. 33, Sec. 4.

The record discloses that Cumberland sold milk at the minimum price established by the Commission with a coupon delivered to the purchaser, redeemable for a certain sum in cash in the event that the legislation was determined to be unconstitutional.

The dominant issue in this case is the constitutionality of the Maine Milk Commission Law.

The leading case in which the right to fix minimum prices for milk was challenged on constitutional grounds is *Nebbia* v. *People of New York* (1934), 291 U. S. 502. In that case the majority opinion held that the New York Milk Control Act, which authorized the establishment of minimum prices for milk, was not violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. The opinion conceded that the regulation of private business can be invoked only under special circumstances. In an elaborate opinion, the court said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.
> * * * *
> These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the con-

duct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need. * * * *

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guaranties. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them. * * * *

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing

economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, it charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or

other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77.
* * * *

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.* 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States,* 193 U.S. 197, 337, 338, 48 L. ed. 679, 700, 701, 24 S. Ct. 436. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every

> possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

The issues in this case have not been passed upon in our jurisdiction. In *State* v. *Latham,* 115 Me. 176, the court held that a statute designed to compel purchasers of milk intended for a particular use to pay their purchase debts at particular times or according to contract on pain of criminal prosecution was class legislation not based upon any real difference in situation or condition. In *State* v. *Old Tavern Farm, Inc.,* 133 Me. 468, a 1933 Act required that the proprietor of a milk gathering station give a bond as a condition precedent to obtaining a license. The court found *Latham* to be of controlling analogy and held the legislation violated the State and Federal Constitutions. (Fourteenth Amendment.) The following excerpts are noted on pages 474 and 475:

> "*Munn v. Illinois,* 94 U.S., 113, 24 Law ed., 77, and *German Alliance Insurance Company v. Lewis,* 233 U.S., 389, 58 Law ed., 1011, sustain the right of a State to control private business when clothed with a public use. These two cases, however, go only to fixing prices.
>
> 'All businesses are subject to some measure of public regulation, . . . that the business of . . . the dairyman may be subjected to appropriate regulation in the interest of public health, cannot be doubted.' *New State Ice Company* v. *Liebmann,* 285 U. S., 262, 76 Law ed., 747.
>
> *Nebbia v. People,* 291 U.S., 502, 78 Law ed., 940, holds that, as to prices of milk produced within the State, the industry may be regulated, within reason, if the public interest demands.
>
> Not price fixing, but the requirement of bond to pay the price, is now the test."

In *Opinion of the Justices,* 157 Me. 152, the Justices of the Supreme Court were asked to pass upon the constitutionality of legislation requiring semi-monthly payments to producers of milk under penalty of suspension or revocation of the license of a dealer upon violation. The justices noted that they were cognizant of certain facts, summarized as follows:

> (1) That Old Tavern Farm arose under a statute enacted in 1933, and was decided in 1935, a few months after the original enactment of P. L., 1935, Chap. 13. (2) That the decision in that case represented the minority view of the decided cases in this country. (3) That the requirements of a bond to secure payments by dealers to producers (using the terms in a general sense, and not with the definition of the Milk Control Act specifically in mind) has been apparently upheld in connection with Milk Control Acts (*Nebbia* v. *New York, supra*). (4) That New Hampshire, Vermont, and Massachusetts have provided by statute for bonds to secure payments to producers of milk.

Having these facts in mind and that the question submitted was really whether the Supreme Judicial Court sitting as the Law Court would overrule its decision in the *Latham* and *Old Tavern Farm, Inc.* cases, it was deemed that the question should not be answered, but should be left to litigation.

We are not called upon here to determine whether purchasers of milk for resale may constitutionally be required to pay their purchase debt, or whether the proprietor of a milk gathering station may be required to give a bond in order to secure a license. We are therefore not required to consider whether *Old Tavern Farm, Inc.*, or *Latham* should

be overruled. The issue here is the validity of price fixing which was never an issue in those cases.

The rationale of majority opinion in *Nebbia* has been followed almost universally in the state courts of this country. A partial list of those decisions in which *Nebbia* has been cited with approval are as follows: *Montana Milk Control Board* v. *Rehberg* (Mont.), 376 P. (2nd) 508, 1962; *Borden Company* v. *Thomason* (Mo.), 353 S. W. (2nd) 735 (1962), (Unfair Milk Sales Practice Act); *Mississippi Milk Commission* v. *Vance* (Miss.), 129 S. (2nd) 642 (1961), (contains an exhaustive research of federal and state decisions involving the constitutionality of Milk Control Acts); *Schwegmann Brothers Giant Super Markets* v. *McCrory* (La.), 112 S. (2nd) 606 (1959); *Abbotts Dairies, Inc.* v. *Armstrong* (N. J.), 102 A. (2nd) 372 (1953); *Board of Supervisors of Elizabeth City County et al.* v. *State Milk Commission* (Va.), 60 S. E. (2nd) 35 (1950); *State* v. *Auclair* (Vt.), 4 A. (2nd) 107 (1939); *Ray, et al.* v. *Parker* (Cal.), 101 P. (2nd) 665 (1940); *Savage* v. *Martin* (Or.), 91 P. (2nd) 273 (1939); *Rohrer* v. *Milk Control Board* (Pa.), 186 A. 336 (1936); *State ex rel. Finnegan, et al.* v. *Lincoln Dairy Co.* (Wis.), 265 N. W. 197 (1936). See also cases cited or discussed in the following annotations: 101 A. L. R. 72; 110 A. L. R. 654; 155 A. L. R. 1403.

On the other hand *Harris* v. *Duncan* (Ga.), 67 S. E. (2nd) 692 (1951) held that the milk industry is not such business affected with a public interest as to abridge the right of contract. The rationale of the opinion was the same as that expressed in the dissenting opinion in *Nebbia.*

In *Gwynette* v. *Myers* (S. C.), 115 S. E. (2nd) 673 (1960) the court, by a three to two division rejected the idea that the public health, safety, or morals were involved in the Milk Control Act of South Carolina or that the milk industry was affected with a public interest. *Gwynette*

was upheld in the recent case of *Stone* v. *Salley* (S. C.), 137 S. E. (2nd) 788. (August 6, 1964.)

In *Feretti, et al.* v. *Jackson, et al.* (N. H.), 188 A. 479 (1936) the court struck down the milk control law on the ground that it granted such a sweeping and general delegation of power that it exceeded constitutional limits. New legislation was then passed in which the board was empowered to establish prices after a finding of an economic condition injurious to public health. In an advisory opinion the court held this provision constitutional, stating that the prices fixed by the board were not permanent but could be changed when public interest so demanded. In re *Opinion of the Justices* (N. H.), 190 A. 713. In *Cumberland Farms Northern, Inc.* v. *Pierce* (N. H.), 190 A. (2nd) 402 (1963) after such a finding, the court denied plaintiff's claim that no suitable standards were provided to guide and control the board in its determination of maximum and minimum prices.

Cumberland concedes that the state, under its police power, upon proper occasion and by appropriate measures, may regulate a business in any of its aspects including the prices to be charged for the product or the commodity it sells. It maintains, however, that the Maine Milk Commission Law, as amended, is permanent legislation (until repealed or otherwise amended by subsequent new legislation) which requires mandatorily that a government agency fix the minimum retail prices of milk at all times and incessantly. It argues that there is thereby established by law in this state, a system by which, permanently and unceasingly, the retail prices of milk must be fixed by an agency of government and that there can never be any period of time, regardless of the state of the market conditions in the industry, when a private businessman is at liberty to sell his own milk at such price as he may see fit

and that the factual situation in this case does not justify such legislation.

In *Nebbia* the New York legislation under which the proceedings were initiated expired within a designated period. It is our understanding that *Nebbia,* as well as other cases cited in the opinion, was not based upon the fact that the legislation expired by its own limitation.

In *Board of Supervisors of Elizabeth City County, et al.* v. *State Milk Commission, supra,* the court said:

> "Mr. Justice Roberts, speaking for the court in *Nebbia v. People of the State of New York* . . . did not base his decision upon an emergency, but on the ground that the milk industry was an industry affected with a public interest, and therefore subject to legislative control and regulation for the public good."

In *Ray, et al.* v. *Parker, supra,* the court held that the milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under the exercise of the police power, not only in emergencies but at all times.

In *Jersey Maid Milk Products Co.* v. *Brock* (Cal.), 91 P. (2nd) 577, 587 (1939) the court said:

> "Amici curiae seek to distinguish the Nebbia case from the instant case, and particularly call our attention to the fact that the New York statute was of a temporary duration while the California act is without any limitation as to duration, but they fail to show how this difference in the two statutes does in any way divest the legislature of the power to protect an industry from a perilous condition which is permanent in character."

All acts of the Legislature are presumed to be constitutional and the presumption is one of great strength. The burden is upon him who claims that the act is unconstitu-

tional to show its unconstitutionality. *State* v. *Fantastic Fair and Karmil Merchandising Corp.*, 158 Me. 450, 476.

It is a matter of common knowledge that the milk industry is one of the important industries in this state; that it is a food absolutely essential to the health of practically every individual in this state; that it is the primary diet of babies, and their health would be jeopardized without it; that it is essential to the balanced diet of the adult members of society; that it is perishable, cannot be stored, and is peculiarly susceptible to bacteria; that a sufficient surplus supply is necessary to meet emergencies and that if the supply were to be cut off for a few days dire results would follow; that it is essential that it be delivered to consumers in the quickest possible time; that the safeguarding of its purity and the insuring of an adequate supply to the consumer presents a problem greater than in any other food product.

> "The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where,

> as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other."
> *Nebbia* v. *New York,* supra, on pages 957, 958, 78 L. ed.

The object sought to be attained by the Milk Commission Law is to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices. There is a further declaration that the sale and distribution of milk is an industry affected with a public interest requiring legislation for the preservation of public health and safety. The method of attaining that object was by the establishment of prices in the state. In the absence of evidence to the contrary this court will take the statements in the preamble of legislative acts to be true, and will not substitute its judgment for that of the Legislature. Even in the absence of legislative findings, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152.

The testimony in this case indicates that if price-fixing at the retail level were lifted, it would result in an influx of milk from outside the state. However, the evidence falls short of showing facts that would disprove the legislative declarations and authorize its nullification on constitutional grounds.

The provisions of the Milk Commission Law do not wrongfully delegate the legislative power to the Commission. The legislation established price-fixing and set up

adequate standards and guides to be followed by the Commission in fixing prices.

Neither the act nor the order promulgated under it is arbitrary, capricious, or unreasonable. The means adopted by the Legislature relate directly and appropriately to the object sought to be obtained.

We therefore hold that the Maine Milk Commission Law does not violate the due process clause of the Constitution of the State of Maine or the due process clause of the Constitution of the United States.

Cumberland also contends that the Milk Commission Law violates the interstate commerce clause of the Constitution of the United States on the ground that the purpose of the legislation is to protect Maine Milk producers from economic injury resulting from out-of-state free-market competition.

As previously stated, the purpose of the legislation is to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices. We cannot accept the contention of Cumberland that the testimony in the case proves otherwise. Neither does the testimony prove that conditions in the industry have changed since the legislative declarations.

The law does not attempt to control the price paid for milk purchased outside of Maine, or the sales price outside this state of milk produced here. It merely attempts to regulate sales of milk within the state.

In *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products,* 306 U. S. 346, the court held that a state statute, regulating the milk industry, which required dealers to pay producers at least the minimum prices prescribed by an administrative agency was not in violation of the interstate commerce clause of the Federal Constitution in respect to a dealer who maintained a receiving sta-

tion in the state at which he purchased milk from a neighboring farm and shipped outside the state for sale. The court in that case on page 351 said:

> "One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse.
>
> The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view."

Cumberland cites the recent case of *Polar Ice Cream & Creamery Co.* v. *Andrews,* 84 S. Ct. 378, 11 L. ed. (2nd) 389 (1964). In that case a state regulatory scheme which required local milk distributors to accept out of state milk only if local producers are unable to fill the distributors needs, was held to be invalid as a burden on interstate commerce. The court in this case said:

> "The cases relied upon by the Commission do not save the regulatory scheme challenged here. Nebbia v. New York, 291 US 502, 78 L. ed. 940, 54 S Ct 505, 89 ALR 1469, established that minimum retail and wholesale prices for milk purchased and sold within the State do not offend the Due Process and Equal Protection Clauses. Nor is such price regulation an impermissible burden upon commerce. Highland Farms Dairy v. Agnew, 300 US 608, 81 L ed 835, 57 S Ct 549, even as applied to a distributor who purchases and cools milk within the State and then transports it to another State for processing and sale, since the burden on commerce is indirect and only incidental to the regulation of an essentially local activity. Milk Control Board v. Eisenberg Farm Products, 306 US 346, 83 L ed 752, 59 S Ct 528. In none of these cases was there any attempt to reserve a local market for local producers or to protect local producers from out-of-state competition by means of purchase and allocation requirements imposed upon milk distributors."

In *Baldwin* v. *Sielig* also cited by Cumberland, 294 U. S. 511, the New York Law forbade the sale in New York of milk obtained by a distributor from other states unless the distributor paid a price which would be lawful under New York regulations. The court held the New York Law could not outlaw Vermont milk purchased at below New York prices.

Cumberland also cited *Hood & Sons* v. *DuMond,* 336 U. S. 525, and *Dean Milk Co.* v. *Madison,* 340 U. S. 349. In *DuMond,* New York was found to have no power under the commerce clause to forbid an out of state distributor from establishing processing plants and additional sources of milk within the state. In *Dean,* the City of Madison was prevented from reserving the Madison market to producers located within a specified distance of the city.

In each of these cases, factors, not present in the instant case, were decisive in striking down the control legislation as unconstitutional.

The legislation in the instant case was enacted for a legitimate purpose. The burden imposed on interstate commerce was incidental only. We hold that it was not violative of the commerce clause of the Federal Constitution.

The remaining issue in this case is whether it is permissible to give away coupons with the purchase of Cumberland's milk, such coupons being redeemable in cash in the event that price-fixing of milk is declared to be unconstitutional. This same question was an issue in the case of *Maine Milk Commission* v. *Cumberland Farms Northern, Inc.*, Law Court Docket #570 (Marden, J., not sitting) certified contemporaneously with this case. The issue in that case was resolved against Cumberland and governs the decision in this case.

The entry will be

Appeal denied.

MAINE MILK COMMISSION
vs.
CUMBERLAND FARMS NORTHERN, INC.

Kennebec County. Opinion, December 3, 1964.

Milk. Food. Injunction.

Milk supplier's practice of selling milk at minimum prices established by commission while delivering to purchaser coupons stating that certain sum would be refunded "when the Maine consumer milk price fix is adjudicated retrospectively unconstitutional" was unlawful under commission law provision making it unlawful to engage in any practice destructive of scheduled minimum prices, and the practice was to be permanently enjoined.

ON APPEAL.

Action on complaint by the Maine Milk Commission against a milk supplier to enjoin it against certain action. The justice below denied an injunction and dismissed the complaint, and the commission appealed. Appeal sustained.

John W. Benoit, Esq., Asst. Atty. General, for Plaintiff.

Berman, Berman, Wernick & Flaherty,
by: *Sidney W. Wernick, Esq.,* for Defendant.

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

SIDDALL, J. Maine Milk Commission, hereafter called Commission, brought a complaint against Cumberland Farms Northern, Inc., seeking to enjoin it against certain action. The justice below denied the injunction and dismissed the complaint. The Commission appealed.

The record discloses that the Commission had fixed minimum prices for the retail sales of milk. Cumberland sold milk at the established minimum prices, and at the time of

purchase delivered to the purchaser a coupon stating that a certain sum would be refunded to the purchaser upon presentation of the coupon "when the Maine consumer milk price fix is adjudicated retrospectively unconstitutional."

The statute upon which the fixing of prices of milk is based has been declared constitutional in an opinion certified contemporaneously with this opinion in the case of *Maine Milk Commission* v. *Cumberland Farms Northern, Inc.*, Law Court Docket #577. In the face of this opinion the coupons have no value at this time. That being so, the question before this court is whether they were issued in violation of the Milk Commission Law.

The pertinent statutory provision reads as follows:

> "It shall be unlawful for any person to engage in any practice destructive of the scheduled minimum prices for milk established under the provisions of this chapter for any market, including but not limited to any discount, rebate, gratuity, advertising allowance or combination price for milk with any other commodity."
> R. S., 1954, Chap. 33, Sec. 4.

It is the contention of Cumberland that the retrospective unconstitutionality of the consumer price fixed is the sole factor allowing the return of the money. In such an event, Cumberland argues, the price fixed is a nullity and void, and the issuing of the coupons cannot be deemed in legal effect a destruction of the price schedule as a gratuity, rebate or discount.

The recent case of *Burlington Food Stores, Inc.* v. *Hoffman* (N. J.), 198 A. (2nd) 106 (1964), 82 N. J. Super. 452, decided after hearing below in this case, presents facts similar to the instant case. In that case Burlington distributed with the sale of milk at minimum prices coupons identical in all pertinent respects with the coupons issued in the instant case. The Milk Control Act of New Jersey prohibited

a licensee from giving or lending anything of value to any customer served or solicited to be served by the licensee. In concluding that the refund coupons constituted a violation of law the court said:

> "Do the coupons which have been issued and distributed by Cumberland and Burlington constitute something of value? Counsel for the companies contends that the coupons have no value at the present moment. If, however, the contingencies upon which their redemption rests should occur, then the legislation which supports Regulation H-5 will have been declared to be null and void retroactively, so that no minimum price structure could be said to have validly existed during the time the Emergency Milk Control Law of 1962, as amended, was in effect. It is therefore argued that the present distribution of coupons is entirely legal.
>
> We hold that the coupons do represent something of value, notwithstanding the fact that the obligation to redeem is conditional and contingent and will expire after a time. Comparable refund coupons issued by milk dealers were determined to be things of value, within the meaning and intendment of Regulation H-5, in Hoffman v. Garden State Farms, Inc., above, 76 N. J. Super. 193, 184 A. 2d 6 (Ch. Div. 1962).
>
> * * * *
>
> Obviously, as one might reasonably have surmised, patrons to whom the coupons are issued believe that they are receiving something of value. And Cumberland and Burlington must impliedly attribute some value to their coupons, otherwise they would be indulging in a deceptive practice in distributing them — a suggestion they violently reject. These licensees are deriving the same competitive advantage as would ordinarily result from a cut in prices. If their coupons are given the stamp of approval, one can reasonably anticipate a flood of similar devices, all gauged to undermine the minimum retail price structure now in

effect." See *Milk Control Comm'n* v. *Rieck Dairy Division,* etc., quoted above.

In the instant case the statute prohibits any person from engaging in any practice destructive of the scheduled minimum prices for milk, included but not limited to any discount, rebate, or gratuity.

In order that a complete wording of the coupon as issued may be before us, we reproduce it in its entirety as follows:

12¢ COUPON

This coupon redeemable in cash to the holder when the Maine consumer milk price fix is adjudicated retrospectively unconstitutional so as to nullify the minimum milk price fixed for this date. No. 7175 A

Coupons must be redeemed within 3 months of the date of adjudication with cash register receipt attached.

*CUMBERLAND FARMS

*Operated by Pine Cone Food Stores, Inc.

We hold that Cumberland, in issuing these coupons was engaged in a practice destructive of the scheduled minimum prices of milk by offering an inducement to purchase. Notwithstanding the fact that the obligation to redeem is contingent, its customers are purchasing milk on better terms than they can receive from competitors who offer no expectation of a rebate. To allow such and similar practices to exist would bring chaos to the milk industry. Furthermore, a careful reading of the coupon, and of the contemporary advertising material, convinces us that many unsuspecting customers have been led to believe that the Maine consumer milk prices would be adjudicated unconstitutional. The spirit as well as the letter of the law has been violated by the issuance of these coupons.

Cumberland should have been permanently enjoined from doing the acts set forth in the prayer of the Commission for injunctive relief.

The entry will be

Appeal sustained. Case remanded to the Superior Court for Kennebec County for entry of a decree in accordance with this opinion.

CUMBERLAND FARMS NORTHERN, INC.
vs.
MAINE MILK COMMISSION
(Cumberland Superior Court Docket No. 5718)

Cumberland County. Opinion, December 3, 1964.

Appeal and Error.

Case on appeal from judgment of permanent injunction against enforcement of a milk commission order was moot and the appeal would be dismissed where the order which purported to fix minimum prices for only certain types of sales and not all six categories enumerated in statute providing that no price would be established for any one or more of classes unless price was established for all classes had been superseded by later official order covering all types of sales in question.

ON APPEAL.

Action wherein a judgment of permanent injunction was issued in the Superior Court against enforcement and execution of a milk commission order purporting to fix minimum prices for only certain types of sales of milk at retail but not for all categories enumerated in statute providing that no price would be established for one or more classes

unless fixed for all classes. An appeal was taken. Appeal dismissed.

Berman, Berman, Wernick & Flaherty,
by: *Sidney W. Wernick, Esq.,* for Plaintiff.

John W. Benoit, Esq., Asst. Atty. General, for Defendant.

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

PER CURIAM

This case is before us on appeal by the Maine Milk Commission from a judgment of permanent injunction issued in the Superior Court against the enforcement and execution of a certain official order of September 26, 1963. The order in question purported to fix minimum prices for certain types of sales of milk at retail, but not for all six categories of sales enumerated in R. S., c. 33, § 4.

The sitting justice, in his Decree and Judgment, said:

> "Therefore the public hearing of the defendant Commission conducted on September 26, A.D. 1963 pursuant to the call of September 13, A.D. 1963 and the consequential administrative determination by the Commission were disobedient to the statutory directive that:
>
> '*No price* shall be established *for any one or more* of said sales *unless at the same time* a price shall be established *for all of said sales in any market.*' (R. S. c. 33, § 4.)
>
> "The statute creating the defendant Commission not only failed to authorize the public hearing and resultant order of the Commission but expressly forbade them. The hearing and order were of no legal validity."

We are satisfied from statements by counsel for both parties at oral argument before us that the case is moot. It appears (1) that the price-fixing order of September 26, 1963, has been superseded by a later official order of the defendant Commission covering the types of sales in question; (2) that the injunction has no vitality, that is to say, there is presently no existing order against which it is or could be operative; (3) that there are no issues involving breach or damages turning on the validity or invalidity of the injunction.

The defendant urges that we decide the case on the merits to the end that the Commission may be guided in future administrative action. In our view it will be time enough to consider the problem of statutory construction faced by the Commission when a live case reaches us. What the Commission seeks in substance is an advisory opinion, and this we are not prepared to give.

Accordingly, without in any way considering the merits of the controversy as it existed in the Superior Court and solely on the ground that the case is now moot, we dismiss the appeal.

The entry will be

Appeal dismissed without costs.

ARTHUR FOWLES
vs.
JANE LOUISE DAKIN
AND
LAWRENCE FOWLES, PRO AMI
vs.
JANE LOUISE DAKIN

Oxford County. Opinion, December 3, 1964.

Automobiles. Evidence. Negligence. Bicycles.

In cases involving controversial facts bearing upon actions of a child, it is for jury to determine whether child has exercised care that ordinarily prudent child of his age and intelligence is accustomed to exercise under like circumstances.

Under exceptional circumstances and in instances where conduct of child is reflected by undisputed testimony or physical facts, jury question may disappear and conduct may be ruled upon as matter of law.

A bicycle is not a "vehicle" within terms of highway law and as such it and rider are not bound by rule of the road.

Where minor bicyclist testified that he kept proper lookout and merely coasted down driveway from which he emerged before he collided with automobile in street and where defendant motorist elected not to take the stand, jury was justified in finding due care on part of minor bicyclist.

ON APPEAL.

Actions by minor and parent for personal injuries sustained by minor bicyclist emerging from private driveway and colliding with motorist's automobile in the street. From an adverse judgment the defendant appealed. Held that where minor bicyclist testified that he merely coasted down the driveway and kept a lookout but failed to see the approaching automobile and where defendant never took the stand, a finding of negligence on part of defendant and

of due care on part of minor bicyclist was justified. Appeal denied.

William E. McCarthy, Esq.,
Richard E. Whiting, Esq., for Plaintiffs.

Mahoney, Thomes, Desmond & Mahoney,
by: *James R. Desmond, Esq.,* for Defendant.

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

MARDEN, J. On appeal from judgment entered upon denial of defendant's motions for new trial and judgment notwithstanding the verdict in companion cases of minor and parent complaining of personal injury sustained by the child in collision between the child ridden bicycle and defendant operated automobile. The case went to the jury upon the testimony of witnesses and exhibits, the defendant electing not to take the stand, and the motions by defendant were based, and the appeals are based, upon the conventional issues of negligence on the part of the defendant and contributory negligence on the part of the minor plaintiff.

The questions before this court are whether the record

(a) legally justifies a finding of negligence on the part of the defendant, and

(b) legally justifies a finding of due care on the part of the minor plaintiff.

The record establishes the following undisputed facts: The accident occurred in the Town of Dixfield, about midday on Route 2, a highway which, for purposes of the case, is described as running north and south with a hard surface of approximately 20 feet in width with a white line

in the center, and a gravel shoulder on the easterly side of 4 - 5 feet in width.

A gravel driveway serving two houses easterly of Route 2 descends "sharply" or "steeply" in a southwesterly direction to enter Route 2. The mouth of the driveway widens as it approaches the westerly line of the highway so that the northerly and southerly lines of the driveway as extended at the point of the intersection represent an opening of about 45 feet. On the easterly side of Route 2 within the area involved is a high bank, about 30 feet high at its highest point, sloping upward from the ditch line at about 45 degrees, and through the northerly end of this bank the driveway reaches the highway through a cut, the southerly bank of which is about 15 feet high. The intersection of the driveway and the highway was a "blind" intersection.

The minor plaintiff, a boy of 11 years 5¾ months of age, in the "fourth or fifth" grade in school, had been playing with companions in the area of the houses served by the driveway. He had been on this driveway on one previous occasion. Upon his bicycle he descended the driveway toward Route 2 with both legs extended and his heels in contact with the ground to control his speed. After covering about three-quarters of the distance from the houses to Route 2 he stopped to observe the conduct of his companions, who were behind him, and then proceeded toward Route 2, looking both north and south on Route 2 when he reached the shoulder of the road, observing no cars approaching and without stopping, entered the highway, to proceed southerly. The collision occurred approximately 3 - 4 feet into the highway from the easterly edge of the hard surface. This point is identified as being "about three-quarters of the way southerly from where the mouth of the driveway begins on the north side." The boy testified that he first observed the defendant's car when it was

"pretty near on top of me; just looked around; it was right there; just a flash of the car I see."

The defendant was operating an automobile from south to north on Route 2, which southerly of and approaching the driveway forms a gradual curve from west to east and descends a grade past the exit of the driveway. This grade is described by the Engineer as "somewhere 6 to 8 feet," which we interpret as meaning 6 to 8 feet vertical descent in 100 feet horizontal distance. On the easterly side of Route 2, 320 feet south of the driveway was a sign "blind driveway." The plan records 13.5 feet descent from a point near the "blind driveway" sign to a point opposite the middle of the driveway. The road was dry. The posted speed limit affecting north bound traffic was 40 miles per hour. There is no testimony as to the speed at which defendant was traveling as she approached or reached the driveway.

The investigating officer testified that "Mrs. Dakin said she was proceeding northerly on Route 2 toward Dixfield Village and upon rounding the curve, approaching the driveway, she suddenly observed the bicycle coming on to Route 2, she applied her brakes and the collision occurred between her vehicle and this bicycle."

After the collision the defendant's car stopped, facing north, in the mouth of the driveway partially on and partially off the black surface of the road. There were "rubber marks" extending southerly from the rear of the car 48 feet, all easterly of the center line of the highway and beginning 2 - 3 feet south of the mouth of the driveway and about 8 to 10 feet south of the point identified as the point of collision.

There was also a rubber mark in the driveway which "appeared to be of a tire which was dragging from the bicycle" which started back from the shoulder of the road,

was "less than half" as long as the rubber marks attributable to the automobile and terminated at the point 3 or 4 feet onto the easterly portion of the highway at the spot identified as the place of collision.

There was a sign in the area, prepared and erected by the local police, reading "Drive Carefully Children Playing."

Controversy exists as to two physical features identified with the case. The state officer testified that the "Children Playing" sign was located somewhere south of the driveway facing north bound traffic. The local officer who had to do with the erection of the sign stated that he believed the sign was located about 200 yards toward Dixfield Village from the point of the accident, which would have been northerly of the scene, and facing south bound traffic.

As to the rubber mark on the driveway attributable to the bicycle, the plaintiff testified on direct examination that after his pause to observe the conduct of his companions, he continued on toward Route 2 again dragging his feet. On cross-examination he testified that no part of his feet were on the pedals of the bicycle coming down the driveway "until three-quarters of the way down the hill," that thereafter he was not pedaling but was just "coasting."

As to visibility southerly from the area of the driveway the Engineer who prepared the plan testified that the "blind drive" sign was visible from the easterly edge of the highway at the middle of the driveway.

From cross-examination it is indicated that in a pretrial interrogatory of the minor plaintiff, he had stated that "just prior to reaching U. S. Route 2 * * * I could see about 100 feet to the left." At trial to the question: "Well, at least, you can see more than half way to this sign ("Blind Drive") can't you?" Answer: "Yes, I think so."

Photographic exhibits offered to lend visual aid to an understanding of the location, leave much to be desired. They are not keyed to the record and the points from which they were taken are not disclosed. We do not have the benefit of the jury's view.

Measuring first the defendant's conduct, it cannot be said that the record does not support the jury finding of negligence. She did not elect to become a witness and "we must assume that (s)he preferred the adverse inferences which might be drawn from the complainant's evidence to any statements (s)he could truly give or any explanations (s)he might make and the failure of this defendant to take the stand under these circumstances is a fact which cannot be disregarded." *Devine* v. *Tierney, et al.*, 139 Me. 50, 55; 27 A. (2nd) 134. The absence of her testimony dealing with the "Children Playing" sign, the visibility from her north bound car, her observance of the posted speed limit, and whether or not the statement attributed to her by the State Officer that "she suddenly observed the bicycle coming on to Route 2" is to be accepted as a grammatically accurate quotation or that her statement was that "the bicycle suddenly appeared coming onto Route 2," — which latter expression would suggest defensive application of the "sudden appearance" doctrine, *Bean* v. *Butler*, 155 Me. 106, 108; 151 A (2nd) 271, justifies inferences that the "children playing" sign was south of the point of collision, that it was or should have been observed, and that it charged defendant with reasonable expectation of the presence of children in the vicinity, *Bean, supra*, at 109. Such inferences suggest either an existing condition within the speed regulation (§ 113, Chapter 22, R. S.), calling for operation of the car at a careful and prudent speed and under control as defined in *Esponette* v. *Wiseman*, 130 Me. 297, 303; 155 A. 650, or imply thoughtless inattention which has been characterized as negligence as a matter of law. *Bridgham* v. *Hinman, Inc.*, 149 Me. 40, 42; 97 A. (2nd) 447.

In testing the conduct of a minor child, as plaintiff, our rule has been many times announced that in cases involving controversial facts bearing upon the actions of the child, it is for the jury to determine whether the child has exercised care that the ordinarily prudent child of his age and intelligence (training, experience, judgment, capacity) are accustomed to exercise under like circumstances, of which *Ross* v. *Russell,* 142 Me. 101, 104; 48 A. (2nd) 403 and *Johnson* v. *Rhuda,* 156 Me. 370, 374; 164 A. (2nd) 675, are examples. Conversely, under exceptional circumstances, *Searles* v. *Ross,* 134 Me. 77, 83; 181 A. 820, and in instances where the conduct of the child plaintiff is reflected by undisputed testimony or physical facts, the jury question may disappear and the conduct ruled upon as a matter of law. See *Moran* v. *Smith,* 114 Me. 55, 57; 95 A. 272 (child of 8 years); *Brown* v. *European & North American Railway Company,* 58 Me. 384, 389 (child of 8 years 8 months); *Levesque* v. *Dumont,* 116 Me. 25, 27; 99 A. 719 (child of 9 years 2 months); *McKinnon* v. *Bangor Railway & Electric Company,* 116 Me. 289, 292; 101 A. 452 (child of 10 years); *Colomb* v. *Portland & Brunswick Street Railway,* 100 Me. 418, 420; 61 A. 898 (child 10 years 7 months); *Crosby, Admr.* v. *Maine Central Railroad Company,* 113 Me. 270, 274; 93 A. 744 (child 11 years 10 months); and *Greene, Admr.* v. *Willey,* 147 Me. 227, 233; 86 A. (2nd) 82 (child 11 years 11 months).

Here the child's capacity for self care must be determined from the only facts given us, — that he was 11 years 5¾ months of age and that he was in the 4th or 5th grade in school.

A bicycle is not a "vehicle" within the terms of our highway law (Chapter 22, § 1, R. S.) and as such it and the rider are not bound by the rule of the road (Chapter 22, § 86, R. S.), which requires the driver of a vehicle entering a public way from a private road to yield the right of

way to all vehicles approaching on such public way, and our case interpretation of that rule.

Adopting a view of the evidence most favorable to the minor plaintiff, we find that from the easterly shoulder of the highway he admits to having visibility of at least 150 feet in the direction from which the defendant came. Assuming that the defendant were traveling at such speed as to traverse that 150 feet while plaintiff was moving 4 to 9 feet, which is possible, the fact remains that after the boy "looked" while on the shoulder of the road, he continued without either stopping or further observation until the collision.

The physical evidence of the "rubber marks" attributable to the bicycle during its last indeterminate footage of travel and the boy's testimony upon cross-examination that he was "coasting" justifies a conclusion that the rider was "coasting" before action on his part to cause any rubber marks, and that a) during the period of "coasting" and b) during the period of creation of the "rubber marks," — if these periods were not, in fact, simultaneous, or over-lapping, he was moving at a speed sufficient for him to remain astride the bicycle. When he states that "I could have stopped myself with my feet if I had seen a car coming," he implies that he was not theretofore dragging his feet.

Upon these facts and proper inferences originating in them we are urged to hold as a matter of law that the minor plaintiff was negligent. The interpretation and significance of the marks attributable to the bicycle, in the light of the descending driveway, which the jury saw, and the conduct, if any, on the part of the boy which the marks reflected, was a jury question.

To hold the boy's conduct, at relevant times, as negligent is to hold that his failure to continue his observation to the

south after his "look" or his failure to stop and listen for approaching traffic not yet visible was a breach of the due care expected of him.

To so hold, is to charge this boy with the realization that a motor vehicle could appear around a curve 150 feet distant, travel that distance and expose him to danger before he could move from the shoulder of the road and cross the north bound lane of Route 2. Our knowledge of the boy upon which to premise his capacity for self care is extremely limited, and whether his capacity for self care included knowledge of the danger inherent at this blind intersection, and an awareness of the brief time required for a car to appear and reach him was a jury question. See *Shimkus* v. *Caesar,* 62 A. (2nd) 728 (N. H. 1948) and *Locklin* v. *Fisher,* 36 N. Y. S. (2nd) 162 (S. Ct. N. Y. 1942), which represent the distinct weight of authority.

Appeal denied, in both cases.

RICHARD A. BRINE
vs.
STATE OF MAINE

Cumberland County. Opinion, December 3, 1964.

Criminal Law. Constitutional Law.

Refusal to allow prisoner to make final statement before he was sentenced did not make his imprisonment illegal.

Right, if any, to make final statement before being sentenced exists by reason of statute or rule of court.

Prisoner was not deprived of due process by refusal of prosecutor to turn over to prisoner witnesses' grand jury testimony conflicting with testimony given by same witnesses at trial.

ON APPEAL.

Proceeding on petition for post-conviction relief. The justice declined to appoint counsel and dismissed the petition with prejudice, and prisoner appealed. The Supreme Court, Webber, J., held that statute providing that if justice finds that petition for post-conviction relief is frivolous or without merit or is filed in bad faith request for appointment of counsel shall be denied and his decision shall be final did not deprive prisoner of equal protection. Appeal denied.

Thomas F. Monaghan, Esq., for Plaintiff.

John W. Benoit, Asst. Atty. General, for State.

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

WEBBER, J. The petitioner is confined in the Maine State Prison serving a sentence of life imprisonment imposed after his conviction for murder. He seeks post-

conviction relief pursuant to the provisions of R. S., Chap. 126, Sec. 1-A to 1-G inclusive (P. L., 1963, Chap. 310, Sec. 1). The petitioner asserted his indigency and requested that the court appoint counsel to aid him in the prosecution of his petition. The justice below found the petitioner to be indigent but declined to appoint counsel on the ground that the petition is without merit. The petition was dismissed with prejudice. Petitioner seasonably appealed and is now represented by court appointed counsel on this review. The appeal in substance raises issues both as to the dismissal of the petition and the refusal to appoint counsel.

R. S., Chap. 126, Sec. 1-E provides in part:

> "If the justice finds that the * * * petition is frivolous or without merit or filed in bad faith, the request for appointment of counsel *shall be denied* and the justice shall file a decree setting forth his findings and his decision thereon *shall be final.*" (Emphasis ours.)

The legislature has made it clear that the decision of a single justice *not to appoint counsel* in post-conviction relief cases is not appealable. We do not construe this finality of decision as applying to other questions of law which may be raised by the allegations of the petition. As will be seen, the constitutionality of the above quoted portion of the statute presents the primary issue for consideration here.

The petition avers that the petitioner "is illegally imprisoned in that he was not allowed to make a final statement before he was sentenced." His counsel in oral argument properly conceded that this ground for the petition is without merit and is therefore abandoned. In so saying counsel quite appropriately recognized that no matter of jurisdiction or constitutional right is involved. See *Hill* v. *United States* (1962), 368 U. S. 424, 82 S. Ct. 468. Where

the right is recognized it exists by reason of statute (as in several of the states) or by rule of court (as in the Federal system). See *Green* v. *United States* (1961), 365 U. S. 301, 81 S. Ct. 653; *Hill* v. *United States, supra; Machibroda* v. *United States* (1962), 368 U. S. 487, 82 S. Ct. 510; *Andrews* v. *United States* (1963), 373 U. S. 334, 83 S. Ct. 1236; and Anno. 96 A. L. R. (2nd) 1292. There is no provision in the constitution or in any statute or rule of court in this state which creates such a right. The rationale which gave rise to the right of allocution under the early common law has no application in a day when respondents are afforded counsel in all felony cases as well as the right of appeal. Since a life sentence for the crime of murder is mandatory in Maine and cannot be reduced by the court, a statement by the respondent before sentence could avail nothing.

As his second ground for relief the petitioner set forth that the indictment on which he was convicted did "not inform the accused of the nature and cause of the accusation." The justice below determined that this issue had been adjudicated against the petitioner in a prior proceeding. No appeal from this ruling has been included in the points of appeal and the parties agree that this issue is therefore not now before us.

The petitioner further alleges that upon his trial he "was deprived of due process of law in that the prosecutor refused to turn over to defendant (petitioner) certain Grand Jury testimony of witnesses, where testimony conflicted with this testimony at the trial." This ground was also abandoned by counsel for petitioner in the course of oral argument. The contention is without merit. No case has been called to our attention which even remotely suggests that there is a constitutional deprivation of rights when a prosecuting attorney fails or refuses to invade the secrecy of Grand Jury proceedings, there being no intervening

action of the court authorizing, directing or approving such a disclosure. It should be noted that we are not here dealing with the ruling of a court denying to a party access to conflicting testimony of a witness given before a Grand Jury and now essential to an effective presentation of the party's case. Cf. *Pittsburgh Plate Glass Co.* v. *United States* (1959), 360 U. S. 395, 79 S. Ct. 1237.

The petitioner relies heavily and in fact exclusively on his contention that a portion of the statute (R. S., Chap. 126, Sec. 1-E) is unconstitutional. Reference is to the above quoted provision which requires a presiding justice to decline to appoint counsel for an indigent petitioner if he finds that the petition is "frivolous or without merit or filed in bad faith." In effect he contends that even such a petition, though devoid of merit, should alert the court to the fact that the petitioner thinks or believes that he may have a grievance and that he should then have court appointed counsel to advise him and if necessary to redraft or amend the petition. This, he argues, is the effect of the constitutional guarantee of equal protection of the laws. We cannot agree that constitutional requirements go so far. In *Duncan, Petr.* v. *Robbins* (1963), 159 Me. 339, 193 A. (2nd) 362, while recognizing that no case as yet decided by the United States Supreme Court had imposed the requirement, we found a constitutional deprivation when an indigent person was not afforded counsel *at his hearing* on the common law writ of error *coram nobis.* In that case the writ had issued and the petitioner was proceeding "as of right." We neither intimated nor suggested that in our view court appointed counsel must be provided at the petition stage and before issuance of the writ. The statute above quoted meets all the requirements of *Duncan* but properly, we think, requires a recitation of some facts by the petitioner which if proved would warrant some relief. We find nothing in recent cases decided by the United States Supreme Court which suggests a contrary result.

In *Douglas* v. *People of State of California* (1963), 372 U. S. 353, 355, 359, 367, 83 S. Ct. 814, 816, 817, 821, the court found a violation of the equal protection clause where indigent respondents upon their appeal from a criminal conviction were denied appointed counsel after the state appellate court reviewed their record and concluded that "no good whatever could be served by appointment of counsel." In the majority opinion, however, the court carefully pointed out the limited scope of its decision in the following terms:

> "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. *We are dealing only with the first appeal, granted as a matter of right to rich and poor alike * * * from a criminal conviction.* * * * But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' * * * Absolute equality is not required; lines can be and are drawn and we often sustain them. * * * *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.*" (Emphasis ours.)

Mr. Justice Clark and Mr. Justice Harlan in their dissenting opinions both made reference to the present practice of the United States Supreme Court itself. Mr. Justice Clark said:

> "Last Term we received over 1200 *in forma pauperis* applications in none of which had we appointed attorneys or required a record. Some were appeals of right. Still we denied the peti-

> tions or dismissed the appeals on the moving papers alone. At the same time we had hundreds of paid cases in which we permitted petitions or appeals to be filed with not only records but briefs by counsel, after which they were disposed of in due course."

Mr. Justice Harlan said:

> "Under the practice of this Court, only if it appears from the petition for certiorari that a case merits review is leave to proceed *in forma pauperis* granted, the case transferred to the Appellate Docket, and counsel appointed. Since our review is generally discretionary, and since we are often not even given the benefit of a record in the proceedings below, the disadvantages to the indigent petitioner might be regarded as more substantial than in California. But as conscientiously committed as this Court is to the great principle of 'Equal Justice Under Law,' is has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1,000 *pro se* petitions for certiorari currently being filed each Term. We should know from our own experience that appellate courts generally go out of their way to give fair consideration to those who are unrepresented."

Sound public policy militates against the appointment of counsel for every indigent prisoner who merely desires legal advice. We have now had the benefit of some experience with the practical application of R. S., Chap. 126, Secs. 1-A to 1-G since many petitions have been filed under these sections and disposed of by the court. We are not persuaded that any petitioner with a meritorious grievance has been disadvantaged by the requirements of the statute. The petition in the instant case is no exception. The facts relied upon and which in the petitioner's view at the time of filing constituted a remediable grievance are readily apparent. The difficulty is not in comprehending the petitioner's claim — it is only that as a matter of law the

remedy he seeks is not available to him. The mere presence of court appointed counsel would not and could not change or alter this result. Our system now provides that at the moment of his greatest need — that is, at the time of his trial and subsequent appeal, an indigent respondent is provided with court appointed counsel and his rights are thus fully protected. At the post-conviction relief stage a petitioner who presents a legitimate reason for relief is likewise protected. We are satisfied that R. S., Chap. 126, Secs. 1-A to 1-G provide a method of post-conviction relief which is fair and adequate and meet all constitutional requirements with respect to the appointment of counsel. The justice below correctly found the petition to be without merit on its face. He was therefore required by the statute to decline to appoint counsel.

Appeal denied.

DONALD P. CORBETT, ET AL.
vs.
PAUL NOEL, ET AL.

Kennebec County. Opinion, December 3, 1964.

Contracts. Master and Servant.

In construing a contract, apparent intent of contracting parties must be regarded.

Where trust agreement provided that participation of eligible employees commenced on first anniversary date of trust and that participation of other employees commenced on trust anniversary dates that they were eligible, agreement's referral to full year of continuous participation meant period from trust anniversary date to trust anniversary date before which employee was trust participant for 12 months, and those becoming employees were not entitled to year's credit for periods between their employment dates and trust anniversary date.

Intent of contracting parties should be ascertained from purpose of parties, as shown by language used in contract as applied to subject matter of agreement.

Employer's establishment of trust accounts for employees before they were eligible to become participants under salary bonus trust agreement was not evidence that employees were entitled to year's credit for period between their respective employments and trust anniversary dates, where agreement provided that percentage of employee's account vesting on termination of employment was not based on years of contribution by company but on years of continuous participation by employee.

ON REPORT.

This is reported to us upon an agreed statement of facts upon the complaint of five former employees seeking an interpretation of a salary bonus plan and the extent of their vested rights thereunder. Remanded to Superior Court for entry of judgments in accordance with this opinion.

Weeks, Hutchins & Frye,
by: *Miles P. Frye, Esq.,* for Plaintiff.

Bryan, Cave, McPheeters & McRoberts,
by: *William M. VanCleve, Esq.,*
Lester T. Jolovitz, Esq., for Defendant.

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

WILLIAMSON, C. J. This case is before us on report upon an agreed statement of facts. Five former employees seek an interpretation of the provisions of the Salary Bonus Plan Trust (the "Trust") of the Fort Halifax Packing Company to determine the extent of their vested rights and the amounts to which they are entitled under the Trust.

The amount in controversy as of July 31, 1964, was $7,492.52. The decision will determine whether this

amount belongs to the five plaintiffs who ceased to be employees in 1961 and 1962, or to the fourteen defendant salaried employees with the Company on the termination of the Trust on December 31, 1963. Neither the Company nor the Trustees have any pecuniary interest in the outcome of the case.

What is the meaning of the words "five (5) full years of continuous participation" in Article XIV, Section 1(a) of the Trust?

> "The Trust was established on October 20, 1953, and the 'Anniversary Date' of the Trust is defined as:
>
> "The *twentieth* day of *October*, in each year, including the *twentieth* day of *October*, 1953 which date is herein sometimes referred to as the first anniversary date, during which this Plan and Trust shall be in force." (Article II, Section 1. (m))
>
> "The terms of the Trust determining the eligibility and date of participation of qualifying employees provide as follows, in pertinent part:
>
> 'Article IV
>
> '*Section 1.*
>
> 'Employees of the Company eligible to become Participants under this Plan shall be all those present and future salaried employees of the Company who as of an anniversary date are employed and acitvely engaged in the conduct of the business of the Company and not on a leave of absence or in the Armed Forces of the United States.'
>
> * * * * * * *
>
> '*Section 3.*
>
> 'Subject to the provisions of this Agreement, the participation of present employees eligible as above specified who meet the above require-

ments, as of the first anniversary date, shall commence as of the first anniversary date hereof, and the participation of other employees, present and future, who meet the above requirements on any subsequent anniversary date concerned shall commence as of such anniversary date.'

"The terms of the Trust determining the vested interest of a Participation in his account upon 'termination of employment' provide as follows, in pertinent part:

'Article XIV

TERMINATION OF EMPLOYMENT

'*Section 1.*

'In the event of termination of employment, either voluntary or involuntary, for any reason other than disability, retirement at normal or an earlier retirement date, or because of death, the vested interest of the Participant in his account shall be determined as follows, the periods stated being computed from the date when last he became a Participant.

'(a) If, at the date of termination of employment, the Participant has completed less than five (5) full years of continuous participation, his interest in his account and in this Trust shall be forfeited.

'(b) If, at the time of termination of employment, he has completed five (5) full years of continuous participation, he will be entitled to ten per cent (10%) of the value of his account.

'(c) For each additional full year of continuous participation in excess of five (5) full years, he will be entitled to ten per cent (10%) of the value of his account.

'(d) If, at the time of termination of employment, he has completed fourteen (14) or more years of continuous participation, he will be en-

titled to one hundred per cent (100%) of the value of his account.'

"The terms of the trust provide that the portion of an account which is not vested in a Participant, in the event of 'termination of employment,' shall be allocated, as of the next valuation date, among the remaining Participants as though it were a profit to the Trust for that year.

'Article VI

DETERMINATION OF SHARE OF PARTICIPANT IN CONTRIBUTIONS

'*Section 1.*

'Each contribution by the Company to the Plan shall be allocated as follows:

'(a) Each person who is a Participant in the Plan on the anniversary date as of which a contribution to the Trust is made by the Company shall, subject to the other provisions of this Agreement, be allocated a share in the Distributable Profit Share as follows:

'(1) Each Participant shall be credited with one profit sharing point for each $100 of his regular salary for the year, to the nearest $100 of such salary.

'(2) Each Participant shall be credited with one profit sharing point for each completed full year of past service, except that each Participant as of the first anniversary date shall be deemed to have completed one full year of service, for the purpose of the fiscal year ended October 31, 1953 and for all subsequent fiscal years."

Of the four plaintiffs who were employed prior to October 20, 1953 and became participants in the Trust on the first Anniversary Date of October 20, 1953, three terminated their employment on October 30, 1961 and one in January 1962. The fifth plaintiff was employed in Febru-

ary 1955, became a participant in the Trust on the Anniversary Date of October 20, 1955, and terminated his employment in January 1962.

The plaintiffs contend that the Anniversary Date on which a salaried employee becomes a participant marks the completion of one "full year of continuous participation" within the meaning of Article XIV. The defendants' position is that a "full year of continuous participation" means a twelve month period from Anniversary Date of the Trust to Anniversary Date in which the employee was at all times a participant in the Trust.

In our view the construction placed upon the quoted phrase by the defendants is correct. Under Article IV, Section 3, we find that participation of an eligible employee commences on an Anniversary Date. Under Article XIV, Section 1, the vested interest is determined by periods "computed from the date when last he became a Participant."

Plaintiff Corbett, for example, contends that he had nine full years of continuous participation and thus is entitled to 50% of the value of his account (Article XIV, Section 1(c)) as follows:

From employment to first anniversary date of October 20, 1953	— 1 year
Four "full years" to October 20, 1957	— 4 years
Four additional "full years" to October 20, 1961	— 4 years
	9 years

The defendants on their part give no credit for any period prior to the commencement of participation on October 20, 1953. Thus Mr. Corbett had eight full years of continuous participation from October 20, 1953 to October

20, 1961, and acquired a vested right in 40% of his account, or 10% less than claimed by him.

The plaintiffs place weight on the fact that an account was established for each employee on his becoming a participant. Thus in the case of Mr. Corbett, for example, at the Anniversary Date in October 1957 he would have had five payments made to his account, although in fact he had been employed four years. The Trust, however, provides that the percentage of the employee's account vesting on termination of employment is based not on years of contribution by the Company, but on years of continuous participation by the employee. There is no required relationship between the number of payments by the Company into the fund to the account of the employee and the percentage of the account to which on early termination of employment he is entitled.

In reaching this conclusion, we are fully satisfied that we are giving effect to the plain meaning of the Trust.

> "The first maxim of construction, and that upon which rest all the rules, is this, namely, that, so far as the law will permit, the apparent intent of the contracting parties shall be regarded. Operation and intent are to be ascertained from the purpose of the parties; their meaning and understanding as shown by the language they used, applied to the subject-matter." *Katz, et al.* v. *New England Fuel Oil Co., et al.*, 135 Me. 452, 457, 199 A. 274, 457.

See also *Eliasberg, et al.* v. *Roosevelt, et al.*, 157 Me. 370, 173 A. (2nd) 147; *Old Colony Trust* v. *McGowan, et al.*, 156 Me. 138, 163 A. (2nd) 538; *Monk* v. *Morton,* 139 Me. 291, 30 A. (2nd) 17; *Seed Company* v. *Trust Company,* 130 Me. 69, 153 A. 671; *Power Company* v. *Foundation Company,* 129 Me. 81, 149 A. 801.

The plaintiffs are entitled to the percentage of the value of their accounts and to final judgments for the amounts

stated below with interest earned on the accounts on and after July 31, 1964, to the date of judgment, in accordance with the terms of the report.

Donald P. Corbett	40%	$10,858.85
John H. McGowan	40%	$ 6,225.66
Oscar T. Turner	40%	$ 5,159.67
Robert McGowan	40%	$ 6,661.31
Thomas Myers	20%	$ 499.92

The entry will be

Case remanded to Superior Court for entry of judgments in accordance with this opinion.

KENNETH CARVER

AND

EDITH CARVER

vs.

DONALD N. LAVIGNE

Cumberland County. December 4, 1964.

Trial. Appeal and Error. New Trial. Damages.

When intimation of insurance coverage was unpredictably elicited from witness on cross-examination from plaintiff's counsel without culpability of counsel or of parties, judge did not exceed his discretion in condemning improper testimony as immaterial, striking it from evidence and commanding jury as an oath bound obligation to prescind from such testimony but not granting mistrial.

Defendant motorist had burden of establishing that jury in bias and prejudice disregarded all of testimony of state trooper, a disinterested witness, who testified as to conversations of plaintiff and defendant held at scene of intersectional collision and mere rendition of plaintiffs' verdicts would not suffice to demonstrate such bias or prejudice or that jury ignored testimony.

Defendant failed to establish that jury in bias and prejudice had disregarded all of testimony of state trooper, a disinterested witness, who had testified as to conversations of plaintiff wife and defendant held at scene of intersectional collision.

Award to husband of somewhat less than $2,000 for loss of consortium past and conceivably future was not excessive, where there was evidence of wife's disability and suffering for more than three years and of prospective distress.

Award of $10,644 to wife for past and anticipated future pain and suffering was not excessive in view of evidence of constant pain endured by wife from May 1960 until necessitated surgery was undergone with beneficial consequences in January 1962 and that wife had not experienced complete relief and there was prognosis of chronic future distress in some degree.

ON APPEAL.

Action arising out of collision of automobiles. From a judgment for plaintiffs defendant appealed. Appeals denied; judgment for plaintiff husband on verdict affirmed and judgment for plaintiff wife on verdict as diminished by remittitur affirmed.

Berman, Berman, Wernick & Flaherty,
by: *John J. Flaherty, Esq.*, for Plaintiffs.

Julian G. Hubbard, Esq., for Defendant.

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

SULLIVAN, J. As a sequence of a collision of motor vehicles the plaintiff wife sought compensation from the defendant for personal injuries and for loss of wages and her husband claimed reimbursement for damage to an automobile and for his losses attendant upon his wife's inflicted disabilities. There was a conjoined trial. At the close of all the evidence the defendant moved for directed verdicts. His motions were overruled. The jury awarded plaintiffs'

verdicts. Defendant moved for judgments *n. o. v.* and for new trials. *Rule 50, M. R. C. P.,* 155 Me. 548. The presiding justice ordered conditionally a remittitur by the plaintiff wife of a substantial portion of her awarded damages and she assented to such a reduction. In effect the motions were otherwise denied. *DeBlois* v. *Dunkling,* 145 Me. 197, 202. Defendant appeals from such rulings.

Defendant asserts 8 points on appeal. Condensed they are as follows:

1. The Trial Court erred in its refusal to grant defendant's motion for a mistrial when the jury during the trial was made aware that the defendant at the time of the accident had liability insurance coverage on his motor vehicle.

2. After denying a mistrial the court erred in instructing the jury in open court to disregard the fact of defendant's insurance coverage and thereby further advised of and emphasized the existence of such coverage, to the defendant's prejudice.

3. On all credible evidence, testimonial and real, the defendant was entitled to a directed verdict in that the plaintiff wife by her own admissions and statements had established her own contributory negligence.

4. The jury through bias and prejudice erred in disregarding the entire evidence of the state trooper, the only disinterested witness in the case.

"5. That the damages were excessive based on the original injuries admitted to by the Plaintiff (wife) to her family doctor, being inconsequential in extent and nature."

6. The court erred in refusing to grant defendant's timely motion for a directed verdict.

7. The court erred in that the verdict of the plaintiff wife even as diminished by the remittitur still contains the

item of $644 for loss of her wages while the same item is improperly included in the husband's award and double damage obtains.

8. The court erred in denying and in denying without hearing a motion of defendant to include in the Law Court record a photograph of a blackboard diagram in chalk with posted items of damage which had been utilized by all parties at the trial for evidential purposes and jury argument.

At the trial a medical expert testified at the call of the defendant. During cross examination by plaintiffs' counsel the following interlocution ensued resulting in the judicial action here reported:

"Q. Dr. Monaghan, is that the report of Dr. Branson to which you make reference?

"A. That is not the exact one but it was a photocopy.

"Q. Were you provided a copy of this report by Mr. Hubbard?

"A. I don't believe I saw this particular report. I saw the little insurance form and also a letter that Dr. Branson had written to the Insurance Company saying that Mrs. Carver was not getting better and she should be seen by an orthopedic surgeon, but basically it is the same as that.

"Mr. Hubbard: I move.

"The Court: The jury will go to their jury room at this time. Do not discuss the case amongst yourselves at this time.

Recess.

"Mr. Hubbard: In view of the fact that the defendant was covered by insurance was brought out in testimony in cross-examination by the Plaintiffs' counsel of the Doctor appearing in behalf of the defendant, the Defendant moves for a mistrial in the case at this time.

"The Court: Motion denied. I find that the remark by the Doctor was made without intention to prejudice anyone, and the Court finds that there was no prejudice whatsoever conveyed to the jury by reason of the Doctor's remark.

"Mr. Hubbard: Note my exceptions.

"The Court: Your objections are noted.

(The jury then returned to the courtroom and the following proceedings took place in the presence of the jury:)

"The Court: At this time, Members of the Jury, the Court strikes out from the evidence the statements of the Doctor in relation to any insurance. You are to disregard completely that the word 'insurance' was mentioned by the Doctor, or 'Insurance Company.' Disregard that completely because that is absolutely immaterial to the case. You are not to consider it under any circumstances in order to comply with your oath as jurors.

"Mr. Hubbard: Your Honor, at this time - - - -

"The Court: I am sorry. The question of insurance, whether or not there is some or is not, is absolutely immaterial to this case or to any case. You may proceed.

"Mr. Hubbard: May I have a conference at the bench?

"(Bench Conference)."

This court said:

"- - - - insurance in negligence cases is immaterial, prejudicial, and not admissible."
Deschaine v. *Deschaine,* 153 Me. 401, 407.

In the case at bar the intimation of potentially detrimental insurance coverage was unpredictably elicited from an undoubtedly guileless witness by a question from plain-

tiffs' counsel which provided no foreseeable occasion for the wordy response given by the witness. There was no culpability of counsel or of parties.

The presiding justice, the responsible trial administrator possessing all proper discretionary authority, was most favorably advantaged to estimate the effect of the witness's inapt disclosure upon the jury consciousness and to weigh the practicable prospect of neutralizing and counteracting any subsisting prejudice. The justice formed his serious conclusion. He condemned the improper testimony as immaterial. He struck it from the evidence. He commanded the jury as an oath bound obligation to prescind from such testimony. We cannot with reason say that the justice exceeded his discretion.

This court said in *Beaulieu* v. *Tremblay*, 130 Me. 51, 55:

> "The single exception reserved in each case is directed to the refusal of the presiding justice to order a mistrial upon the introduction of evidence of the fact that the defendant was insured. This exception can not be sustained. The discretionary power of the presiding justice to attempt to correct the error in his charge to the jury and not order a mistrial does not appear to have been abused."

By appeal point 2 the defendant protests that the presiding justice by his very conduct in outlawing and countervailing the testimony of liability insurance coverage in reality only succeeded thereby in accentuating the fact of such insurance to the defendant's prejudice. This assertion is a variation or readaptation of defendant's point 1 and a persistent expression of defendant's contention that the trial justice abused his discretion in not granting mistrials. There is no need to amplify our previous consideration of the critical evidential problem before the justice and his legitimate resolution of it.

Appeal points 3 and 6 impute error to the presiding justice in his refusal to grant directed verdicts to the defendant. In effect these two protests charge that the pertinent evidence viewed in the light most favorable to the plaintiffs fails to prove the negligence of the defendant and the reasonable care of the plaintiff wife.

> "It is true, - - - - that a verdict should not have been ordered, if, giving to the plaintiffs the most favorable view of the facts and of every justifiable inference to be drawn from them, different conclusions as to the defendant's negligence could fairly have been drawn by different minds."
>
> *Andreu* v. *Wellman,* 144 Me. 36, 38.

In the record of this case there is contained evidence susceptible of jury credence and as believed plenteous in kind and in amount to sustain plaintiffs' verdicts. The plaintiff wife related that on a fair day and a dry road she operated a car slowly over a through way and into an intersection. Contemporaneously the defendant to her right and upon a confluent road slowly and with lessening speed approached the intersection and passed a contraposed stop sign without halting. R. S., c. 22, § 89 as amended through 1959; *Tinker* v. *Trevett,* 155 Me. 426, 428. The plaintiff wife had kept the nearing defendant in view and notice and believed because of the latter's waning speed and the stop sign that the defendant was coming to a standstill. At the intersection suddenly and without apparent reason the defendant accelerated his car to a bursting speed and drove it into the vehicle operated by the plaintiff wife. In the sudden peril (*St. Johnsbury Trucking Co.* v. *Rollins,* 145 Me. 217, 223) the plaintiff wife had alertly but in vain turned to her left in the hope that the defendant might turn to his left and pass to the rear of the car driven by the plaintiff wife. The plaintiff wife became injured by the impact and the automobile she drove was damaged.

True the foregoing ascription and the evidence in support of it were controverted sharply and in detail by the defendant but contain no element which intrinsically or extrinsically render them unfit as a matter of law for factual accreditation by the jury. The credibility of witnesses and the weight of their testimony under such circumstances were a jury prerogative, *Hatch* v. *Dutch,* 113 Me. 405, 411.

Appeal point 4 avers that the jury in bias and prejudice disregarded all the testimony of the state trooper, a disinterested witness who testified as to conversations of the plaintiff wife and defendant held at the scene of the accident. To validate this point the burden has devolved upon the defendant. The mere rendition of plaintiffs' verdicts will not suffice to demonstrate that the jury were biased or prejudiced or that they ignored all of the state trooper's testimony. The jury are the judges of credibility which is not restricted to veracity but relates also to such possible factors as powers and opportunity for observation, recollection and accuracy of observation, etc. The collision occurred some three years and seven months before the trial. Nothing appears in the case record to justify the Law Court in substituting its judgment for that of the jury in this particular.

Appeal point 5 imports that the plaintiff wife should have been restricted in her recovery of damages to compensation for such injuries as she had been aware of and had recited to her family doctor who had treated her in six office calls during the first five months of her disability. In this case there is much and multiple medical testimony. From evidence the jury were warranted in concluding that the plaintiff wife had sustained injuries of a slowly manifesting and assertive nature and difficult of correct referral. The jury were not in this case confined to the personal and early laical diagnosis by the plaintiff wife of her injuries.

Appeal point 7 insists that the compensatory item of $644 for loss of wages of the plaintiff wife had been retained in her judicially diminished verdict and is also by duplication contained in the verdict of her husband. We have been unable from the record to verify or confirm such contention that his wife's lost wages were assessed in the husband's verdict. The instructions to the jury from the presiding justice are not a part of the record. The instructions were therefore presumably proper and plenary.

Appeal point 8 is a remonstrance that defendant is aggrieved by the refusal of the presiding justice to admit to the appeal record a photograph of a chalked, blackboard diagram comprising a freehand outline of the locus of the accident and the position of the colliding cars and some numerical details or data of claimed damage items. Each counsel and several witnesses at trial had resorted to and availed themselves of the plan. Before jury withdrawal neither counsel had requested that the blackboard or the photograph accompany the jury into its deliberation. The faint and unlabelled figures are not completely discernible in the photograph and are not suitable or adequate for use as an exhibit in this appeal court. The blackboard diagram and indistinct numerical figures are not usefully and intelligibly correlated or interrelated with the trial transcript or record. There was no abuse of discretion in the ruling of the trial justice.

The verdict for the plaintiff husband awarded him $3500, presumably $225 for unquestioned damage to the automobile, some $1300 plus for medical and hospital expenses and somewhat less than $2000 for loss of consortium past and conceivably future. There was evidence of the wife's disability and suffering for more than three yars and of prospective distress. The presiding justice upon defendant motion for a new trial reasonably adjudged that the amount

of damage assessed could not be deemed excessive under the circumstances.

For the plaintiff wife the jury resolved the damages at $20,000 inferentially calculated as $644 for loss of wages and $19,356 for past and anticipated future pain and suffering. There was evidence of constant pain endured by the wife through the intervening months from May, 1960 until necessitated surgery was undergone with admittedly beneficial consequences in January, 1962. At the time of trial the wife had not experienced complete relief and there was a prognosis of chronic future distress in some degree.

The presiding justice ordered a remittitur of all save $10,644 of the jury award. In his rulings upon defendant's motion for a new trial because of excessive damages the justice expressed a conviction that the jury had rendered an objectively proper verdict as to liability and his opinion that the fortuitous injection of the element of liability insurance coverage into the trial had not occasioned an inflation of damages assessed but that the jury had mistakenly evaluated "the reasonable equivalent, money-wise, of pain and suffering." The jury award as reduced by the justice does not appear to be excessive or inadequate.

As this court stated in *Garmong* v. *Henderson,* 114 Me. 75, 90, there have been trials wherein:

> "- - - - Even the amount of damages awarded, considering all the circumstances, furnishes manifest evidence that the real merits of the case have not been properly passed upon by the jury. - - - - "

In the case at bar there are satisfactory evidences that the jury rendered a tenable and defensible verdict save for its compensatory over estimation of the wife's damage, an excess opportunely corrected by the presiding justice.

The defendant has succeeded in demonstrating no perceptible grievance. In the decided case of *London* v. *Smart,* 127 Me. 377, 378, a judicious criterion was approved:

"More than a hundred years ago the court of highest authority in this country held that upon a motion for a new trial after verdict the whole evidence is to be examined with minute care, and the inferences which the jury might properly draw from it are adopted by the court. If therefore upon the whole case justice has been done between the parties and the verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial. The granting of a new trial is not a matter of absolute right in the party but rests in the judgment of the court and is to be granted only when it is in furtherance of substantial justice, *M'Lannaham v. Universal Insurance Company,* 1 Peters, 170. This is still the law of the land."

The mandate shall be:

Appeals denied:
Judgment for Kenneth Carver on the verdict, affirmed.
Judgment for Edith Carver on the verdict as diminished by the remittitur to the sum of $10,644, affirmed.

STATE OF MAINE
vs.
ADELAIRD BONNEAU

STATE OF MAINE
vs.
CUMBERLAND FARMS NORTHERN, INC.

Cumberland County. Opinion, December 17, 1964.

Milk. Constitutional Law.

Maine Milk commission law is constitutional.

ON REPORT.

Prosecution for violations of the Maine Milk Commission law. Defendants were found guilty and appealed. The court held that the Maine Milk Commission law was constitutional, that the complaints were well pleaded, and that the sale of milk at a price less than the minimum established by the Milk Commission and the publishing of an offer to sell milk for a price less than the minimum were violations of the statute.

Judgment for the State.

John W. Benoit, Asst. Atty. General, for State.

Berman, Berman, Wernick & Flaherty,
by: *Sidney W. Wernick, Esq.,* for Defendant.

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

TAPLEY, J. These cases are before us on report.

STATE v. BONNEAU

The defendant, Adelaird Bonneau, was charged, by complaint, with selling one-half gallon of unflavored skimmed

milk at a total price of twenty-nine cents (29c), which price was less than the scheduled minimum price established for the Portland Market, Zone One, State of Maine, by the State of Maine Milk Commission. In the Municipal Court the defendant waived reading and hearing, pleaded not guilty, was found guilty and sentenced to a $10.00 fine, whereupon he appealed to the October Term, 1963 of the Superior Court, within and for the County of Cumberland. By agreement of parties the case was ordered reported to the Law Court upon stipulation of facts. The issues stated in the order are:

> "(1) whether the agreed facts are sufficient to show the Commission of the offense charged in the complaint; and (2) whether the statute on which the proceeding is based and pursuant to which the Maine Milk Commission acted is constitutional."

The facts stipulated are as follows:

> "On August 31, 1963 at Portland in the County of Cumberland and State of Maine, Adelaird Bonneau, then of New Bedford, County of Bristol and Commonwealth of Massachusetts, and then commorant of Portland, County of Cumberland and State of Maine, did sell one-half gallon of unflavored skimmed milk at a total price of twenty-nine cents (29¢) to Walter B. Steele, Jr. Said price of twenty-nine cents (29¢) was less than the scheduled minimum price established for the Portland market Zone 1, State of Maine, by the State of Maine Milk Commission, the said Commission acting pursuant to the provisions of Chap. 33, R. S. of Maine, 1954 as amended, said minimum price being thus established at thirty-five cents (35¢) for one-half gallon of unflavored skimmed milk."

STATE V. CUMBERLAND FARMS, INC.

The defendant, Cumberland Farms Northern, Inc., by complaint, was alleged to have offered to sell milk as a licensed dealer,

> "for a price less than the scheduled minimum price established by the State of Maine Milk Commission for the Portland Market, Zone One, State of Maine, to wit: did offer to sell one half gallon of unflavored skimmed milk at a total price of twenty-nine cents, - - ."

The defendant waived reading and hearing in the Municipal Court, pleaded not guilty, was found guilty and sentenced to pay a fine of $10.00. Appeal was taken to the Superior Court. The parties agreed to report the case on stipulation of facts, the order reporting the case contained the same issues as is set forth in the *Bonneau* case. The stipulation of facts reads as follows:

> "On August 31, 1963 at South Portland, County of Cumberland, State of Maine, Cumberland Farms Northern, Inc., a foreign corporation, duly licensed to do business and doing business in said South Portland, did, in the Portland Press Herald, a newspaper of general circulation in said County and published on said day, offer to sell milk as a licensed dealer for a price less than the scheduled minimum price established by the State of Maine Milk Commission for the South Portland Market, Zone One, State of Maine, said Commission acting pursuant to the provisions of Chap. 33, R. S. of Maine, 1954 as amended, to wit: did offer to sell one-half gallon of unflavored skimmed milk at a total price of twenty-nine cents (29¢) when the minimum price established by the said Commission, as described aforesaid, was thirty-five cents (35¢) for one-half gallon of unflavored skimmed milk."

This court, in the case of *Maine Milk Commission* v. *Cumberland Farms Northern, Inc.* (Law Docket # 577), re-

cently certified, determined that the Maine Milk Commission Law is constitutional. This dispsoes of the constitutional issue in the instant cases.

The next issue for us to determine is, "Whether the agreed facts are sufficient to show the commission of the offense charged in the complaint."

Sec. 4 of Chap. 33, R. S., 1954, as amended, provides in part:

> "- - - no dealer, store or other person handling milk in such market shall buy or offer to buy, sell or offer to sell milk for prices less than the scheduled minimum prices established for that market."

A violation of this provision of statute is a criminal offense. Sec. 9, Chap. 33, R. S., 1954, as amended.

We have examined the complaints in each case and the stipulation of facts. We are of the opinion, and so find, that the complaints are well pleaded and that the facts as stipulated constitute a violation of the statute.

The order will be in each case:

Judgment for the State.
Remanded to the Superior Court for imposition of sentence.

CUMBERLAND FARMS NORTHERN, INC.

vs.

MAINE MILK COMMISSION

(2 CASES — #567 AND #571)

Kennebec County. Opinion, December 18, 1964.

Milk. Price Fixing.

When prices fixed by milk commission may reasonably tend to affect business which appellant is licensed to do in Maine, even though appellant's operations have not yet begun, he may properly assert that such business "would be impaired" and acquire status as appellant who reasonably feels himself aggrieved by commission orders.

Policy decisions of milk commissions, apart from those relating to licensing matters, are reviewable only by courts, and review by hearing officer was not prerequisite to direct appeal of price fixing rulings from commission to superior court.

ON REPORT.

Two cases involving price fixing rulings of milk commission. Motion to dismiss denied and cases remanded to superior court for further proceedings.

Berman, Berman, Wernick & Flaherty,
by: *Sidney W. Wernick, Esq.,* for Plaintiff.

John W. Benoit, Asst. Attorney General, for Defendant.

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

RESCRIPT

WEBBER, J. On report. These two cases argued together may be decided in one opinion. As will be noted, the differences between them are insignificant and do not affect the result.

On July 10, 1963 after public hearing the Maine Milk Commission issued certain orders fixing minimum prices for sales of milk in Maine including retail sales. These orders were to become effective on August 1, 1963. The plaintiff was then a licensed retail milk dealer in this state but had not actually engaged in such business in Maine. It had, however, been permitted to participate in the public hearing and deemed itself aggrieved by the orders. It therefore instituted an appeal by filing a complaint in the Superior Court claiming such appeal. The third paragraph thereof stated:

> "3. This appeal is taken by the plaintiff pursuant to, and in accordance with, the provisions of Secs. 4 and 5 of the 'Maine Milk Commission Law', so-called (Chap. 33, R. S. of Me. 1954, as amended); and the provisions of Sec. 13 of Chap. 20-A of R. S. of Me. 1954, as amended; and the provisions of Rule 80(b) of the Maine Rules of Civil Procedure."

In the sixth paragraph thereof plaintiff alleged in part that its "business as a seller of milk would be seriously interfered with and impaired" as a basis for its claim that it was aggrieved by the orders appealed from.

Also after hearings held by the Commission on December 3 and 4, 1963 the Commission promulgated price fixing orders, to become effective on April 1, 1964. In this case the appellant was admittedly doing business in Maine at the time of the order and in its attempted appeal by amended complaint reference was made to Rule 80B rather than to Rule 80(b).

The Commission seasonably filed a motion to dismiss in each case, which are now being submitted for our determination. We turn first to those matters peculiar to case #567 before giving our attention to issues common to both cases.

M. R. C. P. Rule 80(b) deals with the commencement of proceedings for divorce and annulment. Rule 80B deals with the review of administrative actions and provides in part that "when a statute provides for review by the Superior Court of any action by a * * * commission * * * proceedings 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." It should be noted that the appeal is provided by statute. The rule merely provides the mechanics for claiming the statutory review. It is apparent here that the reference to "80(b)" was a typographical error and that the intended reference was to "80B". Since no reference to the rule was required, the error has no effect whatever on the appeal if it is otherwise sufficient.

The Commission contends that Cumberland had no standing to appeal since it had not commenced business operations under its license. R. S., Chap. 33, Sec. 4 as amended provides in part that "any person feeling himself aggrieved by any order of the commission issued under the provisions of this chapter may appeal to the superior court as provided in section 5." We hold that when prices are fixed by the Commission which may reasonably tend to affect the very business which the appellant is licensed to do in Maine, even though appellant's operations have not yet begun, he may properly assert that such business "would be impaired" and acquire status as an appellant who reasonably feels himself aggrieved by such orders.

We now turn to issues raised in both cases. The State contends that there is no direct appeal from the Commission to the Superior Court but that the matter must first be reviewed by a Hearing Officer. As noted above, the pro-

visions for appeal contained in Sec. 4 make reference to the appeal method "as provided in section 5." The fourth, fifth and sixth paragraphs of Sec. 5 are the only pertinent portions thereof. The fourth and fifth paragraphs were enacted by P. L., 1961, Chap. 394, Sec. 19, and the sixth paragraph by P. L., 1957, Chap. 384, Sec. 13. These paragraphs now read as follows:

> "The hearing officer as designated in chapter 20-A may, upon proper evidence, decline to grant a license or may suspend or revoke a license already granted upon due notice and after hearing.
>
> "Violation of this chapter or of any order, rule or regulation made hereunder, or conviction of violating any other law or regulation of the state relating to the production, distribution and sale of milk, shall be sufficient cause to suspend, revoke or withhold such license.
>
> "Upon revocation or suspension of a license it shall not be reissued until the commission shall determine upon application and hearing that the cause for such revocation or suspension no longer exists, and that the applicant is otherwise qualified."

It must be noted at once that Sec. 5 contains no reference to appeals from rulings of the Commission but deals only with the licensing functions of the Hearing Officer. The explanation for this seeming confusion is readily apparent when the development of the two sections is examined.

R. S., 1954, Chap. 33, Sec. 5 (before amendment) provided:

> "**Sec. 5. Licenses; revoking, suspending and withholding; appeal.**—No dealer as defined in this chapter, shall buy milk from producers or others for sale or shall process, distribute, sell or offer to sell milk in any market in the state designated by the commission unless duly licensed by the commission, provided, however, that no license shall

be required of any person who produces or sells milk for consumption only on the premises of the producer or seller. Each person, before engaging in the business of a dealer in any market designated by the commission, shall make application to the commission for a license hereunder, which the commission is authorized to grant.

"The license year shall commence on January 1 and end December 31 following. Application for a license shall be made on a form prescribed by the commission.

"Licenses required by the provisions of this chapter shall be in addition to any other license required by law.

"The commission may, upon proper evidence, decline to grant a license or may suspend or revoke a license already granted upon due notice and after hearing.

"No order of the commission suspending, revoking or withholding a license, or refusing to renew an existing license shall be effective until 10 days after the same has been issued and a copy thereof mailed to the holder of or applicant for such license. Within said period of 10 days any party believing himself aggrieved by the order of the commission may appeal to the superior court in the county in which he resides or is engaged in business, in term time or vacation, and cause notice of such appeal to be served on the commission. Such court, after hearing, in term time or vacation, shall affirm or reverse the order of the commission, or any modification thereof by the commission.

"No appeal taken from an order of the commission shall suspend the operation of such order, except as herein provided. The justice of the superior court before whom such appeal is pending, when in his opinion justice may so require, may order a suspension of or compliance with such order, or with such order as modified by the com-

> mission, pending the determination of such appeal. Violation of the provisions of this chapter or of any order, rule or regulation made hereunder, or conviction of violating any other law or regulation of the state relating to the production, distribution and sale of milk, shall be sufficient cause to suspend, revoke or withhold such license."

Under this section the licensing function was in the Commission with direct appeal to the Superior Court with respect to licensing matters. At the same time Sec. 4 as then written dealt with price fixing by the Commission and provided no appeal whatsoever. In short, appeal rights were limited to review by the Superior Court of Commission action with respect to licensing. There was then no right of appeal from rulings of the Commission establishing prices. Such a right of appeal was first provided in 1957. P. L., 1957, Chap. 384, Sec. 12 stated in part:

> "In addition to any penalty otherwise provided by law, the Commission after notice and hearing may prohibit any such practice, and any person feeling himself aggrieved by any order of the Commission issued under the provisions of this chapter may appeal to the Superior Court as provided in section 5."

Reference to Sec. 5 was then meaningful as that section then provided the detailed procedural mechanics of appeal from the Commission to the Superior Court and subsequent disposition thereof.

By P. L., 1961, Chap. 394 the Legislature enacted a new Chapter 20-A, the "Administrative Code" and established the office of "Hearing Officer." The Maine Milk Commission was included as an "Agency" covered by the Code. An examination of this Act, its broad general purposes and the specific amendments of laws relating to the several Agencies contained therein, makes it apparent that the office of "Hearing Officer" was constituted to deal with contested

cases involving the issuance, revocation or suspension of licenses, certificates of registration and the like. The office was not created as an appellate tribunal to review all of the actions taken by the several boards and commissions. More specifically, there is no intimation that the legislature intended to give to the "Hearing Officer" the authority to fix the prices of milk. The Milk Commission is presumed to be a representative body possessed of special competence in this area. Its policy decisions apart from licensing matters are reviewable, we are satisfied, only by the courts, and we find no suggestion that the legislature intended otherwise. Sec. 19 of Chap. 394, specifically amending R. S., Chap. 33, Sec. 5, dealt only with a transfer of authority from the Commission to the Hearing Officer with respect to licenses refused, suspended or revoked. In the process of amendment, however, the provisions for appeal in licensing matters from the Commission to the Superior Court were entirely lifted — and as a result Sec. 5 as now amended no longer contains any machinery for appeal. The words "may appeal to the superior court as provided in section 5" thereupon became meaningless.

We are satisfied that in so amending Sec. 5, the legislature inadvertently failed to note the collateral impact on Sec. 4, and that it had no intention thereby to subject price fixing rulings to the review of the Hearing Officer. We treat the words "as provided in section 5" as repealed by necessary implication so that Sec. 4 as thus amended simply provides that "any person feeling himself aggrieved by any order of the commission issued under the provisions of this chapter may appeal to the superior court." "Such review shall be instituted by filing a complaint with the court." M. R. C. P. Rule 80B(a). This was the method properly employed by the appellant. Although the grounds for relief should be concisely stated, reasonable allowance will be made for the fact that this is a vehicle for appeal and not an original complaint. A responsive pleading thereto

will not ordinarily be required. In an appropriate case a motion to strike might be employed to eliminate verbiage which is unnecessary or improper. In the instant cases the appeal complaints are not vulnerable to motions to dismiss. The entry in each case will be

Motion to dismiss denied.
Case remanded to the Superior Court for further proceedings.

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO MAINE RULES OF CIVIL PROCEDURE

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure are hereby adopted, prescribed and promulgated to become effective on the fifteenth day of October, 1964. Said rules as thus amended shall be recorded in the Maine Reports.

Dated this 7th day of October, 1964.

ROBERT B. WILLIAMSON
Chief Justice

DONALD W. WEBBER

WALTER M. TAPLEY, JR.

FRANCIS W. SULLIVAN

CECIL J. SIDDALL

HAROLD C. MARDEN

AMENDMENTS OF MAINE RULES OF CIVIL PROCEDURE

Effective October 15, 1964

Rule 76A (b) is amended by striking out "18" in line 3 thereof and in the place thereof substituting "12."

Rule 73 (d) as amended is further amended by striking out "eighteen" in line 1 thereof and in the place thereof substituting "twelve."

CONTRACTS

Affixing a signature to an instrument by a rubber stamp is sufficient to fulfill the requirement of a written endorsement if the stamp is affixed with the intent of using it as an endorsement and with authority.

GMAC v. *Anacone*, p. 53.

If after repairs, other portions of the chimney, not made the responsibility of the plaintiff by contracts, were in such condition as to prevent the chimney from being fully functional, the plaintiff could not be held accountable for the deficiency.

An award for substantial performance is proper when court finds no lack of good faith on part of plaintiff.

Lawrence v. *Cunningham (Footer)*, p. 89.

In construing a contract, apparent intent of contracting parties must be regarded.

Intent of contracting parties should be ascertained from purpose of parties, as shown by language used in contract as applied to subject matter of agreement.

Corbett, et al. v. *Noel, et al.*, p. 408.

CONVERSION

The gist of conversion is the invasion of a party's possession or right to possession at the time of the alleged conversion.

The plaintiff must show that he had a general or a special property in the goods and the right to their possession at the time of the alleged conversion. If the plaintiff's property is a "security interest" it is a special property; if property consists of titled, it is a general property.

If the holder acquired possession rightfully, a demand by the person entitled to possession and a refusal by the holder to surrender is necessary before the withholding becomes a conversion, but if the taking by the holder was wrongful that taking is a conversion without demand. Where the circumstances show that a demand would be useless, a demand is not necessary.

Rule of damages applicable to complaint in trover for conversion is value of goods at time of conversion, even though plaintiff may be accountable therefor to some third party.

Absent entruster's demand for possession of entrusted automobiles held by trustees' transferee subject to claim of entruster under trust receipt, there was no conversion by transferee.

GMAC v. *Anacone*, p. 53.

CORAM NOBIS

Failure to appoint counsel for petitioner at hearing on petition for writ of error *coram nobis* was not error where petitioner elected to act as his own counsel and at no time professed his indigency.

Newly discovered evidence is a ground for new trial, but not for writ of error *coram nobis*.

Mottram, Pet'r v. *State of Maine*, p. 145.

COUNSEL

See Appeals.
Coram nobis.

CRIMINAL LAW

DAMAGES

was evidence of wife's disability and suffering for more than three years and of prospective distress.

Award of $10,644 to wife for past and anticipated future pain and suffering was not excessive in view of evidence of constant pain endured by wife from May 1960 until necessitated surgery was undergone with beneficial consequences in January 1962 and that wife had not experienced complete relief and there was prognosis of chronic future distress in some degree.

Carver v. *Lavigne*, p. 414.

DECEIT

See Fraud.

DECLARATORY JUDGMENTS

School Administrative District was not entitled to declaratory judgment as to rights, duties and liabilities of district and towns withdrawn from it pursuant to statute where there was no genuine controversy over act in respects for which judgment was sought.

Canal Nat'l Bank, et al. v. *S.A.D. #3, et al.*, p. 309.

DEMURRER

See Indictments.

DISCRETION

Whether a case be reported to the Law Court under Rule 72 (c) is entirely within the discretion of the presiding justice.

The granting or refusing to grant a new trial on motion addressed to the trial court rested wholly within the discretion of the presiding justice, and his decision was final and not subject to review.

MacLean v. *Jack*, p. 93.

An order granting or denying a motion for a new trial on the ground of excessive or inadequate damages is reviewable after judgment and may be reversed in the event that a clear and manifest abuse of discretion on the part of the trial judge is shown.

MacLean v. *Jack*, p. 94.

DOG BITE

Person sustaining consequential damages as result of a "dog bite" has a common law remedy available. R. S., 1954, c. 100, § 17.

To recover under common law for consequential damages as result of "dog bite" the plaintiff must show that defendant kept animal after notice of its injurious propensities. R. S., 1954, c. 100, § 17.

Under statute authorizing recovery of damages when dog does damage to a person or his property, remedy is available only to person sustaining the direct injury, and person sustaining only consequential damages is left to his common law remedy. R. S., 1954, c. 100, § 17.

Begin v. *Bernard*, p. 233.

DOUBLE JEOPARDY

Defense counsel's failure to assert plea of double jeopardy after mistrial, did not establish inadequate representation, where record disclosed that defendant himself had requested mistrial.

Clukey v. *State*, p. 198.

DUE CARE

In cases involving controversial facts bearing upon actions of a child, it is for jury to determine whether child has exercised care that ordinarily prudent child of his age and intelligence is accustomed to exercise under like circumstances.

Where minor bicyclist testified that he kept proper lookout and merely coasted down driveway from which he emerged before he collided with automobile in street and where defendant motorist elected not to take the stand, jury was justified in finding due care on part of minor bicyclist.

Fowles v. *Dakin*, p. 392.

DUE PROCESS

See Constitutional Law.

Prisoner was not deprived of due process by refusal of prosecutor to turn over to prisoner witnesses' grand jury testimony conflicting with testimony given by same witness at trial.

Brine v. *State*, p. 401.

EMANCIPATION

Unwed mother could emancipate minor child.

Evidence of subsequent conduct of parent and child is relevant to intent of parent at time of claimed emancipation.

Abandonment of child to grandparent may constitute emancipation.

Best test of emancipation is separation and resulting freedom from parental and filial ties and duties, which law ordinarily bestows at age of majority.

Evidence that unwed mother left her mother's home and her son, did not return and sent no communication other than birthday card five years afer her departure established her emancipation of child, and child retained pauper residence in place where she left him.

Inhabs. of Camden v. *Inhabs. of Warren*, p. 158.

Emancipation is a question of law but whether or not there has been emancipation is one of fact.

Inhabs. of Camden v. *Inhabs. of Warren*, p. 158.

EMINENT DOMAIN

The denial of authority to sell, without more, by the owner of the designated lots constitutes a refusal to sell the same to the plaintiff within the meaning of R. S., Chap. 41, Sec. 15, as amended.

S.A.D. #17 v. *Robert S. Orre, et al.*, p. 45.

A landowner is entitled to just compensation for the taking of his property by the process of eminent domain.

Test for just compensation is the market value of the land for its best and highest use at the time of the taking or in the foreseeable future.

The owner of land taken by the process of eminent domain is entitled to an exact equivalent for the injury and must be made whole in so far as money can compensate.

Where the best and highest use to which unimproved wooded land taken in eminent domain proceedings could be adapted was that of a subdivision for the construction of high grade dwellings, its market value to be determined as of the day of the taking was not based upon

HABEAS CORPUS

Ample credible evidence sustained finding in hearing on petition for writ of habeas corpus that petitioner, who had a fourth grade education and who was represented by counsel, had sufficient capacity and comprehension to participate with personal committal in information proceedings, and had acted understandingly and willingly in entering pleas of guilty to charges of statutory rape and incest.

James, Pet'r v. *State*, p. 362.

HOLDER IN DUE COURSE

Home owners who were defrauded by payee in execution of note in connection with purchase of home improvements but who were not illiterate or inexperienced in business matters and who would not have been confused if they had read what was so plainly stated on note were negligent as a matter of law in signing note, and were estopped from asserting fraud against holder in due course.

Universal C.I.T. Credit Corp. v. *Cyr, et al.*, p. 152.

ILLEGITIMACY

Illegitimate daughter acquired pauper residence with her mother on her mother's marriage to resident of Warren.

Son born to mother who had pauper settlement at Warren connatally derived settlement at Warren from his mother.

Evidence that unwed mother left her mother's home and her son, did not return and sent no communication other than birthday card five years after her departure established her emancipation of child, and child retained pauper residence in place where she left him.

Inhabs. of Camden v. *Inhabs. of Warren*, p. 158.

INDICTMENT

Insufficiency of indictment for absence of allegation that instrument allegedly uttered was falsely altered or forged could be reached by demurrer.

Sufficiency of allegation in indictment must be tested upon presumption that respondent is innocent and has no knowledge of facts charged against him.

Indictment must have that degree of certainty and precision which will fully inform respondent of special character of charge against which he is called upon to defend and which will enable court to determine whether facts alleged are sufficient in law to constitute offense so that record may stand as protection against further jeopardy.

Unless indictment necessarily charged respondent with violation of statute it was insufficient.

Use of machine copying reproductive process to produce copy of instrument for use as part of forgery indictment was approved.

Affixation of impleaded instrument to charge sheet in manner to reduce detachment to a minimum will be valid.

Failure to allege manner in which forgery was assertedly committed is not fatal since means adopted are not material to indictment.

State of Maine v. *Talbot*, p. 103.

Conditions which will warrant discharge of jury and which, if they appear of record, will bar plea of former jeopardy are: (1) consent of respondent; (2) illness of court, member of jury, or respondent; (3) absenting from trial of member of panel or respondent; (4) where term of court is fixed in duration and ends before verdict; and (5) where jury cannot agree.

Clukey v. *State*, p. 198.

Defendant motorist had burden of establishing that jury in bias and prejudice disregarded all of testimony of state trooper, a disinterested witness, who testified as to conversations of plaintiff and defendant held at scene of intersectional collision and mere rendition of plaintiffs' verdicts would not suffice to demonstrate such bias or prejudice or that jury ignored testimony.

Defendant failed to establish that jury in bias and prejudice had disregarded all of testimony of state trooper, a disinterested witness, who had testified as to conversations of plaintiff wife and defendant held at scene of intersectional collision.

Carver v. *Lavigne*, p. 414.

JURY VERDICTS

The finding of a jury is not to be disturbed if there be credible evidence to support it.

GMAC v. *Louis Anacone*, p. 53.

A verdict should not be ordered for the defendant by the trial court when taking the most favorable view of the evidence, including every justifiable inference, different conclusions may be fairly drawn from the evidence by different minds.

A verdict is properly directed when a contrary verdict could not be sustained, and the evidence and inference therefrom are to be taken in the light most favorable to the party against whom the verdict was directed.

When it appears that the jury has discharged their duty with fidelity and have reached a reasonable approximation of the damages, the court will not interfere in the verdict.

Teresa M. McLean v. *Erville A. Jack*, p. 94.

KIDNAPPING

Purpose of 1935 amendment of kidnapping statute was not to narrow but broaden scope of the law by adding as an element the act of seizure, conveyance, inveiglement or kidnapping of another by any means whatever and holding for ransom or reward. R. S. 1954, c. 130, § 14.

1935 amendment of kidnapping statute did not make "ransom or reward" an element of all courses of conduct characterized as kidnapping. R. S., 1954, c. 130, § 14.

Kidnapping indictment charging assault, confinement and forcible transportation both inside and outside the state was sufficient, notwithstanding fact that holding for "ransom or reward" had not been alleged. R. S., 1954, c. 130, § 14.

LACHES

"Laches" is omission to assert a right for an unreasonable and unexplained period under circumstances prejudicial to adverse party.

In absence of legislative findings, existence of facts supporting legislative judgment is to be presumed.

Maine Milk Comm. v. *Cumberland Farms*, p. 366.

LEGISLATIVE INTENT

The legislature views the School Administrative District as an "administrative unit" which is a "quasi-municipal corporation" and it follows that the School Directors may be properly considered to be its "municipal officers" for the purpose of performing those duties which rationally and logically should and must be performed by the School Directors.

"An administrative unit shall include all municipal or quasi-municipal corporations responsible for operating public schools."

School Administrative Dist. #17 v. *Orre, et al.*, p. 45.

Legislature intended in enacting enabling act to allow municipalities to plan for future.

Wright v. *Michaud, et al.*, p. 164.

LIABILITY

One may intend to enter upon the land of another under the reasonable misapprehension that his entry is lawful; such a mistake does not avoid his liability for trespass.

The intention to enter the land of another is an essential element of trespass; absence of such an intention or such negligence as will substitute will destroy liability.

Hayes v. *Bushey*, p. 14.

Where legal fault was found to exist on part of supervising company, which was sued by telephone company and surety company for breach of contract of supervision and inspection, paid surety, defense was not applicable.

Where construction company and supervising company were obligated to perform services by telephone company under separate contracts their liability to telephone company for breach of respective contracts was not joint but several and construction company's failure to construct according to contract was not entitled to contribution from supervising company.

Unity Tel. Co., et al. v. *Design Service Co., Inc.*, p. 188.

LICENSES, LIQUOR

A contract in furtherance of obtaining hotel liquor license unlawfully is against public policy.

Public policy against aiding party to illegal contract is designed not to protect other party from apparently improvident bargain but to deter others from entering into like legal contracts.

Whether hotel owner had failed to disclose any interest in establishment in making its application for liquor license was matter for determination of State Liquor Commission and not of court in collateral proceeding involving legality of contracts relating to operation of dining room in hotel.

Thacher Hotel, Inc. v. *Economos*, p. 22.

MANDAMUS

Mandamus is an extraordinary measure and a remedy to be employed only where there is no other legal resource and where the process will be effective.

Hourihan, Pet'r v. *Mahoney*, p. 260.

M. R. C. P.

Whether a case be reported to the Law Court under Rule 72 (c) is entirely within the discretion of the presiding justice.

MacLean v. *Jack*, p. 93.

MILK COMMISSION

Milk commission law providing that commission is vested with power to establish and change minimum prices to be paid to producers and to fix wholesale and retail prices does not wrongfully delegate legislative power to commission but establishes adequate standards and guides to be followed by commission.

Neither the milk commission law vesting power in commission to establish and change minimum wholesale and retail milk prices nor order promulgated thereunder was arbitrary, capricious or unreasonable, but law related directly and appropriately to object sought to be attained, and the law was not violative of the due process clauses of the State and Federal Constitutions.

Milk commission law empowering commission to fix wholesale and retail milk prices but not attempting to control prices paid for milk purchased outside state was not violative of the commerce clause of the Federal Constitution.

Maine Milk Comm. v. *Cumberland Farms*, p. 366.

Maine Milk commission law is constitutional.

Maine v. *Bonneau, et al.*, p. 425.

When prices fixed by milk commission may reasonably tend to affect business which appellant is licensed to do in Maine, even though appellant's operations have not yet begun, he may properly assert that such business "would be impaired" and acquire status as appellant who reasonably feels himself aggrieved by commission orders.

Policy decisions of milk commissions, apart from those relating to licensing matters, are reviewable only by courts, and review by hearing officer was not prerequisite to direct appeal of price fixing rulings from commission to superior court.

Cumberland Farms v. *Maine Milk Comm.*, p. 429.

MISTRIAL

The injection of evidence pointing to refusal or failure to have a blood test for the purpose of creating an inference of guilt therefrom would result in a mistrial.

State v. *Gillis*, p. 126.

Defendant can be tried anew upon same charge where mistrial is ordered upon his motion or with his consent.

New trial and subsequent conviction could not be avoided on claim of double jeopardy, where mistrial had been granted on record show-

RES JUDICATA

Res judicata ordinarily operates to conclude all matters which might have been tried as well as all that were tried, but Supreme Judicial Court would consider question of defective indictment although it could have been presented on prior writ of error. R. S., 1954, c. 126, § 1, *et seq.*

Austin, Pet'r v. *State*, p. 240.

REVIEW

Policy decisions of milk commissions, apart from those relative to licensing matters, are reviewable only by courts, and review by hearing officer was not prerequisite to direct appeal of price fixing rulings from commission to superior court.

Cumberland Farms v. *Maine Milk Comm.*, p. 429.

SALES AND USE TAX

In absence of clear manifestation of intention that property or title to garments should pass to buyer, before alteration of garments by retail store, the alterations constituted "services that are part of sale" within sales and use tax definitions of sale price, and charges for the alterations were part of the "sales price."

Benoit & Co. v. *Johnson*, p. 201.

SALES TAX

In order that a use tax be imposed, there must be a retail sale or a sale at retail.

Transactions between a parent and subsidiary corporation were subject to the sales tax.

Sale of an aircraft used by a corporation in its business to another corporation for the latter's use and not for resale was a "casual sale" not subjected to use tax even though corporate seller was engaged in the business of selling and operating aircraft.

Maine Aviation Corp. v. *Ernest H. Johnson*, p. 1.

SCHOOL ADMINISTRATIONS

An administrative unit shall include all municipal or quasi-municipal corporations responsible for operating public schools.

The legislature views the School Administrative District as an "administrative unit" which is a "quasi-municipal corporation" and it follows that the School Directors may be properly considered to be its "municipal officers" for the purpose of performing those duties which rationally and logically should and must be performed by the School Directors.

S.A.D. #17 v. *Robert S. Orre, et al.*, p. 45.

SCHOOLS AND SCHOOL DISTRICTS

Validity of school administrative district bond and rights of holders to proceed for declaratory judgment holding that statute providing for reorganization of school administrative districts by which three towns were removed from district impaired obligation of bonds were not negatived by inconsequential error of bond counsel in their legal opinion incorrectly stating that each bond should bear authenticating certificate of one bank when in fact another bank had authenticated bonds.

TRANSPORTATION

Section 14 of Chapter 48, R. S., 1954 supplement, applies only to claims against motor transportation carrying passengers for hire.

As to claims against motor transportation carrying freight for hire, the general statutes of limitations provided by section 90, chapter 112, R. S., 1954 supplement, applies.

Roy v. *Cooper, et al.*, p. 211.

Evidence relating to refrigeration problems in transportation of frozen foods, nature of equipment of existing common carriers and to volume of frozen food carriage involved established existence of need as basis for granting a contract carrier permit for transportation of frozen goods in refrigerated units from cold storage plant in Portland to retail stores in the State of Maine.

Although application for contract carrier permit to transport frozen foods was supported by specific shippers, permit authorizing transportation of frozen foods to retail stores in the state was not invalid on the ground that it was a broader grant than that applied for.

A permit to transport frozen foods in refrigerated units from cold storage plant to retail stores was not subject to objection that it in fact granted a common carrier certificate.

Proposed shipments from cold storage plant to retail store within the state were intrastate in nature and grant of contract carrier permit for such transportation was not subject to objection that evidence of interstate shipments has been considered.

Cumberland, Re: Contract Carrier Permit, p. 136.

TRESPASS

The intention to enter the land of another is an essential element of trespass; absence of such an intention or such negligence as will substitute will destroy liability.

One may intend to enter upon the land of another under the reasonable misapprehension that his entry is lawful; such a mistake does not avoid his liability for trespass.

Involuntary or accidental entry upon the land of another is not a trespass.

There is a distinction between the intention to do a wrongful act or commit a trespass and the intention to do the act which results in or constitutes the intrusion.

Hayes v. *Bushey*, p. 14.

Punitive or exemplary damages are not recoverable against municipality unless expressly authorized by statute.

Statute authorizing double damages for willfully or knowingly destroying property on lands of another and statute authorizing treble damages for destroying or taking fruit or ornamental tree or shrub without permission of owner are remedial and not penal.

That double damages may be recoverable under statute does not of itself determine statute to be penal.

Michaud v. *City of Bangor*, p. 285.

TRIAL

See Verdicts.

TRUST

Where trust receipt gives trustee liberty of sale and trustee sells to a buyer in ordinary course of trade, the buyer takes free of the entruster's security interest in the goods sold.

Knowledge that a dealer has automobile upon floor plan is not sufficient to expose a purchaser, otherwise a "buyer" under the terms of the uniform trust receipts act, to the entruster's security interest; that knowledge which will deprive a buyer of protection against entruster's security interest must be actual.

A person's status as a contemporary automobile dealer does not prevent his being a "buyer" under the uniform trust receipts act.

Absent entruster's demand for possession of entrusted automobiles held by trustee's transferee subject to claim of entruster under trust receipts act.

Absent entruster's demand for possession of entrusted automobiles held by trustee's transferee subject to claim of entruster under trust receipt, there was no conversion by transferee.

G.M.A.C. v. *Anacone*, p. 53.

TRUSTS

Where trust agreement provided that participation of eligible employees commenced on first anniversary date of trust and that participation of other employees commenced on trust anniversary dates that they were eligible, agreement's referral to full year of continuous participation meant period from trust anniversary date to trust anniversary date before which employee was trust participant for 12 months, and those becoming employees were not entitled to year's credit for periods between their employment dates and trust anniversary date.

Employer's establishment of trust accounts for employees before they were eligible to become participants under salary bonus trust agreement was not evidence that employees were entitled to year's credit for period between their respective employments and trust anniversary dates, where agreement provided that percentage of employee's account vesting on termination of employment was not based on years of contribution by company but on years of continuous participation by employee.

Corbett, et al. v. *Noel, et al.*, p. 407.

UNIFORM TRUSTS RECEIPT ACT

Where trust receipt gives trustee liberty of sale and trustee sells to a buyer in ordinary course of trade, the buyer takes free of the entruster's security interest in the goods sold.

GMAC v. *Anacone*, p. 53.

Knowledge that a dealer has automobiles upon floor plan is not sufficient to expose a purchaser, otherwise a "buyer" under the terms of the uniform trust receipts act, to the entruster's security interest; that knowledge which will deprive a buyer of protection against entruster's security interest must be actual.

A person's status as a contemporary automobile dealer does not prevent his being a "buyer" under the uniform trust receipts act.

WILLS

WORKMEN'S COMPENSATION

ZONING